The Repatriation of Competences in Climate and Energy policy after Brexit

Implications for devolution and multi-level government

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Executive Summary[1]

1. The EU has become an increasingly important actor in climate and energy policy. The 2020 Climate and Energy Package set the legal and regulatory framework within which governments at every level across the 28 member states have developed their own policies. The EU has promoted and financed the low carbon transition, including by setting binding targets for renewables and GHG emissions reductions, and targets for greater energy efficiency. It has embarked upon the ambitious project of building an Energy Union, by integrating markets and increasing the physical interconnection of European electricity networks.

2. Climate and energy policies within the UK have been shaped by the EU. The binding renewables targets have committed successive UK Governments to increasing the amount of energy from renewable sources. UK electricity market reform was designed to complement EU market integration. The UK has been a leader in its own right in emissions reductions, surpassing obligations imposed on it by EU legislation. The 2008 Climate Change Act was the first comprehensive national climate legislation in the world. However, the EU Emissions Trading Scheme (EU ETS) has been central to the delivery of the 'carbon budgets' set by that legislation.

3. Climate change and low carbon energy policies have risen up the agenda of the devolved institutions since their establishment in 1999. In Scotland, in particular, successive governments have been keen to demonstrate leadership in renewables and have capitalised on the policy and financial incentives introduced by the EU. The 'world-leading' 2009 Climate Change (Scotland) Act has been supported heavily by the emissions reductions guaranteed by the EU ETS. The drive towards EU market integration has helped to support the development of the Single Electricity Market (SEM) on the island of Ireland.

4. The impact of Brexit on the multi-level governance of climate and energy policy in the UK is difficult to anticipate, especially when the meaning and scope of Brexit remains deeply uncertain. If the UK leaves after implementing a withdrawal agreement, the transition period would ensure legal and (to a lesser extent) financial continuity at least until December 2020. Although the decision of the UK parliament to retain most EU law should provide short-term legal continuity whatever form Brexit takes, a No Deal Brexit can be expected to generate considerable disruption, especially in cross-border trade, mobility and investment.

5. The Northern Ireland backstop, annexed to the current draft Withdrawal Agreement, would keep the whole of the UK part of a single customs territory with the rest of the EU, and ensure a soft border could be maintained on the island of Ireland. If implemented, the backstop would require Northern Ireland to remain compliant with some EU Single

[1] This research has been supported by the Economic and Social Research Council, as part of the UK in a Changing Europe programme. The full project title is: *The Repatriation of Competences: Implications for Devolution* (grant reference: ES/R001308/1).

Market law, including those regulations and directives that support the SEM. It would also keep Northern Ireland within the ambit of the EU Emissions Trading Scheme, but the Protocol does not envisage Northern Ireland being bound or incentivised by EU Renewables, Energy Efficiency or many other climate-focused policies and programmes.

6. The process of negotiating Brexit has generated an unprecedented intensification of intergovernmental relations between the UK Government and the devolved governments, including new inter-ministerial fora such as the Joint Ministerial Committee (EU Negotiations). Yet despite the extent of engagement, the devolved governments have been largely marginalised from the Brexit process, with little opportunity to shape the UK's negotiating position. Both the Scottish and Welsh Governments have opposed strongly the UK Government's stated aims of leaving the Single Market and the Customs Union.

7. The repatriation of EU competences has sparked debate over the need, or otherwise, for UK common frameworks to replace EU frameworks. An analysis carried out by the Cabinet Office suggested that in most areas of climate and energy policy where devolved and EU policies intersect, non-legislative common frameworks (such as a Memorandum of Understanding) may be sufficient. The current Withdrawal Agreement suggests that common standards may be required to establish a level playing field in environmental law, as well as UK-wide emissions reduction and state aid regimes. These could constrain devolved competence, and the legislative commitment of the Scottish Government to 'keep pace' with EU law. They also raise questions about the scope for shared governance within the UK after Brexit.

8. In the longer term, Brexit poses significant risks for the climate and energy ambitions of the devolved nations. These include the loss of European Structural and Investment Funds targeted at climate and low carbon energy policies, from which the devolved territories have benefited disproportionately. European Investment Bank loan funding, which has financed high risk renewables projects, especially in Scotland, may also no longer be as accessible, while future access to research and innovation funding remains uncertain. The removal of the EU policy framework, which has incentivised the low carbon ambitions of the devolved governments directly and indirectly, may also result in lost opportunities fostered by the EU's new legislative framework in climate and energy policy.

1. Introduction

Climate change and low carbon energy policy have risen up the agenda of the devolved governments since their establishment in 1999. In tandem, the EU has enhanced its portfolio in this field, especially in a series of legislative packages and programmes to support the transition to a low carbon future.

Both the devolved governments and the EU have extensive constitutional competence over many areas of environmental policy, as well as a range of other climate-related fields including building standards, waste management and transport. By contrast, their respective competence in energy policy has been more constrained.

