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Chapter 12

Energy Law

Aileen McHarg *University of Strathclyde*

Development of EU Energy Law

Although two out of the three founding treaties of what is now the European Union (EU) – the 1951 European Coal and Steel Community Treaty (which expired in 2002) and the 1957 [European Atomic Energy Community](#) (Euratom) Treaty – had energy at their heart, EU energy law was limited in its scope and impact until the 1990s, with early interventions largely focused on (nuclear) safety and maintaining security of supply. In general, with energy security being regarded as closely linked to national security, Member States jealously guarded their sovereignty in relation to energy policy, and energy industries were mostly organised on national lines, often as publicly-owned monopolies.

Things began to change in the late 1980s and 1990s as a result of two pressures. First, the desire to complete the EU internal market, by addressing indirect distortions to competition such as energy costs, coincided with a worldwide shift in energy policy away from public ownership and monopolisation towards privatisation and liberalisation. Relying on general competition law and free movement powers, the Commission moved to liberalise downstream gas and electricity markets, initially via a [litigation strategy](#) and subsequently through three successive waves of legislation (in 1996/98, 2003, and 2009).

Second, increasing awareness of the adverse environmental impacts of energy production and consumption, and the cross-border nature of issues such as air pollution and climate change, led the EU to become increasingly active in regulating the environmental performance of the energy industries and the efficient use of energy. Although it was not until 2009, with the coming into force of the [Lisbon Treaty](#), that the EU acquired an express general legal competence in energy policy, this was in effect a belated *de jure* recognition of the EU's *de facto* position as a major policy actor on the European energy stage.

What is now [Article 194](#) of the Treaty on the Functioning of the European Union gives the EU institutions shared competence with Member States to adopt measures to '(a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.' Member State sovereignty over the exploitation of primary energy sources, their energy mix, and the general structure of their energy supply, including the ownership of national energy companies,¹⁸ is expressly preserved. In practice, however, the requirements of both liberalisation and environmental policies increasingly constrain Member States' freedom.

This is a trend which seems likely to continue. In 2015, the Commission launched its [Framework Strategy for an Energy Union](#), with the aim of creating a genuinely cross-border internal market in energy in order to achieve secure, sustainable, competitive

¹⁸ EU law is technically neutral on questions of property ownership – [Article 345 TFEU](#)

and affordable energy supplies for European consumers. Considerable work is already under way to secure the technical compatibility of domestic energy markets and in late 2016 the Commission proposed another package of legislative measures (the so-called '[winter package](#)') which would further harmonise Member States' energy policies.

Impact of EU Law on UK Energy Policy

Unlike some other Member States, the UK's energy policy has not been fundamentally shaped by EU energy law. Not only has there been close alignment between the goals of UK and EU energy policy, but the UK has been in the vanguard of European – and indeed global – energy reform since the 1980s, both as regards the liberalisation of energy markets and subsequently in the transition to low-carbon energy systems. In general, therefore, the UK has been a strong supporter – and indeed influential driver – of EU energy policy.

This is not to say that EU law has not sometimes had an impact. For instance, EU state aid law has shaped government support for renewables and, in particular, nuclear generation.¹⁹ The use of so-called 'golden shares' as a means of government intervention in privatised energy companies has been severely restricted by the [CJEU's finding](#) that they constitute a restriction on free movement of capital and the right of free establishment. EU [air quality legislation](#) has largely been responsible for the decline of coal-fired power generation. The imposition of [binding national targets](#) for renewable energy consumption has also significantly accelerated the deployment of renewable energy sources in the UK, particularly in the electricity sector. Overall, though, it is fair to say that EU law has been a constraint upon, rather than a major determinant of, UK energy policy.

However, this does not mean that the role of EU energy law has been unimportant. It has performed two major functions, both of which would be more difficult to replicate outside of the EU. The first is to facilitate trade between, and integration of, European energy systems. Of course, trade would not be impossible outside the EU. Oil, gas and coal are all traded on global markets, subject only to World Trade Organisation rules. But matters are more difficult for electricity and (downstream) gas supply, both of which are networked industries. This means that they depend upon the existence of an extensive infrastructure of wires and pipes to deliver energy from producers to consumers. In the case of electricity in particular, they also require detailed technical regulation to ensure the safe, reliable and efficient operation of the energy system. The EU's institutional framework thus provides a means of reducing transaction costs and technical barriers to trade in gas and electricity by promoting harmonisation of national regulatory frameworks and facilitating common projects, such as the Single (wholesale) Electricity Market (SEM) between Ireland and Northern Ireland, or the proposed North Sea offshore electricity grid.

