

Energy and the EU-UK Trade and Cooperation Agreement

Brexit and Energy – a journey, not a destination

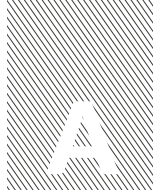
As of 1 January 2021, the United Kingdom (UK) is no longer part of the European Union's (EU) internal energy market. In this article, [Ross Moore](#) – Head of Energy, Infrastructure & Natural Resources, [Mark Stockdale](#) – Partner, Belfast Energy Group and [Alan McCarthy](#) – Partner, EU Competition & Procurement Group, discuss some of the key aspects of the framework for energy market cooperation in the EU-UK Trade and Cooperation Agreement (**Agreement**). We'll give a particular focus to the Irish and Northern Irish perspective (including the all-island Single Electricity Market) as well as some State subsidy and Dispute Resolution aspects of the energy provisions of the Agreement.

When does the Agreement enter into force?

- The Agreement came into provisional effect at 12am (Central European Time) on 1 January 2021/11pm (UK time) on 31 December 2020.
- The UK has approved the Agreement. However, there was not enough time for the European Parliament (**Parliament**) to scrutinise and approve the Agreement before the end of 2020. As a result, the European Commission (**Commission**) proposed provisional application of the Agreement prior to ratification of the Agreement by the EU (involving the Parliament's approval and adoption by the Council of the EU) and, while this is currently due to be by 28 February 2021, it is more likely to be in March or April 2021.



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The Energy provisions of the EU-UK Trade and Cooperation Agreement

What's the big deal?

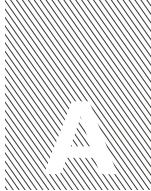
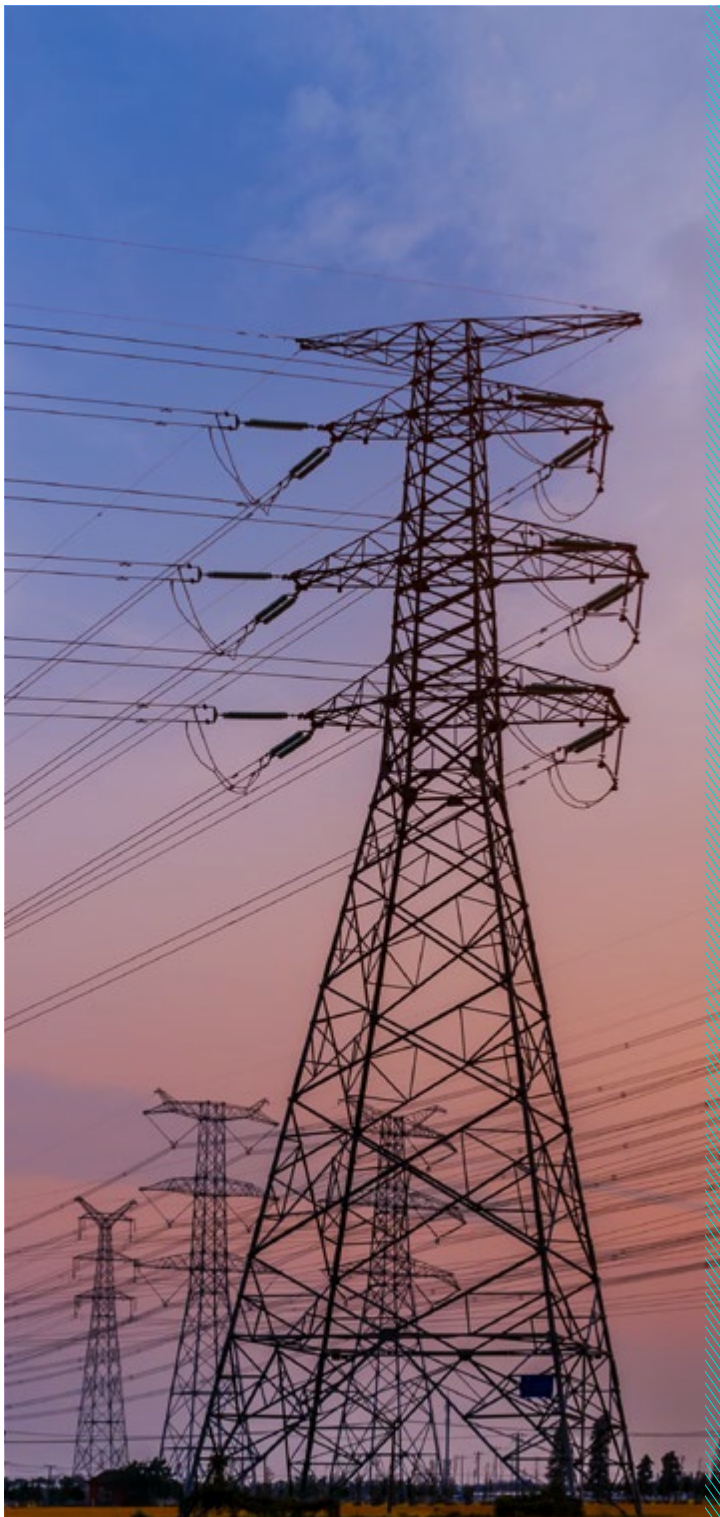
- Now that the UK has left the EU's internal energy market, the mechanisms applicable between the UK and EU member states that were used to trade energy when the UK was an EU member state (and during the transition period) are required to be replaced. For example from 1 January 2021 energy trading over electricity interconnectors between the EU and Great Britain (GB) 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 supports to develop low carbon technologies and infrastructure. It will also leave the EU's Emissions Trading Scheme.