In the UK, only the Northern Ireland settlement excluded energy (excluding nuclear) from the matters reserved to the UK parliament, and thus made it a devolved competence, albeit with some legal and financial constraints and qualifications.[2] In Scotland and Wales, energy market regulation remains a matter for the UK parliament. More limited, variable and growing energy-related responsibilities have been devolved, and both the Scottish and Welsh governments have made commitments to renewables and low-carbon sustainable development central to their economic goals.

Notwithstanding constraints on its policy competence, the EU's Climate and Energy policy has been growing in scope and ambition. Securing an integrated Energy Union and a transition to a low carbon economy is a strategic priority. That is reflected in an extensive legislative programme, an evolving governance framework, and significant financial investment. EU climate and energy programmes set the framework within which all member states – and nations and regions within them – must operate.

The development of the EU's Energy Union will continue after Brexit. What form Brexit finally takes will influence the extent to which the UK's climate and energy policy remains in step with EU policy or charts a new course. These UK level decisions will also shape the opportunities and constraints facing the devolved governments.

This briefing paper explores the effect of Brexit on the territorial governance of climate and energy policy in the UK. It first provides an overview of EU climate and energy policies, and the extent to which they have shaped policy and action across the UK. It then explores the opportunities and constraints facing policy makers within the UK and devolved governments once the UK leaves the EU, and the scope for new shared governance in climate & energy policy.

[2] Muinz and Ellis, 2017, 'Subnational governance for the low carbon energy transition: Mapping the UK's "Energy Constitution", *Environment and Planning C: Politics and Space*, Vol. 35(7), p.1184

2. The Multi-level Governance of EU Climate & Energy Policy

The European Union has become a frontrunner in climate policy, both in setting mandatory targets and in outcomes. EU Climate and Energy Policy has been characterised by: the promotion of renewable energy and energy efficiency across member states; domestic and international efforts to reduce greenhouse gas emissions; and the liberalisation and integration of the European energy market. Its approach is aimed at addressing the *energy trilemma* - security of supply, sustainability, and competitiveness – and developing a fully integrated 'Energy Union'.

2.1 Legal framework

EU Legal framework for Renewables

Energy and climate change policies were later-comers within the EU's competency framework. Until the 1990s, EU influence over member states' energy and climate mitigation policies was mainly through internal market competition policy, environmental policy and research and development. These remain important, but the EU has since developed specific competence in energy.

The 2007 Lisbon Treaty was an important step. It designated energy as a shared competence of the EU and member states, with a specific EU role in relation to market integration, security of supply, low carbon energy and demand reduction. Member states retain control of key areas of energy policy, including the right to decide how best to exploit their energy resources, their particular energy mix, and the general form of their energy system. Other EU competences also matter to the energy sector, including environmental policy, competition policy, state aid, research and innovation, and free movement of goods, services, capital and labour.

Lisbon Treaty, Article 176A

"In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between member states, to:

(a) ensure the functioning of the energy market;

(b) ensure security of energy supply in the Union;

(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and

(d) promote the interconnection of energy networks…

"Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply…"

The first electricity directive was passed in 1996 (Directive 96/92/EC), followed by a second in 2003 (Directive 2003/54/EC). These set out common rules which opened up energy markets to competition, ensured the separation, or 'unbundling', of Transmission and Distribution System Operators, and promoted the development of a regulated, integrated and inter-connected energy market.

Promoting renewable energy and energy efficiency has been a key feature of EU energy policy since the Kyoto protocol. The 2001 Renewable Energy Directive (Directive 2001/77/EC) created incentives for member states to promote renewable generation and established a Community-wide target of 21% of electricity produced from renewable sources by 2010, with indicative national targets. More ambitious targets were set by the 2009 **Renewable Energy Directive** (Directive 2009/28/EC), as part of the **2020 Climate and Energy Package**. Collectively, the Directive assigned national binding targets for all member states, towards an overall Community target of 20% of energy consumed within the EU to be sourced from

renewables, as well as 10% of energy used in transport. The UK's obligations under this 'effort sharing' were to ensure that, by 2020, at least 15% of overall energy consumption, including 10% of transport fuels, would be generated from renewable sources.

