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BREXIT AND UK ENERGY POLICY

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EU Energy Policy

Despite the fact that two out of the three founding organisations of what is now the European Union (EU) – the European Coal and Steel Community (which expired in 2002) and the European Atomic Energy Community (Euratom) – had energy at their heart, the EU did not acquire a general legal competence in energy policy until the Lisbon Treaty came into force in 2009. 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. However, Member State sovereignty over the exploitation of primary energy sources, their energy mix, and the general structure of their energy supply is expressly preserved.

Nevertheless, well before the Lisbon Treaty, the EU had begun to make significant inroads into Member States’ energy policy autonomy, often in the face of considerable resistance, relying on other policy bases. From the early 1990s onwards, the European Commission sought to liberalise European gas and electricity markets, relying on general competition and free movement laws. Three successive waves of liberalisation directives, in 1996/98, 2003 and 2009, progressively opened Member States’ wholesale and retail energy markets to competition, and in February 2015, the EU launched its *Framework Strategy for an Energy Union* with the aim of creating a genuinely cross-border internal market in energy. EU environmental policy, and latterly climate change policy, has also had a significant impact on Member States’ energy systems. The promotion of low-carbon energy, along with transparent and integrated markets, affordability, and security of energy supply, is now a key objective of EU energy policy.

UK and EU Energy Policy

Since the 1980s, the UK has been in the vanguard of energy reform in Europe, both as regards the liberalisation of energy markets and subsequently in the transition to low-carbon energy systems. In general, the UK has been a strong supporter, and influential driver, of EU energy policy. EU law has therefore been a constraint upon, rather than a major determinant of UK energy policy, although more of the detail of UK energy regulation has been derived from EU law as the scope and ambition of EU energy policy has increased.

Given the clear alignment between EU and UK energy goals, withdrawal from the EU is unlikely to change UK energy policy significantly. In any case, other constraints – such as domestic and international climate change obligations, and the sharing of domestic energy policy competences between UK and devolved institutions - are likely to ensure considerable policy continuity. Moreover, achievement of those policy goals makes ongoing integration with European energy markets highly desirable. Nonetheless, loss of the external enforcement and accountability mechanisms provided by EU law means that Brexit will remove an important guarantor of energy policy stability. Such stability is particularly important in the current low-carbon energy transition. This requires enormous

investment in energy infrastructure, which – given its long-term, capital-intensive, and ‘sunk’ nature – is notoriously susceptible to political risk.

Brexit and UK Energy Policy

So far, the UK Government has given very limited indication as to how it sees Brexit affecting UK energy policy. However, the key issues are likely to arise in the following areas.

Market Structures

There is unlikely to be much change in the short term in relation to energy market structures. Regulatory rules, even where derived from EU law, are mostly contained in domestic primary or secondary legislation, and where they are not they can relatively unproblematically be given a domestic legal base via the Great Repeal Bill. In the longer term, Brexit will in theory allow greater freedom to reform energy markets. This might encompass detailed aspects of energy regulation, for instance in relation to the scope and content of consumer protection obligations, the technical requirements on networks and providers, or the duties of energy regulators. More fundamentally, it could also relate to the structure of the energy industries, for example, allowing more direct governmental involvement in energy decision-making, a stronger emphasis on energy planning rather than market-driven investment, a reintegration of energy networks with producers and suppliers, or restrictions on foreign ownership. In practice, alongside ongoing ideological commitments to free energy markets, the room for manoeuvre is likely to be significantly constrained by whatever relationship the UK has in future with the Internal Energy Market (IEM).

Market Integration

As a net importer of both gas and electricity, maintaining access to European energy markets is essential from a security of supply point of view. In addition, transparent and properly integrated energy markets improve energy affordability by increasing the efficient use of existing energy facilities and thereby reducing investment costs, as well as by removing opportunities for arbitrage. Finally, integration is also an important means of managing the potential balancing problems caused by intermittent renewable energy sources. This is particularly important for the Scottish Government, which has high ambitions as a producer and exporter of renewable energy.

The UK has significantly increased its interconnection with other European gas and electricity systems in recent years, and more interconnection capacity is planned. It has also played a leading role in the development of European Network Codes to facilitate genuine system integration, and not merely inter-system trade. Integration is particularly advanced in Northern Ireland, where there has been a single All-Ireland electricity wholesale market since 2007, and where work to create an All-Ireland wholesale gas market is ongoing.

In its Brexit White Paper (Department for Exiting the European Union, 2017: para 8.28), the UK Government recognises the value of co-ordinated trading arrangements, but states simply that “[w]e are considering all future options for the UK’s future relationship with the EU on energy, in particular, to avoid disruption to the all-Ireland single electricity market ... on which both Northern Ireland and Ireland rely for affordable, sustainable and secure electricity supplies.” Options for continued participation in the IEM include membership of the European Economic Area, which the UK Government has already ruled out, or some kind of bespoke agreement along the lines of the Energy

Community Treaty, which extends the IEM into non-EU Member States in South-East Europe and beyond. Alternatively the UK might seek access to European energy markets without being part of the IEM as such.