As already noted, the EU is actively promoting the integration of European energy markets via the [Energy Union](#), and the UK's hitherto rather isolated energy systems are now increasingly physically integrated with other European markets, through the development of interconnectors. Integration makes sense in energy policy terms as a means of ensuring security of supply, in order to increase competitiveness and therefore reduce prices, and to facilitate the deployment of intermittent renewable

¹⁹ Financial subsidy for the Hinkley Point C nuclear power station is currently the subject of a [dispute](#) before the ECJ

energy sources (by enabling intermittency to be balanced by imports).²⁰ Given that the UK is a net importer of energy, and the UK government's low carbon ambitions, it has been a strong supporter of market integration within the EU, and this is likely to continue to make sense unless its energy policy objectives change substantially.

The second important function performed by EU energy law is to 'lock in' energy policy goals, by limiting the extent to which policy can change through unilateral Member State action. This has the effect of promoting policy stability – a particularly important concern in relation to the energy industries, which are highly capital-intensive industries operating over long time horizons. In a period, such as the present, of high capital demand – where investment is required both to replace aging energy infrastructure and to facilitate the low carbon transition – policy stability is essential to promote investor confidence. But it is difficult to achieve on a purely domestic basis, given the UK's highly flexible constitutional arrangements and adversarial political system.

The external constraint provided by EU law is also valuable for internal policy actors. For instance, the devolved Scottish government has high ambitions to exploit Scotland's vast renewable energy potential, but limited policy competence within the current devolution settlement to enable it to achieve those ambitions. The policy support provided by EU law therefore gives some guarantee that regulatory powers retained at the UK level will continue to be exercised in a way that supports renewables expansion, as well as, for instance, enables access to EU-level funding for low-carbon investment, and research and development.

Of course, both of these functions performed by EU energy law have their downsides. For instance, as market integration has advanced, regulatory decision-making, particularly in relation to technical market and network operation, has to some extent shifted from domestic to EU-level regulators – ACER (the Agency for the Co-operation of Energy Regulators), ENTSO-E and ENTSO-G (European Network of Transmission System Operators for Electricity and for Gas), which were set up as part of the 2009 liberalisation package. Although UK regulators and network operators are powerful players in these decision-making fora, they are difficult to subject to wider democratic and public accountability at the domestic level (although they are subject to oversight by the European Parliament). Accordingly, the shift of regulatory capacity to the European level may have had the effect of undermining hard-won gains in the accountability of domestic regulators, which were the subject of intense debate in the 1990s.

In addition, while locking-in energy policy promotes stability, it also necessarily makes it more difficult to achieve policy change. This may therefore lock-in policy mistakes. For instance, VAT on domestic fuel was a policy – much criticised at the time – introduced by the Major government in 1993, but EU law meant that the subsequent Labour government was able only to reduce the VAT rate to 5% rather than to abolish it altogether. The UK's reduced rate of VAT on some energy-saving products has also been [held](#) to be incompatible with EU tax law. More fundamentally, EU law locks-in a market-based energy system. Notwithstanding ongoing criticism of the UK's liberalised energy markets, this therefore limits the extent to which new thinking about, for instance, the role of public or community

²⁰ For physical reasons, electricity supply and demand must be kept in balance at all times. On the current state of technological development, electricity also cannot easily be stored, hence keeping the electricity system in balance is a major challenge for energy regulators

ownership, the structure of energy markets, or the balance between markets and planning can be pursued.

