Brexit Law – your business, the EU and the way ahead

The implications of Brexit for UK energy

November 2016

Overview

The energy trilemma (security, affordability and sustainability) was not a prominent feature in the Brexit debate and yet remains a fundamental issue for the UK. With Brexit now a reality, to what extent will energy issues be a key focus in Brexit negotiations? This paper explores the principal considerations in respect of the UK’s future relationship with the EU energy market.

The UK’s prospective role in, and relationship with, EU energy regulators and institutions is uncertain and there is a risk the UK will become sidelined from vital policy and decision making that will affect its energy market. Energy infrastructure in, and connected to, the UK has benefited from significant EU and EIB funding – early answers are needed as to whether such funding will continue to be available (or swift alternative solutions if it is not), in order to reassure investors and secure future energy funding. Security of supply will also depend on how the UK and EU gas and electricity markets learn to co-exist. As regards climate change and decarbonisation, the UK Government’s commitment going forward will be keenly scrutinised if it is no longer bound to comply with EU regulations and targets. The future of the UK Continental Shelf (UKCS) remains an ongoing concern, although Brexit itself may have little impact as decommissioning and a low oil price remain the key factors. Underlying all these matters is the uncoupling of EU and UK energy law – this is a mammoth unbundling task that will take many years beyond Brexit.
The UK’s role in the EU energy market

The energy policy objectives of the Treaty on the Functioning of the European Union (TFEU) are to ensure the functioning of the internal energy market and security of supply in the EU, to promote energy efficiency and energy saving and the development of new and renewable forms of energy and to promote the interconnection of energy networks.

The UK has played a leading role in promoting the benefits of the liberalisation of the European energy market. The most recent incarnation of this is the 2009 Third Energy Package. Attacking vertical integration, through legal and/or economic ownership unbundling requirements in gas and electricity businesses, is at the heart of this approach.

The UK has also been a keen proponent of other market-based interventions in, or that affect, the energy market (such as the EU Emissions Trading Scheme (ETS)), as well as other EU schemes (such as market coupling, a method of using cross-border transmission capacity efficiently).

The future pace of liberalisation in the EU (and the achievability of a single European energy market) will depend on the strength of support remaining – the more protectionist structures in some Member States could become more prevalent (under the banner of national energy security and the related sovereign right of a Member State to determine its own fuel mix) and in turn this could affect the decarbonisation, supply and cost of energy to all consumers in Europe.

Single energy market

Depending on the terms of Brexit, the UK may no longer be part of the emerging single European energy market. There are concerns that this may affect the UK’s security of supply of gas and electricity, as well as have cost implications for energy businesses and their customers. For example, over the 24 hours to 08:50 on 20 August, more than 7% of the electricity demand in the UK was met from generation outside the UK.

Uncertainty over access to the EU market may impact investors’ decisions to invest in UK energy infrastructure, and financing costs may increase as investors and lenders seek higher returns in respect of the increased risk, on top of cost increases due to the effect of Brexit on the value of sterling generally. These costs will inevitably be passed on to the customer. It is therefore no surprise that National Grid has warned that it is vital that the UK retains access to the EU internal energy market for security of supply and to keep energy bills from increasing.

There could also be implications for UK investors in generating businesses as the participation in the electricity capacity markets of other Member States is only available to generation located in Member States and EEA states. The status quo for UK investors in transmission assets should not (depending on the terms of Brexit), be affected, however, as the unbundling restrictions on owning assets in other Member States apply irrespective of EU membership. As regards future procurements in Member States, non-discrimination requirements may, in principle, cease to apply to UK entities if not addressed in the Brexit terms.

Regulation

Depending on the terms of Brexit, the UK may no longer be represented on EU energy bodies tasked with producing a pan-European transmission system that is consistent with European energy aspirations. Non-Member States are currently represented on the European Network of Transmission System Operators for Electricity (ENTSO-E) and European Network of Transmission System Operators for Gas (ENTSO-G), but not on the Agency for the Cooperation of Energy Regulators (ACER). Observer status is however open to certain non-Member States.

Geography does, however, suggest that the UK will continue to be involved in some capacity with these bodies (and also in the single European energy market) as, if this were not to be the case, Ireland could be stranded and essentially physically unconnected to the rest of the EU (although exploratory work in relation to an electricity interconnector with France is underway).

