



Energy regulation

SEPTEMBER 2019

The impact of the result of the referendum on the energy sector will only become clear over time. Initially, the key determinant will be whether or not there is a no-deal on 31 October 2019 (or later, if there is a further extension). We can be reasonably clear in advance on the scope of what the impact of that might be. Beyond that, the nature and extent of the impact will depend on the model of EU-UK co-operation adopted as an alternative to EU membership.

Beyond the physical integration of energy markets, Brexit raises significant questions for the UK. How will the UK approach security of gas supply as an EU 'third country'? How will the UK's approach to climate change and international negotiations evolve? And, more specifically, how will the UK price carbon emissions once, as seems likely, it leaves the EU-ETS? While these issues are pertinent in the long term, this note will examine the immediate impact of a no-deal Brexit on key areas of the energy sector.

Given the relative depth of EU legislative harmonisation involved in the Internal Energy Market ('IEM'), the greatest risk of discontinuity in a no-deal comes in relation to electricity trading, explored below.

Tariffs and customs procedures

As with other industries that involve the trade in goods, parts of the energy sector could be impacted by tariffs. So, for example, wind and

solar projects could be impacted by tariffs of up to 2.7% applicable to Wind-powered generator sets and Lithium-ion (for use in batteries) imported into the UK from the EU. The impact of new customs formalities at the EU-UK border could also have cost implications for energy projections in relation to both construction and maintenance.

Although much less likely in practice, tariffs could also become relevant to energy trading with certain energy products. While the UK and the EU have both agreed as WTO members that the electricity and oil that they trade must be zero rated, natural gas could be increased to its 'bound rate' of 0.7% if the EU or UK chose to (from its currently applicable zero rate).

Internal Energy Market ('IEM')

The EU issued a [notice](#) to stakeholders on 27 April 2018 on the UK's withdrawal from the IEM which sets out, from the EU's perspective,

**The section is part of our
Brexit Legal Guide.**

No Deal

- If the [Withdrawal Agreement](#) endorsed by the EU Council on 25 November 2018 or the [Political Declaration](#), or some version of both, are not approved by 31 October 2019 and there is no change to the exit date, the UK will cease to be a member state on that date without any transitional period
- The body of EU law in force at the end of transition will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments – this is called 'retained EU law'
- A lot of the secondary legislation to adjust retained EU law for the post-Brexit world has already been made, see the accompanying section: [The UK's new legal order post-Brexit](#)

the implications of the UK leaving the EU (and as a consequence, the IEM) without the status quo transitional period envisaged in the draft Withdrawal Agreement. In other words, it is a description of what the EU considers to be the position, if the UK is treated as a third country in relation to energy:

- UK Transmission System Operators ('TSOs') would not be party to the Inter-Transmission System Operator Compensation Mechanism and would be required to pay transmission system usage fees
- UK TSOs would require certification to continue activities within the EU
- UK TSOs would cease to participate in the single allocation platform for forward interconnection capacity, the European balancing platforms and the single day-ahead and intraday coupling
- UK based wholesale power and gas market participants (and any other third country market participants who are registered in the UK) would need to register with a national energy regulatory authority in an EU member state in which it is active in order to continue to trade
- entities controlled by the UK or UK nationals may be refused authorisation (or an existing authorisation may be challenged) for the prospecting, exploration and production of hydrocarbons in EU member states on grounds of national security; and
- trade and fundamental data relating to the UK wholesale energy market will no longer be collected by ACER during a review period shortly after exit day, but will be collected by Ofgem instead. Following the review period, Ofgem will announce the start date of the new reporting scheme, allowing at least three months' period for market participants to adjust to the new requirements.

Single Electricity Market on the island of Ireland ('SEM')

A consequence of the UK being de-coupled from the IEM in a no-deal Brexit is that, in practice, Ireland is also de-coupled from the immediate benefits of being within the IEM as Ireland is currently dependent on the UK for any degree of electricity interconnection (pending the construction of interconnection between Ireland and France).

