	Issue	What to consider
1.	Obligations under the Regulation on Wholesale Energy Market Integrity and Transparency (Regulation (EU) No. 1227/2011) (REMIT)	One of the main regulatory considerations when acquiring a power or gas asset is REMIT. If the target trades in the EUpower or gas markets, including LNG and biogas (known as 'wholesale energy markets'), it will be subject to the REMIT framework. Under REMIT, certain reporting obligations may arise. It is therefore necessary to ensure that the entity that is reporting is properly registered with the relevant EU Member State regulator (known as the national regulatory authority (NRA)). The buyer may also need to ensure it is set up to make timely and accurate reports. While not a lengthy or onerous process, it is essential that this is in place in order to avoid regulatory penalties or sanctions. The sale and purchase agreement may also require reporting under REMIT if the transaction constitutes a 'trade' of a wholesale energy product. Being subject to REMIT means, in many EU Member States, the buyer's market behaviour will be subject to the purview of the energy regulator, as well as the financial services regulator and competition authorities. Therefore, the buyer may need to get comfortable with being under the auspices of several distinct regulators with separate powers and enforcement rights. With that in mind, the buyer may wish to consider the sector-specific nature of this regulatory requirement and whether or not the buyer is able and willing to deal with the added reporting, trading and transparency requirements, standards and burden imposed by REMIT. Following the expiry of the Brexit transition period, the UK 'onshored' the REMIT framework into domestic law in an amended form (UK REMIT). While the provisions are largely the same as EU REMIT, including the requirement to register with Ofgem (the UK's NRA), and Ofgem's investigation and enforcement powers, we note that in the short term, there will not be a reporting obligation under UK REMIT for power and gas trades undertaken in the UK, although this may change in the future.
2.	Due diligence of contractual arrangements	Due diligence is an essential stage in any merger or acquisition. In terms of the power and gas sectors in particular, the buyer may wish to conduct extensive due diligence with respect to the contracts that revolve around the output generated by the asset. This is because the primary source of revenue for a power or gas asset is its output. Issues that are likely to be the focus of the due diligence include, but are not limited to: (i) exclusivity arrangements; (ii) restrictions on assignment, novation and change of control provisions;

	Issue	What to consider
		(iii) the term and provisions of the various bespoke sale and purchase arrangements that deviate from the target's standard terms; (iv) leases and licences that are due to expire within a year of the proposed acquisition date; and (v) compliance with all applicable laws including, in the context of LNG sales, competition laws applicable to destination restrictions and profit-share arrangements, which in certain key import jurisdictions undergo regular review.
3.	Service provision and transitional services arrangements	Service agreements are contractual arrangements in the power and gas sectors that may require specific due diligence. To ensure the continuation of the target asset's function and output level, it is important to ascertain whether any service agreements are in place. In the power and gas sectors, this may include technical, engineering, consulting or research services being provided by a third company or group company. In the absence of such services, the target asset may cease to function, output may decrease or less profit may be generated. Therefore, following the purchase, a prospective buyer may need to consider interim or transitional arrangements with the seller or third parties already providing those services, until it can arrange, develop or implement its own capabilities for such services. These are known as transitional services agreements and are generally in force for a period of 12 – 24 months, starting from completion. A buyer may therefore look to identify, as early as possible, the systems and services that are currently used to conduct the acquired business, and reconcile those against its own systems and services in order to identify which will still be required post completion.
4.	Hedging arrangements	In recent years, certain underperforming assets in the power and gas sectors have implemented hedging arrangements and/or route-to-market services. Therefore, when acquiring an underperforming asset, a buyer may wish to consider its viability for the imposition of hedging arrangements and/or route-to-market services (unless these are in place already). For example, in the context of a generation asset, the buyer may wish to check if the asset is registered with Elexon (the party responsible for the smooth functioning of the wholesale electricity market in the UK) in order to determine whether or not it would be possible to trade power production on the wholesale electricity market.

	Issue	What to consider
5.	Consents and approvals	The provision of hedging arrangements may require an application for authorisation from the relevant financial regulatory authority for the entity undertaking those arrangements. Similarly, the individuals performing hedging or route-to-market services may need to be approved by a regulator. Such authorisations and approvals cannot be transferred from the seller to the buyer; rather, the buyer will have to seek such approvals from the regulator for the entity and relevant individuals. Depending on the buyer's market share, approval from the relevant competition authority also may be required. Obtaining such approvals and consents is often a lengthy process. Therefore, the buyer may wish to factor the process and timing for completing the documentation to obtain consents and approvals, as well as the actual delay in obtaining each such consent or approval, into the proposed timing for the transaction.
6.	Change of control	Change of control related consents and/or approvals are a key consideration in any merger or acquisition. With regard to the power and gas sectors, a buyer may want to be mindful of any notifications that will need to be made as a result of a change in control of the target entity or its assets. For example, an entity that holds an Ofgem licence for the supply of electricity or gas will need to apply for the licence to be transferred if the sale is structured as a business or asset sale and the legal entity holding the licence is to change. When considering whether to approve the transfer, Ofgem will apply the same criteria as those applied when granting a new licence. Ofgem will then publish a notification that it is proposing to consent to the transfer of a licence, allowing for at least two months for representations or objections before consent is actually given. The parties may therefore wish to factor additional time into the transaction timetable, particularly if the buyer wishes to commence activities immediately after conclusion of the transaction. By way of another example, if the target business is authorised and regulated under the Financial Services and Markets Act 2000 (FSMA), then a buyer who acquires 'control' of the target is required to seek consent from the Financial Conduct Authority or the Prudential Regulation Authority (as applicable) before purchasing that entity, under the FSMA change of control regime. 'Control' of a firm may arise on acquiring 10 per cent of the firm's voting capital. The change of control notification requires new controllers to provide, as a minimum, a strategic developmental plan, information on the impact of the acquisition on the corporate governance of the target firm, and a due diligence report highlighting risks identified and proposed mitigation steps, along with various other pieces of information. Buyers who are increasing their control in a target may also have to seek consent from the regulator if the level of control increases over