A new framework for energy co-operation

- Accordingly, the EU and 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 the approval of the Agreement, "aimed at creating a robust level playing field".

Same but different, and watch the caveats

- Title VIII Energy, and the associated Annexes of the Agreement, is one of the more detailed of the specific sector sections. 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 and other member states with whom it traded benefited, the section covers and in aspects tries to replicate, at least at conceptual level, many areas that are covered in the EU electricity and gas directives. This includes provisions dealing with promotion of competition and non-discrimination in energy markets, free price formation and pricing transparency, market abuse and market integrity, requirement for independent regulation, non-discriminatory and transparent third party network access, co-operation between system operators and regulators and so on. However, it is in many respects 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.



Together forever and never to part?

- No.
- Under Article ENER 33 of Title VIII the Energy Title ceases to apply on 30 June 2026. However, between 1 July 2026 and 31 December 2026 the Partnership Council may decide that the provisions of the Energy Title will apply until 31 March 2027. Between 1 April 2027 and 31 December 2027, as well as at any time in any subsequent year, the Partnership Council may decide that this Title will apply until 31 March in the following year.

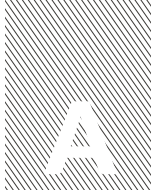
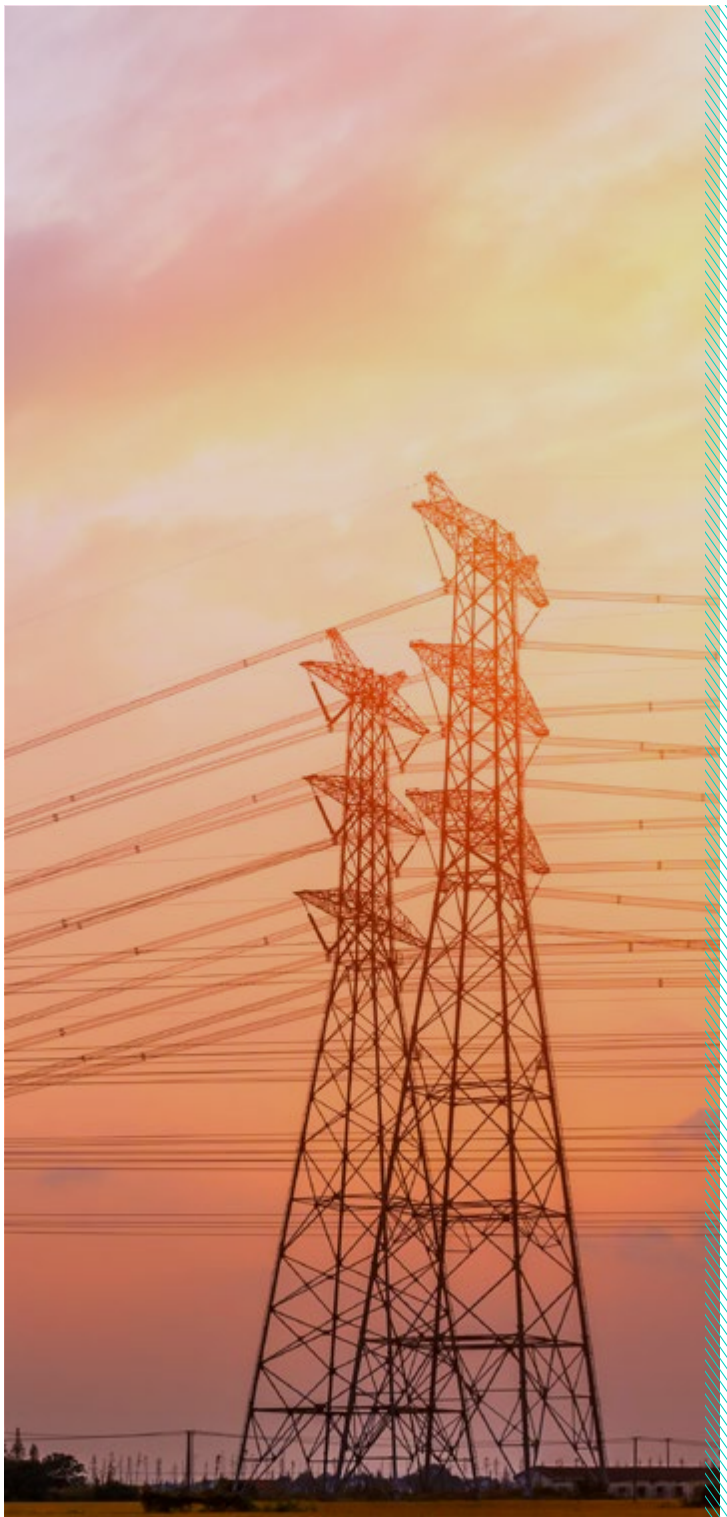
What's the position on tariffs?

- Article 27 of the Energy section would appear to make it clear that there are no tariffs chargeable on export of electricity and gas in 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.

Let's stay connected

- Given that the UK is an importer and exporter of energy, the Agreement puts significant emphasis on the future regulation of electricity and gas interconnection. As mentioned above, energy trading over electricity interconnectors between the EU and GB will no longer be managed through existing EU Single Market tools such as market coupling which are reserved to EU member states. However, significantly for the all-island (i.e. Northern Ireland/Ireland) Single Electricity Market to GB relationship, and recognising that the Withdrawal Agreement¹ is to preserve 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 GB. This includes congestion management and capacity allocation, with the Specialised Committee on Energy (one of the Specialised Committees established by the Agreement) being mandated to develop technical procedures.
