CLIFFORD CHANCE

Briefing note December 2013

Energy Act passed and EMR Delivery Plan finalised

The Energy Act has received Royal Assent paving the way for introduction of the Government's major Electricity Market Reform (EMR) programme in the UK. The Government has also finalised its EMR Delivery Plan and updated the draft terms of the Feed-In Tariff Contract for Difference (CfD). Following publication of draft EU State Aid guidance, the Delivery Plan announces that CfDs for established technologies such as onshore wind, are likely to be subject to immediate auctioning from 2014.

Energy Act passed

Following more than a year's passage through Parliament, the Energy Act has finally been passed[1]. It contains the framework powers for a number of the EMR elements. These include:

- Powers to introduce a **CfD**, and **transitional Investment Contracts** under the Financial Investment Decision enabling for Renewables programme;
- The power to increase the threshold at which renewable plant qualify for the CfD as opposed to **microgeneration feed-in tariffs** from 5MW to 10MW;
- Powers to introduce a **Capacity Market**;
- Powers to introduce an "**offtaker of last resort**" to ensure renewable generators will be able to access the market;
- Provisions dealing with the transitional phasing out of the **Renewables Obligation** including the move to a fixed price certificate purchase scheme; and
- Introduction of an **Emissions Performance Standard** (EPS) which will limit annual carbon dioxide emissions allowed from new fossil fuel power stations, equivalent to 450g/kWh operating at baseload (effectively preventing new coal capacity coming online without CCS).

It also includes the controversial provision to establish a target range for carbon intensity of UK electricity generation from 2030.

Key issues

Energy Act passed allowing introduction of CfDs, Capacity Market and Emissions Performance Standard

Delivery Plan announces:

- Established technologies, e.g. onshore wind, to be subject to immediate competition.
- Capacity Market Reliability Standard set at 'LOLE' of 3 hours per year.

CfD contract terms updated

[1] Energy Act 2013

Delivery Plan

The Department of Energy and Climate Change (DECC) has finalised its first 5-yearly Delivery Plan [2]. It sets out much of the policy framework and route to implementation of EMR including details of the levy control framework, CfD strike prices, capacity market reliability standard and next implementation steps.

CfD Strike Prices – Established technologies

The Delivery Plan republishes the Strike Prices for different technologies which were recently announced by the Government in early December[3]. However, since then, the European Commission has published draft guidance on environmental and energy aid for consultation[4]. This guidance proposes that limitations on state aid for "feed-in tariff"-type support for new renewable energy installations will apply. Among a list of criteria for compatible support schemes, the support for "deployed technologies"[5] would have to be "*granted in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria.*" This clearly would not be met by the administratively fixed strike prices in DECC's announcement.

The Delivery Plan therefore announces that the Government is considering introducing competition (presumably through an auction process) to the setting of strike prices for established technologies including onshore wind, solar PV, energy from waste, hydro, landfill gas and sewage gas immediately as from the introduction of CfDs in 2014. The Government will make a decision on this in early 2014 and will also confirm its approach to biomass conversion at the same time.

Capacity Market – Reliability Standard

DECC has confirmed the enduring reliability standard that will be used as a guide to determining how much capacity is auctioned in the Capacity Market. The standard is a Loss of Load Expectation (LOLE)[6] of 3 hours per year (the same level as used in France).

Update on timings

The Delivery Plan contains additional updates on EMR implementation timing:

- March 2014 – Investment Contracts awarded under the Final Investment Decision enabling for Renewables programme (the interim CfDs)
- First half of 2014 – Publication of updated CfD terms
- Late 2014 – First CfD applications to be submitted
- December 2014- first capacity auction to be run for delivery of capacity in the October – September 2019 period.
- April 2015 – first likely payments to flow under the CfD

[2] The Delivery Plan is published along with various annexes and associated documents at: https://www.gov.uk/government/publications/electricity-market-reform-delivery-plan
[3] See our briefing: Strike prices for Contracts for Difference published and other Electricity Market Reform news – December 2013.
[4] Draft Guidelines on environmental and energy aid for 2014-2020
[5] Deployed technologies are those established technologies which make up at least [1-3% (to be determined as part of the consultation)] of EU electricity production.
[6] LOLE is statistically calculated as the economically efficient number of hours / periods per annum where, over the long term, it is expected that supply will not meet demand .

CfD Contract terms update

The Government has published a revised draft of the CfD terms (building on the draft published in August 2013) together with various other associated policy papers [7]. The structure of the CfD terms has changed since then, and it is now proposed that it will consist of two parts:

- the **CfD Agreement** will be a short section applying the CfD to the specific project by including information such as the project location, strike price and target commissioning window; and
- there will be a longer section containing the generic clauses which set out the rights and obligations of the CfD signatory.

The Government has also refined its thinking on the treatment of phased offshore wind projects and will shortly consult on the proposed approach to apply the first phase strike price to the whole project. The key elements of the approach are:

- the first phase must deliver 25% of the total capacity (rather than 35% as previously proposed) to encourage efficient phasing of projects;
- the target commissioning date of the first phase must be no later than 31 March 2019 and the target commissioning date of the final phase must be no later than two years after the target commissioning date of the first phase;
- payments will commence once 95% of the capacity committed in respect of each phase is delivered; and
- the project must be completed in no more than three phases.

More generally, the other terms are:

- **Qualifying shut-down events:** there will be protection against political decisions to shut down a generator but not where the shut-down is in connection with health and safety, security, environmental factors or damage to property;
- **Change in law:** generators will be protected against specific and discriminatory changes in law but no other general changes in law (on the basis that these are an ordinary business risk);
- **Termination events:** the termination events will include failure to meet milestones, insolvency and non-payment by the generator; and
- **Collateral:** rather than a requirement to post collateral for a period where the reference price is higher than the strike price, it is now proposed that collateral is only required where there has been a repeated failure by the generator to make payments.

The Government is seeking stakeholder feedback on a number of key commercial aspects of the CfD terms including the collateral and form of direct agreement[8]. The deadline for comments is 27 January 2014.

DECC also launched separate technical consultation on structuring CfDs which deals with the use of standard terms, modification of terms, notification and offer of contracts and reference prices[9]. The deadline for comments is 7 February 2014.

The Government intends to publish the final CfD terms in the first part of next year, reflecting on the feedback received from stakeholders, with a view to implementation through regulations laid before Parliament later next year.

[7] https://www.gov.uk/government/publications/electricity-market-reform-contracts-for-difference

[8] Between the generator, the Government-owned CfD counterparty and the secured creditors' security trustee.

[9] Electricity Market Reform: Consultation on Regulations for Contracts for Difference (Standard Terms and Modifications) – DECC – December 2013

Nigel Howorth
Partner
Environment & Planning

T: +44 20 7006 4076
E: nigel.howorth
@cliffordchance.com

James Shepherd
Senior Associate
Environment & Planning

T: +44 20 7006 4582
E: james.shepherd
@cliffordchance.com

Michael Coxall
Senior Professional Support
Lawyer
Environment & Planning

T: +44 20 7006 4315
E: michael.coxall
@cliffordchance.com