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## **Infrastructure Act 2015--energy and project finance**

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**Planning analysis: How will the Infrastructure Act 2015 (InA 2015) affect the nationally significant infrastructure projects (NSIPs) regime? Simon Buchler, associate, and Sarah Fitzpatrick, barrister and associate director, at Berwin Leighton Paisner, consider what the new legislation could mean for energy and project finance matters.**

### **Original news**

Infrastructure Act 2015, LNB News 13/02/2015 93

### **What existing problems is InA 2015 seeking to address as far it relates to energy and project finance matters?**

According to the government, the 'powerful new measures' in InA 2015 'will drive investment, making it easier, quicker and simpler to get Britain building for the future'.

One of the principal aims of InA 2015 was to cut red tape for NSIPs to boost investment. Although the UK is already a top destination for debt and equity investment for infrastructure projects, in part due to its highly regulated environment, the level of regulation and, in particular, the delays in the planning process for such projects was seen as a possible barrier to investment. InA 2015 seeks to speed up parts of the planning process for NSIPs with the aim of attracting future investment.

On its enactment, Transport Secretary Patrick McLoughlin said:

'This Act will hugely boost Britain's competitiveness in transport, energy provision, housing development and nationally significant infrastructure projects. Cost efficient infrastructure development is all part of the government's long term economic plan, boosting competitiveness, jobs and growth.'

Another principal aim of InA 2015 was to boost the UK's energy security and economic growth by extracting domestic shale gas, which the government says 'has the potential to create jobs, making us less reliant on imports from abroad and help us tackle climate change, all within one of the most robust regulatory regimes in the world'.

InA 2015 makes it easier for operators to tap into the UK's shale gas reserves from a land access perspective, although the usual raft of planning, environmental, and other regulatory consents will still be required. InA 2015 also requires greater collaboration between UK offshore petroleum operators to maximise economic recovery; and provides access to deep level land without landowner consent for operators in relation to UK onshore petroleum and geothermal energy.

### **Will there now be an even playing field between independent connection providers and distribution network operators for connections to the electricity grid?**

The provisions of InA 2015 could change the relationship between customers and network operators. InA 2015 has opened it up for the Secretary of State to introduce regulations whereby persons who had previously paid for grid connection infrastructure can now recover a proportion of their costs from third parties, where such third parties utilise the existing (paid for) infrastructure to enable a second connection to

be made for their own use, regardless of whether a distribution network operator (DNO), independent connection provider (ICP) or independent distribution network operator (IDNO) made the first or second connection.

Previously, under the Electricity Act 1989, this right for early contributors of grid connection infrastructure to be repaid was only in respect of connections with DNOs. This is why InA 2015 is seen as potentially opening up the market to ICPs and IDNOs and creating a more level playing field. However, the regulations would only apply in a limited set of circumstances where a third party requires use of an existing (first) connection to make use of its own (second) connection.

However, since the Department of Energy & Climate Change (DECC) is still to release the regulations permitting third party cost recovery, for now we can only speculate as to what the regulations will contain and when these will be released. According to DECC, that will not be until at least 2016.

## **How will the UK energy sector benefit from InA 2015, notably in terms of maximising oil and natural gas extraction and the simplification of onshore drilling for shale and geothermal energy?**

### **UK offshore petroleum**

InA 2015, s 41 places an obligation on the Secretary of State to implement strategies to maximise the economic recovery of UK offshore petroleum, in particular through:

- o developing petroleum infrastructure and equipment, and
- o requiring petroleum licence holders, operators and infrastructure owners and persons planning and carrying out the commissioning of upstream petroleum infrastructure to collaborate

This section implements one of the key recommendations in Sir Ian Wood's 'UK Continental Shelf Maximising Recovery Review' (published 24 February 2014). This identified a number of key issues, including the need for operators to focus on maximising economic recovery for the UK as well as pursuing their individual commercial objectives.

DECC is required to produce its first strategy by 12 February 2016. Until then, we are unlikely to know the exact nature and scope of these strategies, but with oil prices still low, improving financial efficiency is likely to be high on the agenda.

### **UK onshore petroleum and geothermal energy**

Prior to the enactment of InA 2015 on 12 February 2015, a company drilling for petroleum or deep geothermal energy had to reach agreements with landowners to obtain rights of access, even where works took place far below the surface. However, from 12 February companies now have a statutory right to use the land pursuant to InA 2015, s 43.