- So the current position as at the date of writing on interconnector trading in the various Single Electricity Market timeframes is relatively ambiguous. A number of industry participants, including the Irish Wind Energy Association (now Wind Energy Ireland), have called out the lack of a day-ahead coupling timeframe for interconnection trading between the Single Electricity Market with effect from 1 January 2021 as potentially having a significant negative impact on price volatility and liquidity. The Agreement states that this day-ahead time frame must be addressed and Annex ENER-4 (in its current form) contemplates the development over time of day-ahead trading over interconnectors based on a form of coupling model known as 'multi-region loose volume coupling'. However it anticipates the development of the new procedures within a 15 month operational timeframe (i.e. by April 2022).

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community



The Energy provisions of the EU-UK Trade and Cooperation Agreement

Secure in our relationship

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

Renewable Energy Targets and Climate Action – fundamental importance

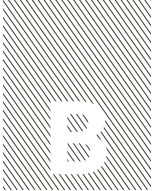
- Helpfully both parties reaffirm commitments to meeting renewable energy targets, albeit the UK refers to the targets in its National Energy and Climate Plan as opposed to the previously applicable renewable energy directives.
- The Agreement does, particularly in Article 8.5 of Part Two, Heading One (Trade), Title XI, place a high priority on addressing the challenge of climate change and maintaining high levels of protection and cooperation in the fight against climate change and carbon pricing. Both parties recognise the importance of taking urgent action to combat climate change. Both parties also commit to effectively implement the 2015 Paris Agreement. Indeed, under Article INST.35 of Part Six, Title III this is deemed so fundamental that any violation of this principle would enable the other party to terminate or suspend all or some of the Agreement. Each Party reaffirms its ambition of achieving economy wide climate-neutrality by 2050.