Euratom – The UK, alongside the other Member States, is a member of the European Atomic Energy Community (Euratom). The objective of Euratom is to pool nuclear research and ensure common supply arrangements for nuclear fuels, provide regular and equitable supply of ores and nuclear fuels and establish uniform health and safety standards. Euratom has a distinct legal personality from the EU but is administered by the same institutions, namely the
Council, the Commission, the European Parliament and the Court of Justice of the EU (CJEU).

The Euratom Treaty states that those provisions in Article 50 of TFEU which permit a Member State to withdraw from the EU, also apply to Euratom. It is likely that a separate Article 50 notice would have to be issued in order for the UK to withdraw from Euratom. However, there is some ambiguity in the application of the EU withdrawal procedures to Euratom and a possible alternative interpretation is that, to the extent the UK issues an Article 50 notice and withdraws from the EU, it will also withdraw from Euratom.¹ We would expect any negotiated agreement between the UK and the EU in relation to Brexit terms to address this ambiguity and the UK’s future role (if any) in Euratom.

**Energy Charter Treaty (ECT)** – The ECT is an international treaty for cross-border cooperation in the energy industry. The ECT covers a range of aspects of commercial energy activities, including investment, trade, transit and energy efficiency. The ECT contains dispute procedures, both between an investor and a contracting state and between two contracting states. The ECT has 52 state signatories and has also been acceded to by the EU and Euratom. Signatories to the ECT include states outside of the EU, including Japan, the Russian Federation and Australia.

The UK has individually acceded to and ratified the ECT and therefore, in the event of Brexit, the rights and obligations of the UK under the ECT will continue.

**REMIT** – Pursuant to an EU regulation on energy market integrity and transparency (REMIT), in order to (continue to) trade, market participants have to be registered with an EU national regulatory authority and must comply with reporting obligations to ACER. REMIT will still apply after Brexit because it applies to non-EU suppliers when they deliver electricity or gas into the EU. UK-based market participants will therefore have to register in an EU country and will be required to comply with relevant national legislation implementing REMIT. In some Member States criminal sanctions are attached to breaches of REMIT.

**TEN-E** – The EU regulation on guidelines for trans-European energy infrastructure (TEN-E Regulation) sets out rules for the timely development and interoperability of trans-European energy networks in order to achieve the energy policy objectives of TFEU. TEN-E provides a new framework for the identification, planning and implementation of projects of common interest (PCIs) which are required to implement the nine strategic geographical energy infrastructure priority corridors identified in the fields of electricity, gas and oil and the three EU-wide energy infrastructure priority areas for smart grids, electricity highways and carbon dioxide transportation networks.

PCIs benefit from accelerated and streamlined permit granting procedures, better regulatory treatment and, where appropriate, EU financial support. Proposed PCIs are put forward by project promoters to regional groups composed of representatives from the Member States and EU energy bodies, but decisions are made only by Member States whose territory is involved and the Commission, following consultation with relevant stakeholders.² The UK would no longer have a voice in such decisions on leaving the EU, although the assumed cost benefits of interconnection to Ireland via the UK suggest that there is some commercial incentive (to Ireland) for the UK to remain involved.

The list is revised every two years and there are a number of PCIs in and/or connected to the UK on the current list,³ such as projects to construct the first interconnection between Belgium and the UK, projects increasing the integration of renewable energy between Ireland and Northern Ireland and projects to increase the transmission capacity between France, Ireland and the UK. PCIs must satisfy various criteria including being necessary for at least one of the energy infrastructure priority corridors and areas – whether the latter are affected by the UK no longer being in the EU remains to be seen. PCIs must also satisfy criteria involving connection to Member States – it is feasible that some projects will continue to do so.