Brexit and UK Energy Policy

Despite these criticisms, energy policy did not feature significantly in debates leading up to the EU referendum, nor has it done so subsequently. Given the close alignment of UK and EU energy policy, Brexit is unlikely to produce major changes in UK energy policy, at least in the short term, and existing EU-derived market and environmental rules will largely be given continuity of effect via the [European Union \(Withdrawal\) Bill](#). Nevertheless, in addition to the potential general economic effects of Brexit in relation to free movement of workers, availability of investment capital and supply chain impacts, some energy-specific issues do require to be addressed.

Euratom

The issue here which has attracted greatest attention so far is the implications of Brexit for the nuclear industry. One apparently unanticipated consequence of Brexit is that, in its [Article 50 notification](#), the UK government also gave notice of its intention to withdraw from Euratom, which now shares an institutional framework with the EU. Although [legal opinion is divided](#) on whether withdrawal is legally required, the prime minister's insistence on ending the jurisdiction of the CJEU over the UK makes it politically inevitable.

Euratom currently provides the legal framework for the safe and secure operation of civil nuclear power generation and nuclear waste disposal in the UK, as well as governing the supply of nuclear materials for power generation and other (for example, medical) uses into and out of the Community, the free movement of nuclear workers and co-operation in nuclear research and development. It is therefore essential that a replacement regulatory framework is put in place before the UK leaves the EU in order to comply with international non-proliferation obligations, and to ensure that the nuclear industry can continue to operate.

A new Nuclear Safeguards Bill was announced in the 2017 [Queen's Speech](#), which will transfer regulatory responsibility for safety and security to the (existing) Office for Nuclear Regulation. In addition, the UK government's [negotiating position](#) states its intention to maintain close co-operation with Euratom, as well as to sign new nuclear co-operation agreements with other key nuclear states. However, there [remains some doubt](#) as to whether suitable arrangements can be put in place in time.

Internal Energy Market

A second key issue concerns the UK's continued participation in the EU's Internal Energy Market (IEM). The [general consensus](#) is that continued participation would make sense for the reasons discussed above, and in particular to secure the future of Ireland's SEM and to avoid disruption and inefficiencies in the operation of interconnectors – a view apparently shared by the [Energy Secretary](#). The EU27 may also favour continued UK participation in the IEM, given that it is already seeking to extend the Energy Union beyond the EU's borders. For instance, Norway currently participates fully in the IEM via the EEA, as do a number of EU candidate countries in south east Europe via the Energy Community Treaty, and Switzerland (in some respects) via a bilateral agreement.

Nevertheless, there are potential obstacles and disadvantages to continued UK participation in the IEM. As regards the former, the UK government's 'red lines' in respect of free movement and CJEU jurisdiction may prove to be insurmountable obstacles, as might be the [European Parliament's insistence](#) that there should be no preferential access to the single market for particular sectors. As regards the latter, continued participation in the IEM from outside the EU would almost certainly mean a loss of influence for the UK in EU regulatory decision-making, making it a rule-taker, rather than a rule-maker. Moreover, the loss of UK influence might change the future direction of EU energy policy in ways which UK governments and regulators might find unpalatable.

Green Energy

If the UK remains part of the IEM, it will continue to be bound by most EU green energy laws, including new obligations in relation to energy efficiency and renewable energy contained in the Commission's [winter package](#). Nevertheless, decisions require to be made on whether to seek to continue to participate in the EU Emissions Trading Scheme (which includes major power generators) and on how to replace EU research and investment schemes for low-carbon energy.

However, if the UK leaves the IEM, green energy is the area in which policy change seems most likely. The current Conservative government is no fan of EU energy efficiency and renewable energy targets, and has already (prior to the EU referendum) withdrawn a range of subsidy and support schemes. Even post-Brexit, the UK will remain subject to domestic and international climate change obligations, as well as internal pressures from the devolved governments. But it is unclear how effective these will be in ensuring the low carbon energy transition remains on track.

Conclusion

The desire to 'take back control' which motivated the decision to leave the EU is one which seems to make little sense in the energy sector. Not only has the UK been a stronger influence over EU energy law and policy than vice versa, but there are persuasive arguments in favour of continued energy market integration. At a time when policy stability is particularly important to the energy industries, Brexit therefore seems like a distraction. However, it remains to be seen how far 'business as usual' will be possible post-Brexit, or alternatively how any new policy flexibility will be used in practice.

Further Reading

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