Offshore – it's not just fishing

- While there is a sufficient 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.

A busy time for the Specialised Committee on Energy

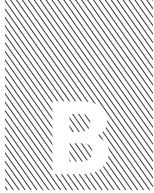
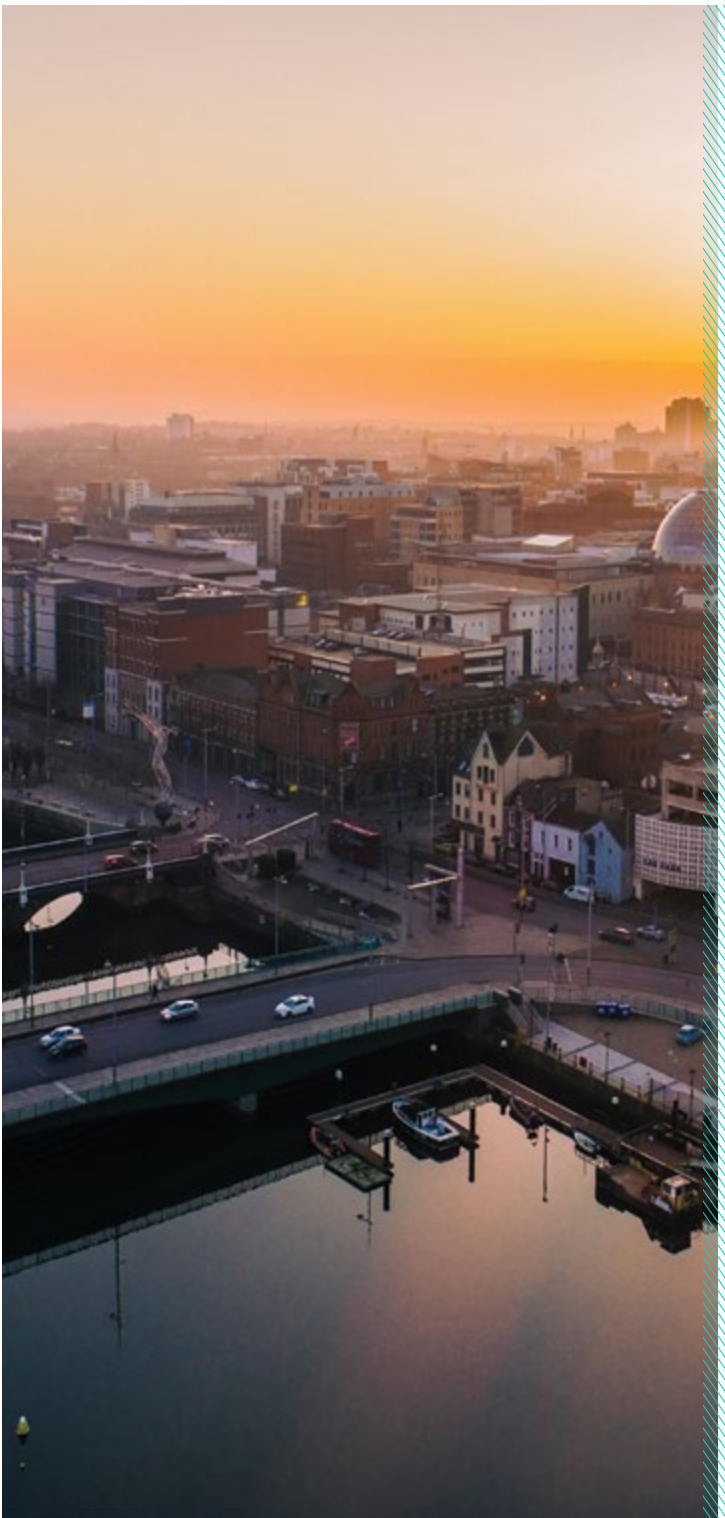
- So broadly speaking the framework for energy trading is there, but with many technical aspects still to be worked out. We suspect the Specialised Committee on Energy will be busy.



