Energy Infrastructure and Disputes (1): When is power generation, a waste process?

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In the first of a three-part series, Juan Lopez considers some important questions which are increasingly arising for energy generation infrastructure – and in particular, the energy-from-waste sector – in the context of construction disputes and adjudication.

The Technology and Construction Court has not infrequently been invited to consider how specific infrastructure projects – including energy generation facilities – fall to be statutorily characterised, on given facts. The trial in **Engie Fabricom (UK) Ltd. V MW High Tech Projects UK Ltd [2020] EWHC 1626** offers one such interesting example, in which Mrs. Justice O'Farrell considered whether the "primary" (as opposed to ancillary) onsite operation – framed interchangeably under relevant statute as an "activity" – of an energy-from-waste (EfW) facility (being the Energy Works Hull facility, for processing and gasifying 'refuse derived fuel' and combusting syngas byproduct, for electricity generation) was "power generation" rather than "waste processing". The outcome of this conundrum would, in turn, answer the main issue at trial as to whether the facility's operation would be excluded from adjudication (by s.105(2)(c)(i) of the Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act)) and so render two existing adjudications unenforceable for want of adjudicator jurisdiction.

For the purposes of the 1996 Act, the contractual right for adjudication is confined to disputes falling within its scope. Section 105(1) defines "construction operations" for these purposes, whilst s.105(2) lists excluded operations and includes the installation of plant or machinery on a site where the "primary activity" is "power generation".

The headline is that the characterisation of energy (or power) generation infrastructure within this context is intrinsically a question of fact (**Laker Vent Engineering Ltd. v Jacobs E&C Ltd [2014] EWHC 1058 (TCC)**), something strongly reinforced in **Engie**. Distinguishing "primary" from 'ancillary' operations at trial, will inevitably turn on the factual analysis, and, it follows, the extent to which the Court is (or sometimes is not) assisted by comprehensive expert evidence addressing determinative factors, including: how all relevant operations of a specific facility have been defined contractually, how such operations are scoped under the various statutory frameworks which govern the consenting, permitting and regulation of facilities, how operations are characterised by energy infrastructure policy (including planning policy), the financial package in support of the facility, and naturally, how operations are carried out onsite.

The list of factors potentially relevant to the central interpretative question is not exhaustive. Nor need it be finite. Perhaps most interestingly, the particular weighting of individual factors will also differ from case to case, and between energy facility typologies. An exploration of these factors will not be bound by conventional distinctions of power generation, waste processing, and transmission and distribution.

The UK EfW sector in particular, has experienced significant growth in the spread of facilities incorporating one or more waste combustion generation processes, as distinguishable from a "primary" waste treatment process. With this industry trend set to continue, the factual analysis that will critically underpin the question of "primary activity" – for the purposes of s.105 of the 1996 Act, *and indeed beyond* (the interpretative question being one which notably overlays with planning and environmental law spheres) – will develop in its complexity. This of course resonates with the fact that most UK EfW facilities are truly 'integrated'. Most anaerobic digestion or gasification plants will be good examples, and the UK upturn in their construction reflects a direction of travel for the energy generation industry alongside other energy plan objectives and measures of the recent British Energy Security Strategy.

This also suggests that the factual analysis central to s.105 will, in practice, be often clouded by generalities of expression embedded within much governing policy and which punctuate the relevant consenting, permitting and regulatory frameworks. This is not to ignore the language of instruments and notices that consent and permit such facilities. In significant part, these generalities will however prove unavoidable – a practicality which signposts that close scrutiny of onsite facility operations, viewed against the overarching background of the contract(s) concerned with facility design and manufacture, may well prove highly significant to the view formulated on "primary activity".