The House of Commons' Energy and Climate Change Committee reported in October 2016 that none of the respondents to its inquiry into the implications of Brexit for energy and climate change policy had advocated leaving the IEM (Energy and Climate Change Committee, 2016: para 95). It did, however, note considerable concern that the UK might remain subject to IEM rules while losing its current influential position in the making of those rules (ibid: para 97). It therefore recommended that the Government should seek to ensure a continued role for the UK in European energy regulatory bodies (ibid: para 103).

Low Carbon Energy

The energy industries are subject to a range of EU measures to reduce greenhouse gas (GHG) emissions. These include the EU Emissions Trading Scheme (EU-ETS), targets and measures to promote renewable energy consumption, and targets and measures to promote energy efficiency, although these are all supplemented by domestic policy measures.

It is unclear whether the UK will seek to remain within the EU-ETS after Brexit, or establish its own emissions trading scheme linked to the EU-ETS, or pursue a different approach to establishing a price for carbon, such as a carbon tax. The Energy and Climate Change Committee noted that, despite criticism of the EU-ETS, it is highly valued as a policy instrument for reducing GHG emissions, and warned that alternative measures would potentially be costly and complex or politically difficult (Energy and Climate Change Committee, 2016: para 84).

In relation to renewable energy and energy efficiency, we are likely to see continuity at least in the short term in relation to specific policy measures, many of which have already been incorporated into domestic law. It is, however, unlikely that EU-level targets will be replicated at domestic level as the UK Government has in the past been critical of the distorting effects of sectoral targets, preferring to rely on overall climate change targets to drive emissions reduction. Given that the Conservative Government has already reversed some domestic policy supports for low carbon energy (including withdrawal or cuts to subsidies for renewable electricity generation, cancellation of funding for carbon capture and storage demonstration projects, and ending some energy efficiency programmes) in order to reduce energy costs, and is keen to promote shale gas exploitation, there must be considerable concern about the future direction of policy in this area post-Brexit.

Other Environmental Constraints

A host of other EU environmental laws also affect the energy industries, including atmospheric and water pollution controls; nature protection measures; and environmental impact assessment regulations. The impact of such measures can be considerable. It was, for instance, the Large Combustion Plants Directives of 1998 and 2001 (now replaced by the 2010 Industrial Emissions Directive) that were primarily responsible for the decline of the coal-fired electricity generation in the UK. The Habitats and Wild Birds Directives similarly often pose obstacles to the exploitation of renewable generation.

The majority of relevant EU environmental measures are already implemented in domestic law and will therefore be unaffected by Brexit. In the short term, there is unlikely to be much appetite for significant change in the environmental regulatory framework, given the other policy uncertainty caused by Brexit. In any case, some EU environmental laws are underpinned by international obligations, and in domestic terms much environmental law making falls within devolved competence in Scotland, Wales and Northern Ireland. Over time, however, there may be pressure from the energy industries to weaken environmental constraints, and there may be concerns about policy divergence between the UK and devolved governments.

Research and Investment Funding

Research and investment funding is likely to be both directly and indirectly affected by Brexit. Regarding the former, there are various EU funding sources for energy-related research and investment in energy infrastructure from which the UK has received very substantial sums in recent years. It is unclear whether British researchers and UK-based firms will be able to continue to access those funding sources after Brexit, or if not, whether they will be fully replaced by domestic funding sources (Energy and Climate Change Committee, 2016: paras 118 – 121).

More generally, Brexit is likely to make for a worse investment climate. Increased policy uncertainty is likely to raise the cost of capital for energy infrastructure; the falling pound has also made investment more expensive since much energy equipment is imported; and adverse impacts on the financial services sector could reduce the appetite for investment. The Energy and Climate Change Committee concluded in its October 2016 report that the greatest risk of leaving the IEM was higher investment costs, and that the Leave vote had reduced already weak investor confidence in the energy sector (ibid: paras 96 and 122 – 133).

Nuclear Safety

The UK Government has made clear in its Brexit White Paper that leaving the EU also means leaving Euratom (Department for Exiting the European Union, 2017: para 8.30). The Euratom treaty provides the current framework for civil nuclear power generation and radioactive waste management. Leaving Euratom has raised some alarm about potentially dire consequences for the nuclear industry if alternative regulatory arrangements are not put in place in time (see eg Vaughan, 2017). However, the UK Government insists that seeking appropriate alternative arrangements, as well as maintaining collaboration with other EU Member States on nuclear research, is a high priority for the withdrawal negotiations (Department for Exiting the European Union, 2017: para 8.31). Potentially, this could involve continued participation in Euratom as a non-EU Member State, through a separate treaty, as a number of third parties already do (see Peers, 2017).

Conclusion

In theory, Brexit will bring greater flexibility to future UK energy policy, although depending on one's perspective, potential changes may be desirable or undesirable. In practice, given the convergence between UK and EU energy policy goals, and the clear advantages of continued participation in European energy and related markets, the scope for change in UK energy policy is likely to be fairly marginal. That being so, it is hard to see Brexit as anything other than an unwelcome distraction at a

time when the energy industries are already in a state of transition and facing very significant regulatory and investment challenges.

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Biography

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