The TEN-E Regulation has direct application in Member States and, as the UK’s consent process for major energy infrastructure is broadly similar to the procedures set out in the TEN-E Regulation, it has not been necessary so far for the UK to implement the provisions through domestic legislation nor to materially change UK processes. If projects connected to the UK are to continue to qualify as PCIs, the position as regards the TEN-E Regulation’s effectiveness in the UK (or any

---

¹ This would then impact the UK’s involvement in agreements entered into by Euratom rather than individual Member States, such as the Section 123 Nuclear Cooperation Agreement with the United States.


equivalent substitute national legislation) will need to be clarified. There may be wider legal implications as well as PCIs must also comply with EU legislation including detailed delegated legislation such as network codes (several key detailed EU-wide network codes governing the operation of transmission and interconnector assets are scheduled to be adopted by the end of 2017 – as these codes are directly applicable regulations there is uncertainty how they may continue to apply beyond Brexit). The ability of projects related to the UK to continue to qualify as PCIs will also be a key factor in whether such projects can access EU funding.

**Funding and subsidy**

There are a number of EU initiatives to promote investment in energy infrastructure, in particular to meet targets for renewable energy, greenhouse gas reduction and energy efficiency. UK energy projects benefit from EU funding from bodies such as the European Fund for Strategic Investment (EFSI), as well as financing from the European Investment Bank (EIB).

**EFSI – EFSI** is a EUR16bn guarantee from the EU budget, complemented by an allocation of EUR5bn of the EIB’s own capital, to help overcome the current investment gap in the EU by mobilising private financing for strategic investments in projects which contribute to EU objectives (eg energy infrastructure and expansion of renewable energy and resource efficiency). EFSI supports UK projects such as the 340MW Galloper offshore wind farm and the Calvin Smartmeter programme, a framework facility to support the roll-out of portfolios of smart gas and electricity meters for a number of energy suppliers in the UK.

**EIB – The EIB separately also supports infrastructure projects that interconnect internal markets and economies and projects that make a significant contribution to growth, employment, regional cohesion and environmental sustainability in Europe and beyond. The EIB reports that it supports sustainable projects in 160 countries. The EIB’s involvement in UK financing is significant – as a percentage of total funding to UK projects and utilities from 2011 to 2016 (June YTD) reported on Dealogic, the EIB’s total UK project funding equals 19.5% (EUR36bn). By sector this breaks down as: Education 23.35% (EUR3.8bn); Hospitals 21.38% (EUR869m); Water 24% (EUR7.6bn); Transport 16.2% (EUR7.3bn); Power (including onshore transmission and distribution and OFTOs) 23.8% (EUR9.9bn); and Renewables 11.5% (EUR3.6bn).**

The EIB’s immediate reaction to the referendum decision was one of regret but also confirmed that the UK’s 16.11% shareholding in the EIB remains in place and the EIB’s engagement in the UK is unchanged. 4 The EIB did not make any direct statement as to future participation by, and lending to, the UK and this will ultimately be dependent on the exit negotiations. Approximately 90% of EIB lending is attributed to EU countries “supporting the continued development and integration of the Union”.

**Future** – It will be important that the terms of Brexit clarify whether UK projects (or projects that connect through the UK) will continue to be eligible for EIB and EFSI funding if they continue to satisfy the other applicable funding criteria. Similarly, transitional arrangements may also be required for on-going projects. The continued relevance of the EU or EFTA state aid regimes to UK projects will no doubt be a relevant consideration here.

Reduced access to EU funding may impact the UK’s ability to fund energy projects, particularly capital intensive projects such as offshore wind, and so a re-examination of the extent to which the UK Guarantees Scheme, administered by the Infrastructure Projects Authority, can “plug the gap” will be necessary. In this regard, the approach to public sector accounting in the UK in a post-ESA10 (European System of Accounts 2010) environment will be important. Continued uncertainty will be a major issue for developers who need some comfort that long term funding from third parties will be available, and this may be necessary to

ensure that the UK’s development pipeline does not start to thin out.

**State aid** – Depending on the Brexit model adopted, the UK Government may, in principle, enjoy greater freedom to implement energy subsidies to support UK businesses than under EU state aid rules. However, if the UK was to remain a party to the EEA agreement after Brexit (ie as a non-Member State), EU state aid laws would apply in the UK on substantively the same terms as they do today. In addition, it is important to recall that the post-Brexit model relies on the UK’s existing membership of the World Trade Organisation (WTO), a regime for regulating state subsidies and related actions will still continue to apply after Brexit (albeit the WTO anti-subsidy rules are very different from a procedural point of view to enforcement of the EU state aid regime).