It has also long been the case that development plan policy will commonly describe ambivalently, the various waste management operations of energy generation infrastructure. Similarly, submitted DCO (or planning) application information for integrated EfW facilities is ultimately not required to comprehensively explain and evidence the specific primacy of one or more facility operations, (say) as between electricity (or gas) generation on the one hand, and integral waste treatment processes or waste disposal (e.g. composting, incineration or gasification) on the other. Moreover, the energy-related National Policy Statements: EN-1 [Overarching National Policy Statement for Energy] and EN-3 [National Policy Statement for Renewable Energy Infrastructure] are notably aged, falling behind energy sector growth and industrial technological advances, with neither offering any measurably greater specificity for defining a "primary activity" of an EfW facility. This is not criticism of national energy policy, but rather as an acknowledgment of their limitation within the essential factual analysis underpinning s.105. Definitional analysis was never a policy objective of either EN-1 or EN-3.

Beyond infrastructure planning, the EU Waste Framework Directive 2008/98EC (transposed by the Waste (England and Wales) Regulations 2011) and environmental permitting under the Environmental Permitting (England & Wales) Regulations 2010, are principally concerned with waste incineration and treatment operations from a pollution control perspective, and (insofar as relevant to the factual analysis) formulate a series of high-level waste operation generalities, only. The Directive also provides for myriad operations, which appear unhelpfully circular, from the interpretative perspective. Not least, 'management', 'collection', 'treatment', 'recovery', 'recycling' and 'disposal', will be operations not infrequently pulling in different "power generating" and "waste processing" directions. Indeed, 'recovery' under the Directive (Annex II) may properly comprise a use defined 'to generate energy' and include incineration (of solid waste, etc.) whilst similarly incorporating an identifiable waste process.

This all means therefore that the analysis of determinative facts for the purposes of s.105 will vary considerably. Yet, in **Engie**, those facts had seemingly not proven as wide-ranging as they might – perhaps owing to the shared extent (or limitations) of the parties' expert evidence – having focused on: (i) planning and waste regulatory and policy frameworks (which excluded EN-1 and EN-3 and a detailed critique of development plan policy on energy infrastructure); (ii) the operative planning permission (given that the facility had not

constituted a Nationally Significant Infrastructure Project, under ss.14 and 15 of the Planning Act 2008); (iii) the scope of an Environment Agency permit granted under the Industrial Emissions Directive 2010/75/EU (IED), regulating the facility as a waste incineration plant providing for the thermal treatment of waste; (iv) onsite operations; and (v) the financial model for the facility, accounting for applicable subsidies and grants.

In **Engie**, the principal engineering, procurement and construction contract (EPC) for the facility, by which the "overriding contractual requirement" was held to be the performance of the plant for energy production rather than waste throughput, was found to amount to "very strong evidence" – indeed, the strongest evidence on the facts – that the "primary activity" was "power generation". Separately, the funding model estimation that the majority of revenue for the facility would derive from electricity exports as well as from subsidies, compatibly offered a "strong indication".

On the facts, O'Farrell J ultimately found that the primary activity of the facility was indeed one of "power generation", meaning that the works the subject of the dispute were not qualifying "construction operations" within the meaning of the 1996 Act, and, there being no statutory or contractual right to adjudication on the dispute, the relevant adjudications were unenforceable.

Elsewhere, of summary note, is the (non-construction law) interpretative question in **EFW Group Ltd v Secretary of State for Business Energy & Industrial Strategy [2021] EWHC 2697**, in which the Planning Court considered whether specific EfW infrastructure could permissibly be combined-assessed for development consent under a single (rather than dual) decision-making framework (s.104) of the Planning Act 2008. Here, operative factors considered by the Court – albeit in answer to an altogether different interpretative and jurisdictional question than arises under s.105(2) of the 1996 Act – included facility generation capacity, facility impact on the 'waste hierarchy', capacity of waste fuel, and waste-fuel throughput. These were seemingly not instructive in **Engie**. There would however be no good reason why such factors, where satisfactorily in evidence, should be excluded from the overall factual analysis of an EfW facility for the purposes of s.105.

The interpretative question discussed here serves only to underscore the critical importance of comprehensive, industry-informed, expert evidence in navigating the factual analysis necessary to identify the "primary activity" of EfW facilities, and potentially other energy generation infrastructure.

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