The SEM is based on a [bilateral co-operation agreement](#) between the Irish and UK Governments (rather than as a matter of EU legislation). Brexit will not therefore have the effect of repealing or terminating this arrangement. However, the SEM is regulated by the Irish Commission for Energy Regulation

('CER') together with the Northern Irish regulator and is therefore subject to the EU energy sector regime.

We consider it likely that the EU will be mindful of the interests of Ireland (as an EU member state) when considering its response in a no-deal Brexit scenario to the future of SEM to avoid stranding Ireland from its supplies of electricity and gas. Article 194(1) TFEU provides that EU energy policy shall ensure supply security in the EU in a spirit of solidarity.

Clearly, there is also pressure on the UK Government to, as it says in its [no-deal note](#) on electricity trading, "take all possible measures to maintain [the SEM]".

Given this and that initially after a no-deal there would have been no divergence between UK and EU law, there should be little critical friction and therefore, notwithstanding that there is a technical risk, the SEM should continue functioning after a no-deal Brexit. However, this cannot be guaranteed in the medium to long term.

Interconnectors

In order for cross-border electricity trade to continue between the UK and the EU in a no-deal Brexit, new access rules for all interconnectors need to be approved in the UK and with the relevant EU member state authorities. To that end, all interconnectors between the UK and continental Europe (France, Belgium and the Netherlands) have published their modified access rules for a no-deal and Ofgem has approved the proposed modifications in each case. Broadly this means moving from the implicit day-ahead allocation under the IEM to explicit day-ahead allocation under the revised (no-deal) access rules of the relevant interconnector, analogously to how things operated prior to market coupling in 2014. For further details please see below:

- IFA1 (France - UK) - [IFA Access Rules](#)
- NEMO (Belgium - UK) - [Nemo Link Brexit Contingency Proposals](#)
- BritNed (Netherlands - UK) - [BritNed Access Rules and BSA](#)

REMIT

The UK is amending the EU's REMIT regulations (prohibiting insider trading and energy market manipulation and providing for market monitoring by regulators) for a no-deal under the [Electricity and Gas \(Market Integrity and Transparency\) \(Amendment\) \(EU Exit\) Regulations 2019](#).

- Means:
 - Energy related UK domestic law, as well as licenses and industry codes, will remain in place subject to changes required to ensure their operability. Ofgem has released [guidance](#) outlining the relevant modifications
 - UK market participants will need to register under REMIT with an EU regulatory authority to trade within EU wholesale energy markets or trade within the Single Electricity Market ('SEM') between Northern Ireland and Ireland
 - Operators of UK installations who are participants in the EU Emissions Trading Scheme ('EU-ETS') will no longer be able to take part. See further information [here](#)
 - UK TSOs would require certification to continue activities within the EU

Deal/transitional period

- If approved by the UK Parliament, The Withdrawal Agreement, or some version of it, will set out arrangements for the UK's withdrawal from the EU - when the UK will cease to be a member state
- A transition period will follow the date of the UK's EU exit up till at least the end of 2020, possibly the end of 2021 or 2022
- During transition, EU law will continue to apply in and to the UK and the UK will continue to trade as part of the Single Market
- The Withdrawal Agreement will be accompanied by the Political Declaration on the future relationship between the UK and the EU. This will comment on the future trading relationship between the EU and the UK
- Whether or not the Withdrawal Agreement or the Political Declaration, or some version of both, are approved by 31 October 2019, the UK will

The changes are to 'domesticate' the regime, with market participants facing the same transparency obligations and market integrity prohibitions as before. It is simply that the UK legislation can now only deal with the UK aspects of enforcement and regulation (and not the EU side). Market participants trading in wholesale energy products where delivery is within Great Britain are required to register with Ofgem. However, [Ofgem has stated](#) that it intends to issue a direction before 1 November 2019, stating that, until further notice, this requirement will not apply to market participants already registered with an EU regulatory authority (or the Northern Ireland utility regulator). From the EU side, however, no such waiver has been proposed and so in order to trade on the EU wholesale energy market, registration with an EU member state national authority will be required.

Nuclear

In May 2019, the Department for Business, Energy and Industrial Strategy ("BEIS") published a [quarterly update](#) to Parliament on the UK's exit from the Euratom Treaty. The report notes that the Government has now put in place all the necessary measures to ensure continuity of the UK's nuclear industry, including a no-deal scenario.