It will be interesting to see whether the UK Government submits new state aid cases to the Commission for consideration in the forthcoming period. Developers will have a great interest in receiving clarity on this as soon as possible.

**Carbon reduction and climate change**

**Climate change** - The UK has enshrined its own greenhouse gas reduction targets in the Climate Change Act 1998 and is a separate signatory to the key climate change conventions. However, the UK’s emissions reduction commitment is currently part of the EU target under the United Nations Framework Convention on Climate Change (UNFCCC) and the recent Paris Agreement and so would need to be separately submitted if the UK was no longer part of the EU in this regard. Alternatively, as part of the Brexit negotiations, the UK could agree to continue to meet climate change obligations alongside the EU bloc and possibly retain its share of the EU’s reduction burden.

Climate policy is almost certainly an area where we can expect there to be calls for a change in policy and the adoption of a more tailored UK approach. It is, however, difficult to see any UK Government taking a significantly divergent approach (at least in the near term), even if the UK steps away from existing EU emissions targets and has greater freedom in the design and implementation of climate policy. The UK was one of the first Member States to adopt an emissions trading scheme and has since sought to apply the cap-and-trade model in other policy areas. It has also sought to make strong international commitments to carbon reduction and taken national steps towards pollution abatement in, and closure of, certain coal and gas-fired plants.

**Emissions Trading Scheme** – The UK’s future role within the ETS will need to be resolved. This will, to a large extent, depend on the terms of the new trading relationship between the UK and the EU. These terms could allow for full participation in the ETS. The alternative, assuming the UK and EU do not agree an EEA model, would be to link UK and EU schemes. Such linkage is already provided for in the ETS Directive. The UK has, for many years, been committed to a cap-and-trade model to enable businesses to meet their emissions caps. It is difficult to see a significant change in approach in the medium term.

**UK Government policy** – Following the June referendum and the change in Prime Minister, the UK Government has taken certain steps which could be interpreted as indicative of its position on green energy. The signing of Hinkley Point C nuclear project was initially suspended, although the UK Government subsequently announced its decision to proceed with the first new nuclear power station for a generation (subject to certain ownership controls), with the final documentation being signed in late September.5 The Department of Energy and Climate Change was abolished, its responsibilities falling under the new Department of Business, Energy and Industry Strategy (BEIS). Some commentators fear that this amalgamation, together with the ministerial appointments made and the loss of “Climate Change” from the departmental name, are signs that green energy policy sits lower in the UK Government’s priorities. However, it is worth noting that, since the referendum, the UK Government has published the Fifth Carbon Budget (2028 – 2032)6 in which it followed the advice of the Climate Change Committee to reduce UK greenhouse gas emissions in 2030 by 57% relative to 1990 levels.7 The Climate Change Committee welcomed this as a clear signal of UK ambition to continue reducing emissions into the 2030s across the economy, including from power, transport and buildings. The Prime Minister also announced in her maiden speech at

---


6 http://www.legislation.gov.uk/uksi/2016/785/made

7 The Climate Change Act (2008) commits the UK to reduce its greenhouse gas emissions by at least 80% by 2050 (on 1990 levels) with international aviation and shipping emissions "taken into account". For this reason, carbon budgets are set to ensure the UK is on track to meet its 2050 obligation including emissions from international aviation and shipping.
the United Nations in September that the UK will start domestic procedures to enable ratification of the Paris Agreement to be completed before the end of 2016 and will continue to play its part in the international effort against climate change. In November, the Government also confirmed its commitment in the March 2016 Budget to spend £730 million annual support on renewable electricity projects and opened a consultation on proposals to impose emission limits which would see generation from unabated coal-fired power stations phased out completely within the next decade.9

Supply of gas

Security of supply – In broad terms, the UK already mitigates against risks to the security of gas through the existing infrastructure it has in place – its various storage sites, interconnectors and LNG terminals provide access to multiple supply sources. This diversity and flexibility of supply was one factor in the National Grid’s view in October 2015 that the risk posed by storage and supply disruptions was low.

