

## How Will Brexit Impact Environmental and Energy Law?

***Following the recent UK referendum result, attention is now turning to the legal implications for specific policy areas.***

While the overwhelming majority of the UK's environmental legislation is derived from EU legislation and UK climate change and energy policy is largely influenced by the EU, surprisingly, environment and energy has been the subject of only limited discussion in the context of Brexit. Observers anticipate that most environmental laws will remain in place, initially at least, as the government seeks to avoid a legislative vacuum caused by the repeal of EU laws before new UK laws are in place. However, longer term trends remain unclear as the UK is likely to face challenges associated with its energy supply and the changing energy market.

One interesting aspect of any Brexit negotiations will be how the UK addresses its obligations under international agreements regarding environmental protection and climate change, as much of this is covered under EU laws. Statutes that implement EU directives may need to be repealed or amended, and thousands of EU regulations (which are automatically transferred into UK law) will need to be reintroduced, amended or allowed to lapse.

### EU withdrawal

In accordance with Article 50 of the Treaty on European Union, the UK government has two years to negotiate the terms of its withdrawal from the EU following its formal notification. EU treaties will continue to apply to the UK until the withdrawal agreement comes into force, or the date two years after the UK submits its formal notification, whichever is earlier, unless an extension is agreed. However, given Article 50 has never previously been exercised, there is considerable uncertainty and disagreement on how the exit negotiations will progress.

In terms of the likely post-exit relationship, many campaigners who wanted the UK to leave Europe support a limited free trade relationship with the EU, based on the Comprehensive Economic and Trade Agreement (CETA) to be signed between Canada and the EU (known as the "Canadian model"). A second option may be to agree bilateral accords with the EU to govern UK access to the single market in specific sectors (known as the "Swiss model"). A third option would be for the UK to remain as part of the single market by continuing its membership of the European Economic Area (EEA) (known as the "Norwegian model"). Alternatively, an entirely new model may emerge as a result of the UK's exit. All of these scenarios, are likely to impact the UK's energy and environmental policy. This *Client Alert* considers such implications, in particular, focusing on the overlap between energy and the environment.

## Single energy market

Security of supply is important for the UK. Imported gas made up 61% of total supply in 2014, with 71% coming via pipelines from the EU and Norway (Department of Energy and Climate Change (DECC), 2015). Imported gas is set to remain a key part of UK energy supply in the coming decades. The UK would benefit from remaining a part of the single market in order to secure its energy supply. As the UK is a major point of entry for liquefied natural gas (LNG) imports, the EU also has an interest in the UK remaining a part of the single energy market.

Based on the examples of Norway and Switzerland, membership of EEA and the European Free Trade Association (EFTA) would see the UK retain certain EU energy policies. Yet, such membership brings policy challenges, including: EU energy policy directly applies to Norway, but Norway has no representation in EU institutions; EU policy indirectly influences domestic Norwegian policy as the EU is the largest market for Norwegian oil and gas; and Norwegian and EU interests often diverge, as the EU has a high import dependency. Norway has little lobbying influence in the EU, and often uses alliances with other Nordic countries or EU members to bolster its efforts. Thus EEA and EFTA membership would substantially alter the UK's relationship with the EU, as demonstrated by Norway's existing trade agreement and engagement.

The UK has also committed to new nuclear capacity (notably at Hinkley Point with EDF Energy), and is planning to build a new £1.1 billion subsea power cable that will help double the amount of electricity imported from France. EDF has indicated it will make a final investment decision for the Hinkley Point project this year, and Aquind, the privately-owned developer of the cross-Channel interconnector, has not announced whether the subsea power cable project is still going ahead following Brexit. While commitments to these projects (and others) have generically been reaffirmed, these projects will likely be the subject of closer scrutiny, especially those projects reliant on investors from the EU.

## Renewable energy

Directive 2009/28/EC seeks to promote the use of energy from renewable sources. Across the EU, it requires that 20% of energy consumed must be derived from renewable sources. The UK's national overall target for the share of energy from renewable sources by 2020 is 15% (in 2005 the UK's share of energy from renewable sources was 1.3%). Member State targets are characterised as "binding", but will not attract sanctions or infringement proceedings if they are not met. Whether the UK will be bound to fulfil its quasi-contractual obligations post-Brexit, and if so, how "binding" the target is remains unclear.

Energy investors may also be cautious given policy uncertainties relating to UK renewables. Recently the UK's subsidy regime for low carbon energy has undergone significant and unheralded changes, such as reductions in Feed-in Tariffs and the decision to apply the Climate Change Levy to renewables. Whether the UK will move away from renewable energy to secure its short-term supply and what the future holds for the UK's preferred energy mix remains to be seen.