Implications for Northern Ireland

A good starter and main course

- The 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 for the Northern Irish electricity market had already been addressed in the Withdrawal Agreement. In particular this was addressed by the Protocol on Ireland/Northern Ireland (referred to as the Northern Ireland Protocol) which provides that Northern Ireland continues to be subject to a limited set of EU rules related to the Single Market for goods and the Customs Union after the end of the transition period.
- A major concern around Brexit had always been what would happen to the all-island (i.e. Northern Ireland/Ireland) Single Electricity Market. Before the Agreement was agreed, the Northern Ireland Protocol ensured that after the transition period the Single Electricity Market would continue to operate more or less as normal even if a free trade agreement was not reached.
- The Northern Ireland Protocol provides that Northern Ireland continues to be bound by the various laws which allow the Single Electricity Market to function.
- The Agreement now includes additional protections around the continuance of the Single Electricity Market between Northern Ireland and Ireland. The rules around the use of electricity interconnectors explicitly do not apply to interconnectors between the grids in Northern Ireland and Ireland. This means that the transfer of electricity across the Irish border can continue to operate under the Single Electricity Market rules and not the rules set out in the Agreement.
- The Agreement also preserves the requirement for the UK including Northern Ireland, to have an independent regulatory authority for energy. This means that the Utility Regulator will remain in place, which is important as it makes up half of the SEM committee, which oversees the SEM.
- No tariffs are applied to electricity which crosses the border and the Agreement provides that neither the UK nor EU can introduce unfair subsidies. This is important to ensure that the SEM can continue to operate as a Single Market with a single electricity price.



The Northern Ireland Protocol – a permanent solution?

- The only way that Northern Ireland can exit the Northern Ireland 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 Northern Ireland Protocol covers much more than just energy and so it would likely take significant preparation in a number of 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. If it does vote to withdraw then there is a further two year period before the Northern Ireland Protocol ceases to apply. Investors will therefore have certainty that the Northern Ireland Protocol will not come to an end for at least six years and possibly ten years at the earliest.

Loose Ends

- From a policy perspective, this all sounds 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 by this, but it is not clear yet if they need to reregister with a regulator in the EU.
- This is only one of the various loose ends, which have been mentioned elsewhere in this article, that remain to be tied up.



Energy subsidy control and dispute settlement under the EU-UK Trade and Cooperation Agreement

1. Energy and dispute settlement

Context of the Energy provisions and disputes under the Agreement

As explained above, the energy provisions under the Agreement are more material than a range of other areas covered under the Agreement (such as services), but there is still much that will still need to be addressed in the future on the operation of those energy provisions.

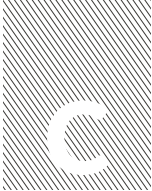
- As the Agreement is a treaty binding under international law, for the most part, businesses and individuals cannot directly enforce or rely on the Agreement in the courts in the EU or in the UK (other than possibly in relation to domestic laws implementing the Agreement).
- The settlement of disputes concerning the energy provisions under the Agreement is covered by Part Six, Title I of the Agreement and are part of the overall political settlement process. The main exception is in relation to energy and subsidy control because competition policy is excluded from the dispute settlement provisions under the Agreement and this feature is addressed below.
- The objective of the provisions on dispute settlement is to establish an effective mechanism for avoiding and settling disputes between the EU and UK concerning the interpretation and application of the Agreement.

From good faith to retaliation

In general terms, where either of the EU or UK considers that the other party is in breach of an obligation under the Agreement:

- There will be initial “good faith” consultations between the EU and UK lasting 30 days.
- They can decide to prolong these consultations or refer the issue to a panel of arbitrators, consisting of three independent arbitrators (including a chairperson).
- The panel has up to 160 days to make a ruling and such rulings are legally binding.
- Unlike the Withdrawal Agreement (and therefore the Northern Ireland Protocol), the Court of Justice of the EU (CJEU) (or the UK courts) have no role in the dispute settlement provisions (in the Withdrawal Agreement, the CJEU provides interpretations of EU law where such questions arise in the arbitration process).
- The Agreement will be interpreted in line with public international law including the Vienna Convention on the Law of Treaties 1969 – the Agreement provides that the EU and UK must take all appropriate measures to ensure they comply their obligations under the Agreement.