Almost half of the UK’s gas supply comes from its own North Sea gas fields. The remainder is imported from a variety of sources. The UK is far less reliant on storage gas to meet energy needs and typically less than 10% of the gas used in winter comes from storage.10 However, North Sea supplies are declining and some estimates say that by 2020 around 70% of UK gas will have to be imported. Most of the gas imported to the UK over the past few years has come from pipeline deliveries (from Norway) and LNG shipments from outside the EU. Gas imported via EU interconnectors is a relatively small proportion of the total, but is key in cases of urgent additional need. If EU funding for new interconnectors to the UK is no longer available or the export of gas from the EU to the UK is otherwise negatively affected (eg through increased tariffs), this could impact the UK’s security of supply.

In the longer term, the UK Government will need to ensure that security of supply is maintained at a reasonable price. In this regard, it will be key to ensure that the UK market structure and the UK’s relationship with the EU delivers appropriate supply contracts (in terms of price, source and duration) and that there is sufficient storage, LNG regasification and pipeline capacity available to reduce overdependence on any single source of gas and to smooth demand.

Alternative supply – The UK Government may need to consider other ways to secure gas supply, including production of UK shale gas (currently a decision for individual Member States as there is no EU position) and construction of further gas storage and LNG terminals. This may be very significantly driven by developments in the UK power market.

Existing UK climate change policy has to a very large part focused on renewable and nuclear power and electrifying travel and domestic heating. The adoption of an “all of the above” approach to decarbonising the UK’s fuel mix is sensible but has had a negative effect on the load factor for UK gas-fired power plants. In the short term, it will therefore be interesting to see the extent to which the capacity mechanism for UK electricity brings forward new build gas power plant developments (as opposed to restarting mothballed plants) in the forthcoming auctions.

Given the changes occurring in offshore wind pricing, demand side response, energy efficiency, battery and other storage methods and the nuclear market, as well as the UK Government’s commitment to decarbonisation, whilst “not picking winners”, it is difficult to see how the investment climate for gas in the UK can be materially improved. However, in the medium term, we are looking out for indications that the 2050 decarbonisation pathway can be achieved with higher levels of gas generation than currently anticipated or that the UK’s decarbonisation ambitions are to be shifted in the interests of affordability and security of supply.

However, the relative attractiveness of investing in UK gas infrastructure may be a question not just of domestic consumption but also of the extent to which the UK, post Brexit, could be a gateway to European gas markets. An appropriate Brexit settlement may very well be key to ensuring a competitive price for gas in the UK.

Supply of electricity

Security of supply – National Grid’s warning about the importance of retaining access to the internal energy market highlights that security of electricity supply is a critical issue. Capacity margins have been decreasing as many older coal and oil-fired power stations are closing due to age and European environmental regulations.

---

8 An order was laid before Parliament on 7 October 2016.
Most coal and oil-fired plants have already closed, with remaining plants expected to close or be converted to more environmentally-friendly generation types by 2018. Unprofitable gas-fired power stations have also been closed or mothballed.

In recent years, the UK has typically imported power from continental Europe via existing interconnectors. OFGEM’s view before the referendum was that conditions in interconnected continental markets, the potential increased supply scarcity in the UK and market reforms would help maintain imports. It seems likely that this will remain the case as prices in the UK have historically been higher than in the Netherlands and France, incentivising imports to the UK, and the price differential has broadly increased in recent years. The Netherlands has a domestic generation surplus and is connected to other well-supplied markets (ie Norway and Germany). The outlook for France is more uncertain as margins are expected to tighten, although exports to the UK are still likely subject to cold temperatures in France.\(^{11}\)

The UK’s capacity mechanism is a key tool through which security of electricity supply is sought to be maintained. It will be interesting to see if the recent changes to the mechanism are sufficient to raise the clearing price so as to allow large gas generators to benefit. National Grid has published Capacity Market Auction parameters for the forthcoming 2016 Four Year Ahead Capacity Auction (2020/21) due to take place in December 2016 for the purchase of 52GW of capacity.\(^{12}\) This auction will also enable the participation of interconnectors based on published de-rating factors which differ between interconnectors to take into account flow direction and reliability. Additionally, the Early Capacity Auction for 2017/18 and Demand Side Response Transition Capacity Auction for 2017/18 are scheduled to start, respectively, in January 2017 and March 2017.

In the longer term, price reductions in offshore wind, the development of battery technology and increased focus on demand side response may reduce the role that gas plays in UK electricity supply, but it is hard to see that it will be entirely irrelevant.