## Climate change policy

In the context of the United Nations Framework Convention on Climate Change (UNFCCC) and other multilateral environmental agreements, the EU and its Member States have secured the right to meet their climate targets collectively, rather than at the level of each Member State. However, both the EU collectively and individual Member States have signed up to new treaties, and some Member States have chosen to set more ambitious climate targets for their economies, including the UK.

The EU's climate change policies may be impacted as a result of Brexit. To date, the UK has been a major economy within Europe and a consistent voice in favour of ambitious climate change. This includes being a vocal supporter of the Paris Agreement. In the absence of the UK, there is greater potential for climate-sceptic Member States to achieve a blocking minority in the European Council, and could in turn affect the level of ambition in Commission proposals.

Going forward, the UK may be unable to negotiate effectively and to influence the EU's approach to international climate change regulation. Depending on the relationship that is agreed, the UK may be bound to meet objectives, but have no influence in the process of determining how those targets should be achieved.

The UK may also be less inclined in the future to adopt stringent and taxing targets for itself without European pressure to do so (we anticipate that in the immediate term, environmental, energy and climate policy may be lesser priorities – perhaps reflected in the abolishment of DECC to form a new ministry called the Department of Business, Energy and Industrial Strategy). However, the UK has been committed to combatting climate change and the main piece of UK legislation on climate change, the Climate Change Act 2008, sets out ambitious UK targets. Notably, since the referendum, the UK has established a more stringent carbon emissions target as part of its legally binding “fifth carbon budget.” The target of reducing carbon emissions by 57% of 1990 levels by 2030 is tougher than the target reduction the UK is committed to as part of the EU (which requires only a 40% cut).

## **EU ETS**

If the UK becomes associated with the EU through the EFTA and the EEA, the EU Emissions Trading Scheme (ETS) would continue to apply, but the UK would not be able to influence future caps (as is the case for Norway).

Outside of the EU, EEA or EFTA, the UK would not be subject to EU ETS and any transition will be logistically complex in relation to reassessing caps and closing carbon accounts, etc. The UK will need to determine how (if at all) it meets its Paris Agreement commitments. Of interest will be whether the UK establishes its own ETS and develops a link between its domestic ETS and EU ETS in order to provide greater resilience against weather-related fluctuations in emissions, and to benefit from cost reductions across a wider EU market. This possibility would of course be dependent on the EU allowing the UK to link to its scheme and the conditions imposed.

## **Product energy issues**

A vast array of environmental and safety standards apply to products sold in the EU. The EU Energy Labelling Directive and the Ecodesign Directive set out labelling and eco-design requirements, and are required for products imported from countries outside the EU. If the UK remains part of the single market, the UK will continue to be required to implement EU rules.

Even outside the internal market, the legislation will continue to affect UK consumers and manufacturers. We anticipate that manufacturers operating in the European market will continue to manufacture to EU requirements and standards, as it is unlikely they will produce a different specification for the UK market.

## **Integrated permitting**

The UK has an integrated Environmental Permitting regime which regulates the environmental impact of industrial installations. This regime partly derives from the EU Integrated Pollution Prevention and Control (IPPC) regime, found in the EU Industrial Emissions Directive (IED). Likely the structure of the

environmental permitting regime will not change greatly following Brexit, because the EU IPPC regime was adopted largely on the basis of the UK model. Integrated permitting is also seen as an efficient administrative mechanism and new elements of permitting are being added on a regular basis; for example the UK government recently published a consultation to add water abstraction to the integrated permitting regime.

Best Available Techniques (BAT) Reference Documents under the IPPC and the IED Directives (BREFs) are key reference documents which environmental regulators use when setting permitting conditions for installations. Adopting BAT standards can add significant expense for businesses and the government may look at reverting to a model based more closely on cost-benefit analysis (as used by the UK's pre-existing integrated permitting regime). If BREFs no longer apply, the UK may have to design a new set of technical guidance in order to implement such an approach.

However, without BREFs, the UK may benefit from greater energy flexibility. Under the IED itself (and the BREFs in addition), the stricter environmental performance standards are making it difficult for coal-fired power stations to continue to operate across Europe. Owing to energy supply implications, the UK could potentially allow for short-term exceptions, even though the UK government has previously stated that it aims to close coal-fired power stations by 2025.

## Conclusion

In summary, the Brexit vote will trigger a considerable period of uncertainty. There will be a number of complexities to work through for energy and environmental policy and regulation. Brexit is taking us into uncharted waters, but with it brings not just challenges, but significant opportunities.

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