

## **Brexit - Energy and the EU-UK Trade and Cooperation Agreement**

Hello and welcome to this edition of A&L Goodbody soundbite series. My name is Ross Moore and I'm head of our energy and infrastructure group at A&L Goodbody. On 1st January 2021, the United Kingdom left the EU's internal energy market.

In this soundbite, myself, Mark Stockdale, an energy partner in our Belfast office, and Alan McCarthy, partner in our EU and competition group, will spend a few minutes discussing some of the key aspects of the framework for energy market cooperation in the EU-UK trade and cooperation agreement.

We'll give a particular focus to the Irish and the Northern Irish perspective, including the all-island single electricity market, as well as some state aid and subsidy aspects of the energy provisions.

The EU-UK trade and cooperation agreement come into provisional effect at 11pm on 31st December 2020. The UK has approved the agreement, though it will require unanimous approval in the Council of the EU and also European Parliament consent prior to ratification.

There wasn't enough time for the European Parliament to scrutinise and approve the agreement before the end of the year. However, the EU Commission proposed provisional application of the agreement prior to ratification. The ratification is likely to be in February or March 2021.

Now that the UK has left the EU's internal energy market, the mechanisms applicable to EU member states that were used to trade energy when the UK was an EU member state are required to be replaced.

For example, from 1st January 2021, energy trading over electricity interconnectors between the EU and Great Britain will no longer be managed through existing EU single market tools, such as market coupling, which are reserved to EU member states.

The UK will no longer be part of the EU's joint action against climate change, nor will it benefit from EU financial support to develop low-carbon technologies and infrastructure. It will also leave the EU's emissions trading scheme.

Accordingly, the EU and the UK have agreed to establish a new framework for their future cooperation in the energy field and ensuring efficiency of their cross-border trading. Importantly, this framework is underpinned by provisions and, to quote what you have all heard on the news leading up to this, provisions aimed at creating a robust level playing field.

Title 8, Energy, and the associated annexes of the Framework Agreement is one of the more detailed of the specific sector sections in the Framework Agreement. Somewhat unsurprisingly, given that the UK was a significant contributor to the formulation of the EU internal energy market regulations and directives from which it benefited. The section covers, and in aspects, tries to replicate many areas that are covered in the electricity and gas directives such as promotion of competition and non-discrimination in energy markets, free price formation and pricing transparency, market abuse and market integrity, the requirement for independent regulation, the requirement for non-discriminatory and transparent third-party network access, cooperation between system operators and regulators and so on.

But in many respects it is very much a framework and many of the specifics and technicalities are still to be worked out. Interestingly the text also has a healthy smattering of caveats in respect of rights of the parties to pursue legitimate public policy objectives and goals.

The agreement provides that the energy title shall cease to apply on 30th of June 2026. However, the Partnership Council may decide that the title will apply until 31st of March 2027. And between 1st of April 2027 and 31st of December 2027 and as well as at any point in time in any subsequent year the Partnership Council may decide that the title will continue to apply until 31st of March of the following year.

Article 27 of the Energy Section would appear to make it clear that there are no tariffs chargeable on export of electricity and gas. And that neither the UK nor an EU member state can impose a higher price for exports of energy goods or raw materials to the other party than the price charged for those energy goods or raw materials when destined for the domestic market.

Significantly, given that UK is an importer and an exporter of energy, the Framework Agreement puts significant emphasis on the future regulation of electricity and gas interconnection. While energy trading over electricity interconnectors between the EU and Great Britain will no longer be managed through those existing EU single market tools, which are reserved to EU member states, significantly for the single electricity market to Great Britain relationship, and also recognising that the Withdrawal Agreement preserves the all-island single electricity market, there are specific sections providing a framework for efficient use of electricity and gas interconnectors between the single electricity market and Great Britain.

That includes congestion management and capacity allocation, with the specialised Committee on Energy being mandated to develop technical procedures. The agreement does also contemplate the development over time of trading over interconnectors based on a form of coupling model known as multi-region loose volume coupling.

So the current position on interconnector trading in the various single electricity market timeframes is relatively ambiguous. A number of industry participants, including IWEA, has called out the lack of a day ahead coupling timeframe for interconnection trading between SEM and Great Britain with effect from the 1st of January 2021 as potentially a significant negative impact on price validity and liquidity in the market.

The agreement does call out that this day ahead timeframe must be addressed and contains a specific annex setting out the principles for development of those new procedures within a 15 month operational timeframe, i.e. by April 2022.

In other aspects relevant to Ireland, the parties are required to cooperate with respect to the security of supply of electricity and gas. This includes development of frameworks as well as risk information sharing.

Helpfully, also both parties reaffirm commitments to meeting renewable energy targets, albeit the UK refers to the target since National Energy and Climate Plan as opposed to the previously applicable renewable energy directives.

