

**APRIL 30, 2020**

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Beyond COVID-19: How to Plan for the Future of Energy Transition

Energy transition is poised to usher in one of the greatest structural changes the energy sector has ever witnessed. Before COVID-19, diversification from fossil fuels to electrification and renewable energy had been continually reinforced by steady increases in corporate commitment to decarbonization, investor prioritization of Environmental, Social, and Governance (ESG) goals, protracted climate-change litigation, and consumer demand for autonomy in personal energy supply.

There is widespread agreement that, at least in the short-term, unprecedented decline in the demand for oil and gas as a result of COVID-19 shelter-in-place orders will pose significant challenges for the entire energy sector, including renewable energy. Since COVID's outbreak, the research organization Bloomberg NEF cut its 2020 growth projection for global solar from 152GW to 143GW and suggested that the wind sector faces "considerable downside risk". The analysts Rystad Energy are even more pessimistic, predicting that growth in newly commissioned renewables projects for 2020 will be entirely "wiped out".

At a time of such profound uncertainty, how can in-house counsel help plan and achieve their client's decarbonization goals? What opportunities might be availed, and how best to manage risk?

AUDIT LIABILITIES & ENGAGE WITH RELEVANT STAKEHOLDERS

Where stable long-term cash-flows are available, typically under long-term power purchase agreements, renewables could act as a hedge against a low and volatile oil price. But in reality, some renewables projects are being put on hold, delayed and even cancelled. Statkraft, for example, recently announced that it temporarily suspended three construction projects due to the pandemic,¹ while Ørsted said that it envisages delays in the supply of critical components, which may hinder construction.²

In some instances, this will cause commercial conflicts between, among others, developers, suppliers, customers and lenders. Prudent companies will have identified risks early and entered into proactive discussions with



contractual counterparties based on a clear understanding of the strength of their contractual protections. Ideally, the contracts will have been appropriately aligned from the outset, including carefully worded force majeure, change in law and material adverse change clauses. In addition to the foregoing provisions, an audit of key contractual provisions might include consideration of common law doctrines such as frustration, and civil law counterparts such as impossibility. Where significant liabilities are identified, refinancing and restructuring may also be required.

For international and cross-border projects, companies might consider engaging with the relevant authorities of the host States in which their investments are located. Several European governments extended deadlines for renewables projects or provided flexibility in existing incentives. For example, a number of countries postponed existing auctions for wind and solar power to allow developers more time.³ In the U.S., Vineyard Wind has been granted additional time to negotiate off-take contracts with Connecticut utilities for electricity from the 804MW Park City Wind offshore development because of the negative impact of COVID-19.⁴ For many this relief will be welcome and, where this approach has not been adopted, companies may wish to advocate for leniency to the relevant authorities. However, such measures may also cause prejudice, allowing competitors more time to prepare bids. In such instances, companies might consider whether to seek reassurances from the government as to how best preserve existing rights.

MAP ROUTES TO DOMESTIC & INTERNATIONAL RECOURSE

When facing a crossroad, it makes sense to map out available routes. An audit of contractual dispute resolution provisions, clear understanding of exposure to sovereign risk, together with a consideration of the enforcement risk posed by the relevant counterparties, will remind companies of their options. Before the COVID-19 pandemic, some 30 countries witnessed a significant increase in resource nationalism risk over the last year.⁵ Increased pressures on State budgets resulting from the pandemic could increase this risk. For some companies it may make sense to assess (or re-assess) investment treaty coverage available to projects and investments, as well as to undertake a detailed review of any contracts with States or State-owned entities. The legal claims funding market may also provide cash-flow and on-balance sheet liability management alternatives.

LOOK TO THE FUTURE

When normality begins to reassert itself, low oil prices and decreased electricity demand may continue to put downward pressure on renewables investment. Carbon-pricing and similar measures would further squeeze the oil and gas industry at a time when operating margins are compressed. Governments might be expected instead to take measures to de-risk renewable energy investments, for example by way of a non-subsidized price-stabilization or a contract for difference mechanism to reduce the uncertainty and volatility associated with electricity pricing. In addition, import-export banks and similar government-backed funding sources could possibly offer competitively priced debt and credit-enhancement products to support the financing of renewables projects.