If compliance is not achieved immediately or within a reasonable period of time, the complaining party can suspend certain of its own obligations under the Agreement in a proportionate way until the other party complies with the tribunal ruling.



Energy and subsidy control – greater flexibility for the UK?

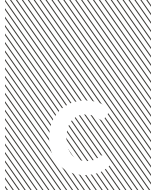
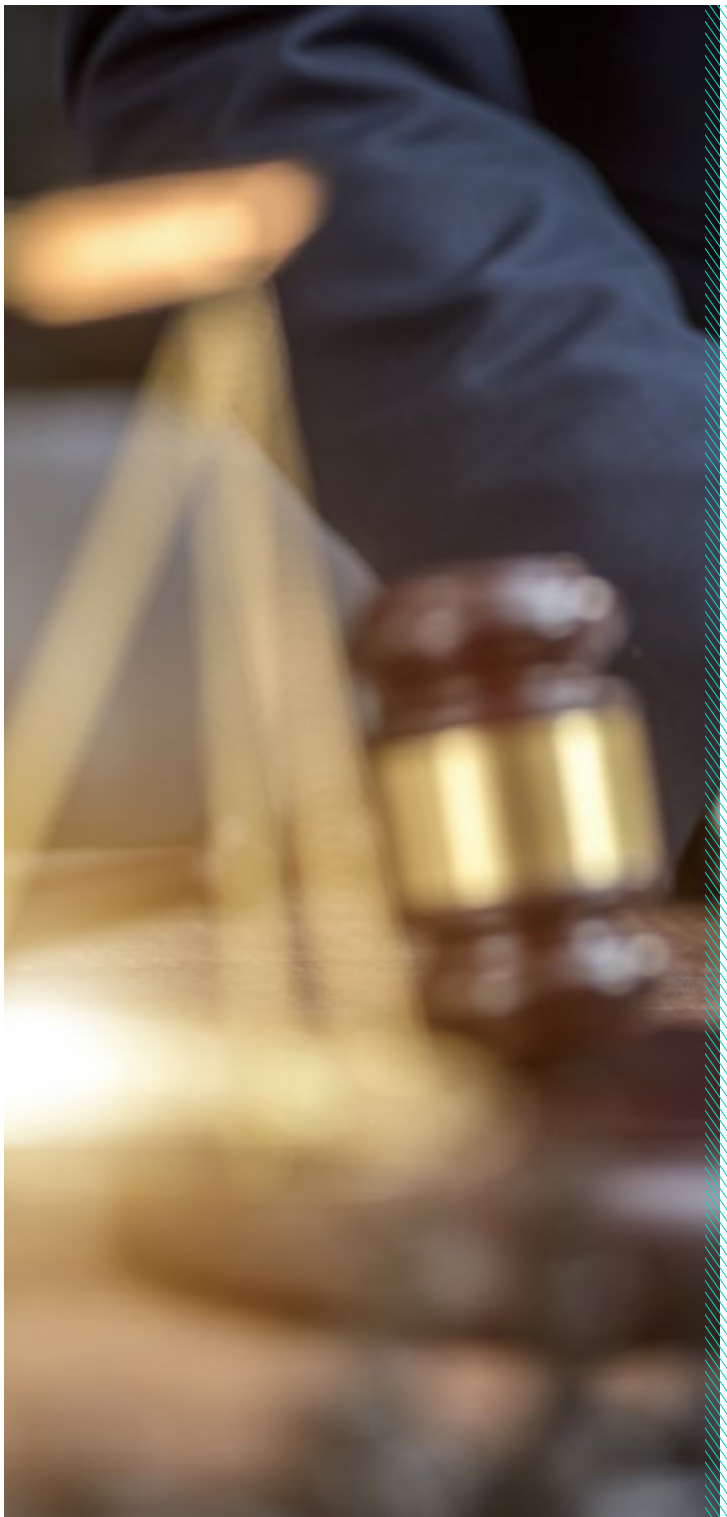
- Energy and subsidy control has always been a key feature of EU State aid law - particularly in Ireland (e.g. with the various government support schemes for renewable energy).
- In line with Part Two of the Agreement, the UK will develop its own domestic subsidy control regime outside the EU State aid regime (which no-longer applies in the UK). However, the Northern Ireland Protocol provides that EU state aid rules apply where this is relevant to trade between Northern Ireland and the EU. This does not mean that EU State aid rules will apply to Northern Ireland as they did prior to Brexit. State aid provisions apply only to trade 'subject to the Protocol' and the Northern Ireland Protocol is limited in scope to wholesale electricity markets.
- Under the Agreement, a “subsidy” means financial assistance which:
 - a. arises from the resources of the EU and UK, including:
 - » a direct or contingent transfer of funds such as direct grants, loans or loan guarantees
 - » the forgoing of revenue that is otherwise due
 - » the provision of goods or services, or the purchase of goods or services
 - b. confers an economic advantage on one or more economic actors (e.g. companies)
 - c. is specific insofar as it benefits certain economic actors over others in relation to the production of certain goods or services
 - d. has, or could have, an effect on trade or investment between the EU and UK