Elsewhere in the agreement, each party reaffirms its ambition of achieving economy-wide climate neutrality by 2050. While there is a significant focus on North Sea cooperation in energy matters, helpfully also for Ireland's offshore ambitions, the parties are required to cooperate in the development of offshore renewable energy by sharing best practices and, where appropriate, by facilitating the development of specific projects.

So broadly speaking, the framework for energy trading is there, but with many technical aspects still to be worked out. We suspect the Specialised Committee on Energy established by the Free Trade Agreement will be busy.

And so I'm going to hand you over to Mark Stockdale. So what does this mean for Northern Ireland and the single electricity market? The Free Trade Agreement came as a welcome relief for many businesses in Northern Ireland who needed certainty around their future trading relationship with the EU.

Whilst it was also good news for the energy industry, the main Brexit concern had already been addressed in the UK Withdrawal Agreement. A major concern around Brexit had always been what would happen to the all-island single electricity market.

The Northern Ireland Protocol ensured that after the transition period ended, the single electricity market would continue to operate more or less as normal, even if a Free Trade Agreement was not reached.

The Protocol provides that Northern Ireland continues to be bound by the various laws which allow the single electricity market to function. The only way that Northern Ireland can exit the Protocol is through what is termed democratic consent.

The Withdrawal Agreement does not specify what this is, but it is likely to be either a decision of the Northern Ireland Assembly or a public referendum. Of course the Protocol covers much more than just energy, and so it would likely take significant

preparation in a number of different areas before Northern Ireland would be in a position to leave.

Even if Northern Ireland does vote to withdraw, the earliest it can do this is the end of 2024 and then again in 2028, and then every four years after that. If it does vote to leave, then there is a further two-year period before the Protocol ceases to apply.

Investors will therefore have certainty that the Protocol will not come to an end for at least six years and possibly even ten years at the earliest. The Free Trade Agreement includes additional protections around the continuation of the single electricity market.

The rules around the use of electricity interconnectors do not apply to interconnectors between the Northern Ireland and Irish grids. This means that the transfer of electricity across the Irish border can continue to operate under the single electricity market rules and not covered by the rules in the Free Trade Agreement.

The Free Trade Agreement also preserves the requirement for the UK, including Northern Ireland, to have an independent electricity regulator. This means that the current utility regulator will remain in place, which is important as it makes up half of the same committee, which is the body that oversees the operation of the single electricity market.

The Free Trade Agreement also provides that no tariffs will be applied to electricity which crosses the border, and also that neither the UK or the EU can introduce unfair subsidies. These are both important points to ensure that the single electricity market can continue to operate as a single market with a single electricity price.

So from a policy perspective, this all sounds pretty positive. There will of course be much more detail to be worked out from an operational perspective. One example of this is the remit directive. Energy companies in Northern Ireland remain bound with this directive, but it's not yet clear if they have to re-register with a regulator in EU.

As we understand it, this is still under negotiation. And this is only one of various loose ends which Ross has already mentioned that remain to be tied up. Now, I'd like to hand you over to Alan McCarthy.

I'm going to look at two features: number one, subsidies and number two, dispute resolution. In relation to subsidies, energy and the issue of subsidies have always been a key feature of EU state aid law in Ireland, for example, REFIT.

As a result of the agreement, the UK must now develop its own domestic subsidy control regime outside the EU state aid regime, the exception being under the Northern Ireland Protocol to the Withdrawal Agreement relating to subsidies in relation to wholesale electricity markets.

The types of subsidies under the agreement which may be prohibited or may need conditions attached include unlimited state guarantees, energy and environment subsidies and large cross-border or international cooperation projects, including energy projects.

Subsidies shouldn't be granted where they have or could have a material effect on trade or investment between the EU and the UK and they must adhere to a set of guiding principles including being proportionate and limited to what is necessary to achieve a legitimate objective.

A subsidy under the agreement is similar to state aid under EU law covering for example public grants, loans and guarantees. It's notable that under the agreement there is clear acknowledgement of the importance of subsidies in the context of energy and environmental goals.

In relation to dispute resolution there will be an independent UK authority to assess subsidies and it's believed that this is likely to be the competition of markets authority although this is yet to be decided by the UK.

UK courts can review compliance with the subsidy principles and hear claims from interested third parties such as EU energy companies and there's already a system for subsidy control in the EU involving the European Commission and National Courts.

If there's a dispute between the EU and the UK about the application of these provisions under the agreement there will be a consultation process with possible arbitration and the EU and the UK can engage in cross-sector retaliation in the case of non-compliance with the subsidy principles.

Thank you, Alan. And so in conclusion, like in many other areas, the energy provisions of the agreement are complex and may take time to become clear both in their application and also in terms of some of the gaps in the provisions.

The agreement is a living document and will very likely change and adapt as the circumstances change and evolve. If you'd like further information on this topic, please do not hesitate to contact us with any queries.

You can also check the Brexit Hub on the A&L Goodbody website for more information and updates. Thank you.