A drop in decarbonization commitments may be cushioned by governments that highlight the need to ensure that economic recovery is aligned with environmental considerations. The International Energy Agency asks that government stimulus packages directly encourage the energy transition. The bloc of 27 EU leaders announced that its coronavirus-related economic recovery plan must be consistent with the “green transition”.⁶ In Asia, Japan’s Environment Minister cautioned that to give “priority unconditionally to economic recovery, while neglecting the environment” would “virtually mean the death of the Paris [climate] accord”.⁷

Certain energy companies that announced net-zero emissions goals pre-COVID thus far have maintained their ambitions through the pandemic. Over a month into widespread lockdown in Europe and the U.S., BP announced that it will move ahead with plans next year to vote on a shareholder resolution that will enshrine its pledge to reach net-zero by 2050,⁸ a goal that has recently been matched by Shell.⁹ Galp pledged to continue with its two-billion-euro solar program.¹⁰



Energy transition scenarios vary. As the pandemic persists, it remains to be seen whether COVID-19 speeds or slows decarbonization measures or affects consumer demand for clean energy. In-house counsel play a pivotal role creating positive outcomes in this evolving landscape.

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¹ Statkraft, "Update on COVID-19 Situation", March 26, 2020, <https://www.statkraft.com/media/news/2020/covid-19-update-march-26/> (last accessed April 21, 2020).

² Windpower Monthly, "Ørsted keeping tabs on Covid-19 impact", March 25, 2020, <https://www.windpowermonthly.com/article/1678224/orsted-keeping-tabs-covid-19-impact> (last accessed April 21, 2020).

³ Greentech Media, "European Countries Postpone Renewable Auctions, Project Deadlines for Coronavirus", April 1, 2020, <https://www.greentechmedia.com/articles/read/european-governments-cut-renewable-developers-coronavirus-slack> (last accessed April 21, 2020).

⁴ renewables.biz, "COVID-19: Park City Wind granted PPA submission extension", March 27, 2020, <https://renewables.biz/59366/covid-19-park-city-wind-granted-ppa-submission-extension/> (last accessed April 21, 2020).

⁵ Verisk Maplecroft, "Resource nationalism rises in 30 countries", March 21, 2019, <https://www.maplecroft.com/insights/analysis/resource-nationalism-rises-30-countries/> (last accessed April 21, 2020).

⁶ S&P Global Market Intelligence, "EU leaders commit to climate considerations in coronavirus recovery", March 27, 2020, <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/eu-leaders-commit-to-climate-considerations-in-coronavirus-recovery-57793181> (last accessed April 21, 2020).

⁷ Reuters, "Japan minister: Paris accord under threat if coronavirus trumps climate change", April 13, 2020, <https://www.reuters.com/article/us-climate-change-japan/japan-minister-paris-accord-under-threat-if-coronavirus-trumps-climate-change-idUSKCN21V13T> (last accessed April 21, 2020).

⁸ BP, "BP and Follow This agree to work towards climate resolution for BP's 2021 AGM", March 27, 2020, <https://www.bp.com/en/global/corporate/news-and-insights/press-releases/bp-and-follow-this-agree-to-work-towards-climate-resolution-for-bps-2021-agm.html> (last accessed April 21, 2020).

⁹ Shell, "Shell's ambition to be a net-zero emissions energy business", undated, <https://www.shell.com/energy-and-innovation/the-energy-future/shells-ambition-to-be-a-net-zero-emissions-energy-business.html> (last accessed April 21, 2020).

¹⁰ PV-Tech, "Oil and gas major Galp persists with solar push despite €500m-plus cuts", April 28, 2020, <https://www.pv-tech.org/news/oil-and-gas-major-galp-persists-with-solar-push-despite-500m-plus-cuts> (last accessed April 29, 2020).