**Alternative supply** – In addition to existing interconnectors, there are PCIs for new interconnectors as described above, some of which are also classified as electricity highways. Ensuring these are constructed will further enhance the UK’s security of supply – whether these remain PCIs and reach fruition, however, is still to be seen and the Brexit uncertainty may affect investor confidence.

**Renewables** - In respect of renewable electricity projects, BEIS has recently announced the draft details of the long awaited second Contract for Difference (CfD) Allocation Round, for Pot 2 “Less Established Technologies” (including offshore wind and fuelled technologies such as dedicated biomass with combined heat and power). Eligible projects will compete for a budget of £290 million (2011/12 prices) for each of delivery years 2012/22 and 2022/23 with a competitive allocation process (auction) for the CfDs due to run in April 2017 if the round is oversubscribed as is anticipated. The falling cost of offshore wind (with Administrative Strike Prices which cap bids prospectively reduced to £105/MWh (2012 prices) in 2021/22, falling to £100/MWh (2012 prices) in 2022/23) is likely to see it dominate. A cumulative maxima of 150 MW will apply to fuelled technology projects, ruling out the largest projects. BEIS has also issued a call for evidence on fuelled technologies and geothermal in the CfD regime and is consulting on the treatment of non-mainland GB onshore wind projects.\(^{13}\)

**UK Continental Shelf**

According to Oil and Gas UK Decommissioning Insight 2015,\(^ {14}\) total forecast decommissioning expenditure for the UKCS from 2015 to 2024 is £16.9bn, although technological advances and improved production cost efficiency could defer the timing if the economic viability of fields is improved as a result. 79 platforms are forecast for removal across the UKCS over the next decade (470 over the next 30 – 40 years) and over 1,200 wells are forecast to be plugged and abandoned (30% of the total that will eventually be decommissioned). The effect of a lower oil price may not yet have been fully seen – more companies could elect to cease production and close their fields.

---

11 [https://www.ofgem.gov.uk/sites/default/files/docs/2015/07/electricitysecurityofsupplyreport_final_0.pdf](https://www.ofgem.gov.uk/sites/default/files/docs/2015/07/electricitysecurityofsupplyreport_final_0.pdf)
14 [http://cid.bz/vvyZecep#6](http://cid.bz/vvyZecep#6)
There are more than 45,000 km of pipeline in the North Sea delivering hydrocarbons to end users and receiving facilities across Europe. These may be vital in field life extension projects and future development opportunities which might safeguard future investment in the UKCS and the future of carbon capture and storage, so any decommissioning needs to be planned carefully and in conjunction with key stakeholders and the regulator (who may require “making safe” activities and maintenance of the pipeline for possible future use). The global oil price and the UK Government’s position on energy and climate change are likely to be the decisive factors in decommissioning and the future of the UKCS, rather than Brexit.

The decommissioning of offshore oil and gas installations and pipelines on the UKCS is controlled through the Petroleum Act 1998, as amended by the Energy Act 2008. The UK's international obligations on decommissioning are governed principally by the 1992 Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR Convention). Agreement on the regime to be applied to the decommissioning of offshore installations in the Convention area was reached at a meeting of the OSPAR Commission in July 1998. As a result, leaving the EU should not affect the legal regime relating to decommissioning of the UKCS.

English law post Brexit

**EU law** – The effect of Brexit on English law is complex and will depend on the Brexit model adopted. For example, the UK Government will have to decide whether to retain, amend or repeal EU-derived laws (eg by repealing the European Communities Act 1972 with saving provisions) and whether to continue with primary and secondary legislation and directly effective EU laws. The devolved legislatures will similarly have to address where they have transposed EU laws into their legislation and some aspects of devolution legislation may also need amendment.