To exercise the statutory right certain conditions have to be met:

- o the land being used must be at least 300m below the surface ('deep-level land')
- o deep level land must be onshore in England and Wales or beneath waters other than those adjacent to Scotland (a 'landward area'), and
- o the purpose of the works must be for the exploitation of petroleum or deep geothermal energy, including searching, feasibility studies, preparing for exploitation and decommissioning

However, InA 2015 does allow for work performed within a landward area to exploit resources outside that area. A company would therefore benefit from this statutory right when drilling from an onshore point in England into a resource in offshore Scotland.

InA 2015 permits various types of uses, including: drilling, boring, fracturing, installing and using wells and extracting substances through the wells. Importantly, InA 2015 permits companies to leave land in a different state to its state prior the exercise of the right.

There are two limitations to this statutory right of use:

- o companies must still obtain all necessary planning permissions and environmental permits, and comply with statute relating to the control of pollution, and
- o landowners will not be liable in tort for any loss or damage companies suffer from using the deep-level land unless the loss or damage is attributable to a deliberate omission by that landowner

So what is in it for the landowner who seemingly gets little say as to whether their land is exploited? The only real consideration is that the Secretary of State may order companies to:

- o make payments to the owners of the land and other interested parties, and
- o notify all concerned parties of their right of use, before it is exercised

While this is good news for petroleum companies who can now avoid protracted negotiations for rights of access, it is likely to be bad news for landowners whose only recourse is a compensation package (which is yet to be clarified).

### **Onshore hydraulic fracturing (fracking)**

InA 2015, s 50 provides that the Secretary of State can issue a consent to drill a well in respect of an onshore licence if that consent:

- o prohibits associated fracking at a depth of less than 1,000m, and
- o requires a hydraulic fracturing consent for associated fracking at a depth of 1,000m or more (a 'hydraulic fracturing consent')

However, before the Secretary of State can issue a hydraulic fracturing consent:

- o an environmental impact assessment must be carried out
- o independent inspection of the well's integrity must be made
- o methane level monitoring must be in place
- o the area must not be within a protected groundwater area (or other protected area), and
- o the substances to be used must be approved by the relevant environmental regulator

InA 2015 reaffirms the government's intention to control the use of fracking by placing restrictions on fracking above 1,000m and more stringent controls on fracking below 1,000m. While this does not simplify the practice of fracking in the UK, it attempts to regulate the process and, hopefully, increase public support for an already controversial topic.

### **Are there any amendments in InA 2015 that would impact the project finance industry going forward?**

In a February 2014 paper prepared by the World Bank for the G20 Investment and Infrastructure Working Group it was stated:

'A clear trend that has emerged over the last years, underscores the need for new, long-term investors to participate in infrastructure funding. To date, debt financing by banking sector has contracted in many regions. As a result, the market is looking to mobilize financing from new types of investors who are well capitalized and seeking longer-term returns.'

A contraction in long-term debt funding by commercial banks, as well as constraints on public budgets, has led to both funding and financing gaps; new sources of finance are required for the funding of infrastructure projects. Institutional investors have been filling this gap, with 2014 seeing a rise in private sector investment in greenfield infrastructure. Infrastructure investments align well with the longer term liabilities of institutional investors. Domestically, there are a number of NSIP projects requiring financing.

In July 2014 the government produced 'Investing in UK Infrastructure' which identified a number of NSIPs presenting opportunities for investment. In April 2014, the government published its response to a consultation on the review of the NSIP regime in which it identified measures to improve the regime. Three of those administrative changes to the NSIP regime have been included in InA 2015. The government response stated:

'Delivering economic growth is a priority for this Government. Improving the efficiency and speed of the planning process, particularly for infrastructure delivery, is a crucial part of creating the right conditions for sustainable growth. This Government is committed to securing investment in new nationally significant infrastructure as part of its efforts to rebuild the economy and create new jobs.

Ensuring that the nationally significant infrastructure planning regime is operating as effectively and efficiently as possible is therefore an important priority and is one of the strands of wider reforms we have made to the planning system.'

Although the amendments to the NSIP planning regime are modest, these should have the effect of smoothing the path, particularly for making material and non-material changes once a DCO has been made. Whether these changes will have the effect of attracting private investment into UK NSIPs remains to be seen.

*Interviewed by Nicola Laver.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*