To ensure continuity of the UK's civil nuclear trade following withdrawal from Euratom, among other things, the following regulations were made in 2019:

- [Nuclear Safeguards \(EU Exit\) Regulations 2019](#)
- [Nuclear Safeguards \(Fissionable Material and Relevant International Agreements\) \(EU Exit\) Regulations 2019](#)
- [Shipments of Radioactive Substances \(EU Exit\) Regulations 2019](#)
- [Transfrontier Shipment of Radioactive Waste and Spent Fuel \(EU Exit\) Regulation 2019](#)

cease to be an EU member state on that date, unless the date for the UK to leave the EU is extended again by agreement between the UK and the EU27 or the Article 50 notice is withdrawn. If the UK enters transition on 31 October 2019, as explained above, the legal position during transition will be very similar for businesses as if the UK were still an EU member state

- The UK Government's [White Paper](#) (July 2018) on the future relationship between the UK and the EU sets out some of the **previous** government's thinking on what a future relationship between the UK and EU may look like

Euratom: Nuclear co-operation agreements

Withdrawing the UK from the Euratom Treaty required separate notice to be given under the Euratom Treaty. This becomes relevant to supply chains both between the UK and Euratom members, as well as to all the other countries with whom the UK's trade in the nuclear sector is currently reliant on Euratom membership (eg US, Australia and Japan).

The [Nuclear Safeguards Act 2018](#) addresses the UK's departure from Euratom and enables the Government to establish a domestic nuclear safeguards regime regulated by the Office of Nuclear Regulation ("ONR"). A UK nuclear safeguards regime is an essential pre-cursor to the future trade of nuclear materials and cooperation with other states on nuclear matters (previously done through the nuclear safeguarding regime of Euratom).

The UK also signed two new bilateral safeguards agreements with the International Atomic Energy Agency ("IAEA") on 7 June 2018 to replace the existing trilateral arrangements between the IAEA, Euratom and the UK, which affirmed the UK's commitment to international safeguards and nuclear non-proliferation and provide the basis for civil nuclear trading arrangements. The agreements ensure that the IAEA retains the right to inspect all civil

nuclear facilities and continues to receive safeguards reporting.

To ensure continuity of arrangements for the UK's nuclear industry in all scenarios, including a no-deal, the Government signed a nuclear cooperation agreement ("NCA") with the [USA](#) as well as with [Australia](#) and [Canada](#). In February 2018, the UK and Japan signed an Exchange of Notes confirming the terms of the UK's 1998 NCA with Japan, following the UK's exit from Euratom.

BEIS in conjunction with the ONR, has also published [Technical guidance](#) for nuclear operators on post-Brexit reporting requirements in relation to NCAs.

Additional Resources

- [The nuclear sector and preparing for Brexit guidance](#) published by the Government.
- Together with [The Boston Consulting Group](#) and [Global Counsel](#) we produced a report which looks in more detail at the implications for the UK and the EU27 of the post-Brexit energy market which is available [here](#).
- Together with [Global Counsel](#) we have written a paper which provides an overview of the legal and political background on the UK's decision to leave Euratom available [here](#).

"Withdrawing the UK from the Euratom Treaty was not a legally necessary consequence of serving notice to leave the EU."

SILKE GOLDBERG

"A no-deal scenario means the UK's participation in the Internal Energy Market ceases. This means the UK market will de-couple from the EU and revert to the situation which existed prior to market coupling in 2014."

SILKE GOLDBERG

"But this does not mean there has to be physical disruption to interconnectors, it simply means, amongst other things, moving to new access rules and losing the single platforms to allocate Transmission System Operators long-term electricity transmission capacities and for balancing electricity at short notice."

PAUL BUTCHER

Key contacts



Silke Goldberg
Partner
T +44 20 7466 2612
silke.goldberg@hsf.com



Kushal Bhimjani
Senior Associate
T +44 20 7466 7484
kushal.bhimjani@hsf.com



Paul Butcher
Brexit Director
T +44 20 7466 2844
paul.butcher@hsf.com