In terms of the energy sector, there are certain UK sectors where some legal changes may be desirable. As regards the UK’s oil and gas industry, for example, EU competition law has been seen as an obstacle to attempts to create the collaborative approach needed to ensure the North Sea’s future development. However, EU merger control and antitrust laws may continue to apply (eg in the context of acquisitions and joint ventures) if the companies concerned are active within remaining Member States (and, in the case of merger control rules, generate significant turnover from customers located in the EU) – potentially in parallel to the equivalent UK rules. EU health and safety legislation has also had a major impact on oil and gas businesses, although it is unlikely the UK will alter the current position and there would be onerous costs for businesses having to operate under different health and safety systems in the EU and UK. As regards employment law, it seems unlikely politically that the UK will amend the status quo as regards certain employment protections, but offshore operators may hope that the position relating to working time and holiday rights is re-examined in their favour.

In relation to power, state aid rules and EU-wide public accounting standards have restricted the UK’s flexibility to support a nationally determined fuel mix. Striking a balance between security of supply (and therefore interconnection and the single European energy market) and the future application of these rules and standards will be just as important (from an energy perspective) as free movement of workers and other more commonly discussed areas of negotiation for the Brexit terms.

Much of the UK’s environmental and emissions law is derived from EU directives and regulations. There is also a significant amount of soft law in the form of guidance which has come to play a major part in the development of operating standards for the energy sector. Aside from the practicalities of decoupling UK and EU law in this regard and ensuring that UK regulators have the capacity to manage their newly defined role, operators may also be faced with near term capital investment decisions which are driven by EU-derived environmental standards (for instance, tighter emission standards under the Industrial Emissions Directive 2010/75 and associated requirements under the large combustion plants Best Available Techniques (BAT) and BAT reference documents (BREF) conclusions. The unsurprising message from regulators is that operators must fully comply with their legal obligations. However, if businesses anticipate significant capital expenditure having to be made over the next five years, now may be the time to ensure that the UK Government is aware of the concerns across the sector and to consider whether there are alternative ways that pending requirements can be managed.

**International conventions** – On their own, international conventions will probably not provide an adequate basis for UK legislation post Brexit. The EU and the UK are
both separate signatories to a number of major international conventions, particularly on environmental issues such as air and water quality, biodiversity, hazardous substances and on nuclear energy. Many EU environmental rules are, themselves, based on key obligations under international conventions. However, to look exclusively to international law as the basis for a UK approach is likely to be insufficient. There are significant areas of law which are largely untouched by conventions (eg waste law). So, even allowing for the UK’s historically proactive stance on signing up to many of the key conventions, there are areas where fresh legislation will be required on Brexit and any subsequent repeal of EU-derived laws.

CJEU decisions – There exists a significant body of law (including in relation to environmental considerations) emanating from decisions of the CJEU. An interesting example for the energy sector is in the area of waste where the legal debate continues as to how best to distinguish between waste and products. CJEU judgments often have immediate and direct implications for businesses across a wide range of sectors. In this regard, Brexit raises an obvious and immediate question – how will pre-existing decisions affect the future interpretation of English law both by regulators and the courts?

What next?

As highlighted above, the implications of Brexit for UK Energy are vast. We are continuing to monitor developments so that we are best placed to advise you on what this means for your energy-related business.

For more information on how Brexit may impact your business, please go to: www.allenovery.com/brexit
Your Allen & Overy contacts

Gareth Price
Partner, UK – London
Global Head of Projects and Energy
Tel +44 20 3088 2740
gareth.price@allenovery.com

Jeremy Parr
Partner, UK – London
Global Head of Energy
Tel +44 20 3088 3383
jeremy.parr@allenovery.com

Matthew Townsend
Partner, UK – London
Environmental and Energy
Tel +44 20 3088 3174
matthew.townsend@allenovery.com

Troy Edwards
Partner, UK – London
Projects and Energy
Tel +44 20 3088 4718
troy.edwards@allenovery.com

Leigh Hancher
Of Counsel, Netherlands – Amsterdam
Energy
Tel +31 20 674 1122
leigh.hancher@allenovery.com

Sheila Connell
Partner, UK – London
Projects and Energy
Tel +44 20 3088 3303
sheila.connell@allenovery.com

Fleur Clegg
Senior PSL, UK – London
Projects and Energy
Tel +44 203 088 4794
fleur.clegg@allenovery.com

Dominic Long
Senior Associate, UK – London
Antitrust and Energy
Tel +44 203 088 3626
dominic.long@allenovery.com

If you would like to discuss the issues raised in this paper in more detail, please contact any of the experts above or your usual Allen & Overy contact.