	Issue	What to consider
		certain thresholds. This is something that needs to be continually monitored, in particular whenever any of the other shareholders with control dispose of their shareholding. It is a criminal offence to acquire or increase control without obtaining prior approval.
7.	Environmental considerations	Certain power and gas assets may give rise to increased liability from an environmental perspective, given the potentially hazardous nature of their output. Therefore, the buyer may wish to conduct targeted environmental due diligence in order to determine the permits, licences, authorisations and consents that are already in place; whether any of the above have been breached; and whether any further permits, licences, authorisations and/or consents are required in order to perform the proposed onsite activities. Similarly, should the target asset contain dangerous substances or be built on a site that is deemed to be hazardous, the buyer may need to consider whether any environmental notifications or permissions are required for the acquisition. One such regime which a buyer will need to be aware of is the Control of Major Accident Hazards Regulations (COMAH). COMAH applies to any “establishment” that manufactures, stores or uses a dangerous substance above a certain threshold.Operators of existing establishments will have to report information to the regulatory authority, the Health and Safety Executive (HSE). The operator of a new establishment will also need to notify certain information to the HSE, which is a lengthier process and will normally take three to four months. It is worth noting that it is a criminal offence to operate a site that is subject to the COMAH regime without making the required notifications. Therefore, the buyer may wish to undertake extensive due diligence to identify any risks, and include indemnities and warranties tailored to such risks in the sale and purchase documents.
8.	Emissions trading	As well as considering potential environmental liabilities, a prospective buyer may also wish to consider the availability (depending on the jurisdiction in which the asset is located) of tradable carbon credits and renewable subsidy payments, including emission reduction and trading credits that may be available due to the nature of the output from the asset, such as the EU Emissions Trading System (EU ETS). Following the expiry of the Brexit transition period, the UK no longer participates in the EU ETS: the UK replaced the EU ETS with its own equivalent system, the UK Emissions Trading System, on 1 January 2021. The UK also has developed the UK Emissions Trading Registry to acquire and surrender allowances. It is worth noting that the UK has also been considering a carbon emissions tax, but it is not yet known to what extent, if at all, this will be implemented.
9.	The UK’s National Security and Investment Bill	A theme that has recently emerged as an issue worth considering for mergers and acquisitions in certain sectors in the UK, including power

	Issue	What to consider
	(National Security Bill)	and gas, is the government's ability to intervene in, scrutinise and potentially block a transaction if there is a threat to national security. The UK published the National Security Bill in November 2020. In a similar fashion to the Committee on Foreign Investment in the United States (CFIUS) system, the National Security Bill shall operate as a stand-alone regime and grant far-reaching powers to the government to call-in certain transactions for review if they are deemed to be a threat to national security. Notably, this call-in power will apply retrospectively to transactions that take place between 12 November 2020 (being the day after the National Security Bill was published) and the date it is enacted. The National Security Bill also introduces a mandatory notification requirement for certain transactions in sensitive sectors. In the government's examples of the sectors that are caught by this requirement, it has included the following areas of the energy sector – gas and electricity networks, and power generation, including renewables and battery storage. Furthermore, where there is no requirement to notify, the National Security Bill also introduces a voluntary notification to encourage parties to self-assess transactions for national security concerns. Failure to notify pursuant to the mandatory requirement will see the government apply civil and criminal sanctions, which may include fines of up to 5 per cent of global turnover (capped at £10 million) and up to five years' imprisonment for individuals. Transactions that are completed without obtaining the required government clearance will be deemed legally void. The government may also impose various restrictions on such deals, which may include blocking the transaction. For more information on the National Security Bill, see our Client Alert: "The National Security and Investment Bill: a new regime for foreign investment in the UK".
10.	Merger control clearance	Similar to the UK government's powers under the National Security Bill, the UK's Competition and Markets Authority (CMA) has the ability to terminate a transaction or require the sale of certain assets if it finds a merger to be in breach of competition rules. Notification of the transaction to the CMA is voluntary, although the CMA encourages parties to notify it as early as possible to avoid transactions needing to be unwound after they have been concluded. With regard to a merger or acquisition involving entities with activities or assets in multiple EU Member States (which included the UK until 31 December 2020), if the parties exceed certain turnover thresholds, it will be necessary to notify the transaction to the EU Commission, and the EU Commission's approval will need to be granted prior to completion of the acquisition. Alternatively, parallel filings to EU Member States' national authorities might be required. Unlike notification to the CMA, notification to the EU Commission and to most

	Issue	What to consider
		other authorities around the world is mandatory for any acquisition or merger that meets the criteria for notification. In some jurisdictions (such as Germany) also the acquisition of non-controlling minority shareholdings can require merger control approval. This can be of particular relevance in Joint Venture situations. Following submission of a notification, review of the transaction by the competent authority can take a number of weeks. The parties to the transaction may therefore wish to carry out the relevant antitrust assessment to ascertain any notification requirements at the outset of the transaction and, if there are any competition concerns, factor additional time into the transaction timetable to account for the notification and review period. In addition, the parties may need to assess whether any additional notification or filing obligations may be triggered by antitrust requirements outside the UK and/or EU.