- The UK could create a subsidy regime that diverts investment to the UK and away from EU member states. If so, this could hamper renewable energy ambitions in the EU member states. Accordingly, the Agreement contains commitments to maintain a level-playing field as well as rules to prevent distortions created by unfair subsidies (and unfair competition).

Some familiar concepts in respect of subsidies

The Agreement lists the types of subsidies which are applicable under the Agreement and which may be prohibited or otherwise may need conditions attached – they are similar to the types of subsidy applicable under EU State aid principles. Prohibited subsidies and subsidies subject to conditions under the Agreement include:

- subsidies in the context of energy and environment - there is acknowledgment in the Agreement of the importance of subsidies in the context of energy and environmental goals. While the main subsidies principles continue to apply to such energy-related subsidies, there is a roadmap for the validity of such subsidies, which must incentivise the beneficiary as part of the delivery of a secure, affordable and sustainable energy system and a well-functioning and competitive energy market or in increasing the level of environmental protection compared to the level that would be achieved in absence of the subsidy
- unlimited state guarantees
- subsidies for restructuring an ailing or insolvent company
- subsidies to restructure banks, credit institutions and insurance companies
- subsidies for large cross border or international cooperation



Subsidies should not be granted where they have or could have a material effect on trade or investment between the EU and 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.

The Agreement also sets out exemptions to the prohibition on providing subsidies (e.g. temporary subsidies in response to a national emergency).

A “subsidy” under the Agreement is similar to State aid under EU law covering: public grants, loans, and guarantees; forgoing revenue otherwise due (e.g. tax waivers or debt write-offs); and the provision of goods or services or the purchase of goods and services, such as agreeing to purchase services at an overvalue.

2. Subsidies and dispute settlement

- There will be “an appropriate role” for an independent UK authority (possibly the Competition and Markets Authority) to assess subsidies.
- There will also be a power for UK courts to review compliance with the subsidy principles by subsidy-granting authorities and to review decisions of the independent authority, to do so on application by interested parties (e.g. EU energy companies) with standing and to grant remedies (including injunctions and orders to recover subsidies paid-out). There will be an equivalent system of subsidy control in the EU – there is already a structure in the EU (involving the Commission and national courts) which assesses State aid and orders recovery where aid is provided in breach of the EU State aid rules.
- The Agreement contains specific provisions to settle disputes relating to subsidies. If consultation does not settle a dispute then a party can unilaterally impose “remedial measures” if it considers that a subsidy by the other party has breached the subsidy rules under the Agreement. There is then an option to request that an arbitration tribunal determines if such remedial measures taken are necessary and proportionate. If the remedial measures were not necessary and proportionate, the party subject to those measures can ask the tribunal to determine what measures it can take in response (e.g. suspending obligations under the Agreement).
- The EU began looking in July 2020 at how to address subsidies granted by 3rd countries and, while free trade agreements normally hold sway, this may yet affect to some extent the application of the new subsidies regime under the Agreement.

The end of the beginning

The energy provisions (like in many other areas) of the Agreement are complex and may take time to become clear (both in their application but also in terms of some of the gaps in the provisions). The Agreement is a living document and will very likely be changed and adapted as circumstances change and evolve.

If you would like further information on any aspect of this guide, please feel free to get in touch with your usual A&L Goodbody contact, or any member of our Brexit [team](#).



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