Renewables in the UK

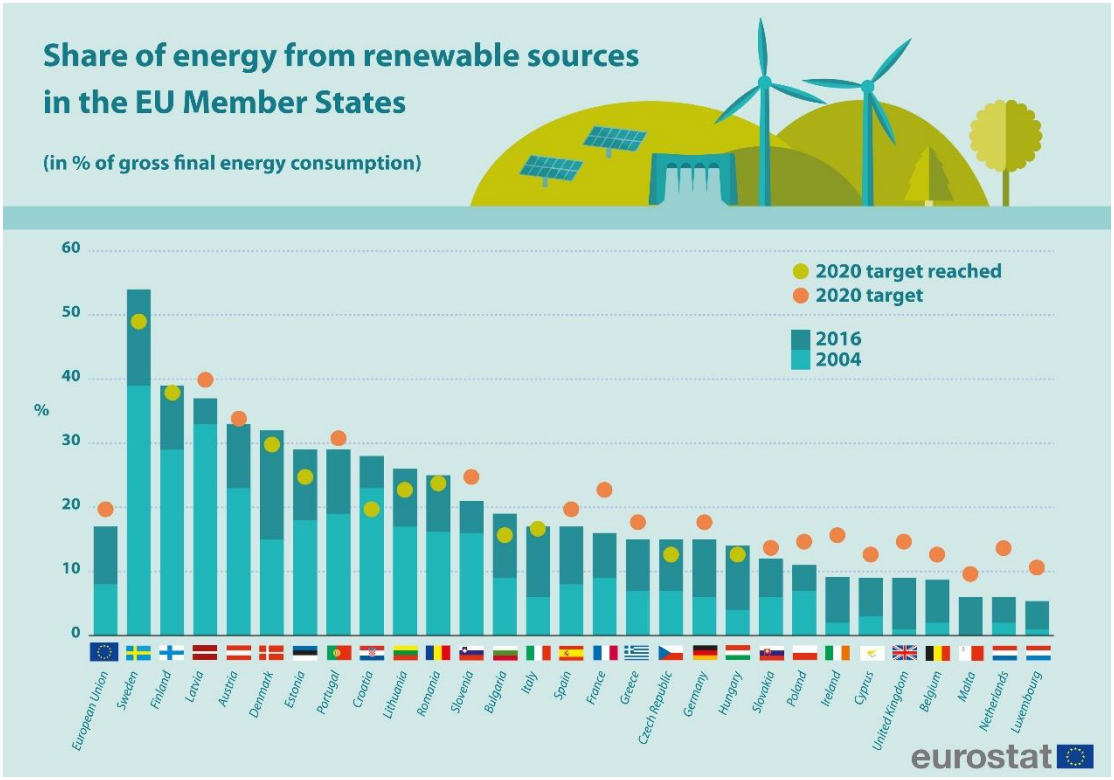
In the **UK's National Renewable Energy Action Plan**, the target of ensuring 15% of energy consumption by 2020 was allocated to the following sectors:

- Around 30% electricity demand
- 12% of heat demand
- 10% transport demand

Set against a baseline of 1.5% of the UK's energy consumption from renewables in 2005, these ambitious targets required a major step-change in policy.

Collectively the EU appears on track to meet the RED targets in renewable energy consumption, though progress in transport remains insufficient.[3] As Chart 2.1 indicates, 11 member states have already met their renewables targets; notwithstanding significant progress more recently (see Chart 2.2), the UK is not among them.[4]

Chart 2.1

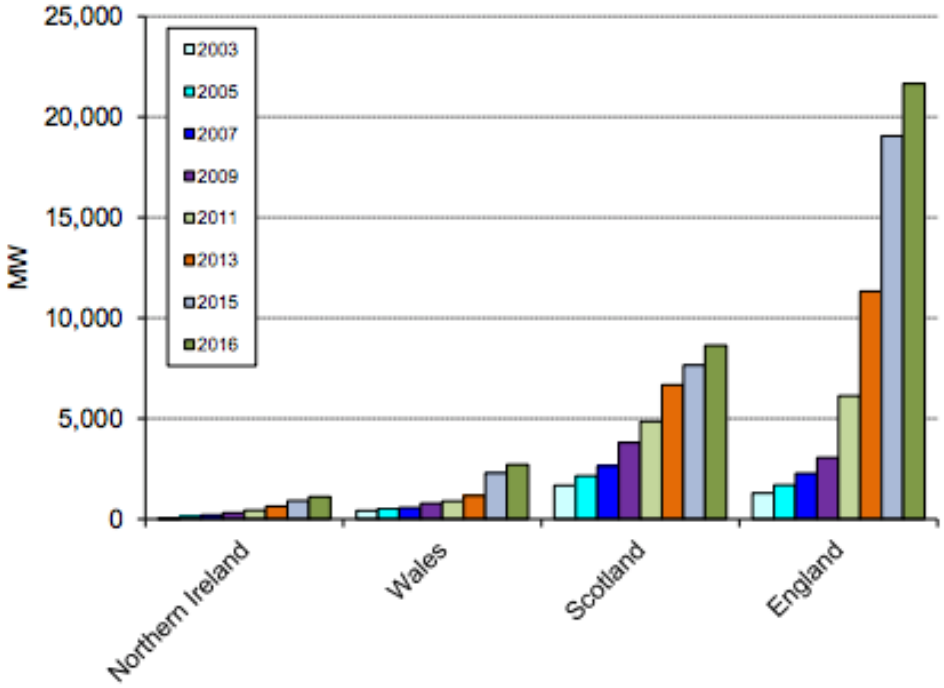


[3] European Environment Agency, 2017, *Trends and projections in Europe 2017*; UK Government, 2018, *Renewable sources data used to indicate progress under the 2009 EU Renewable Energy Directive (measured using net calorific values) (DUKES 6.7)*

[4] http://ec.europa.eu/eurostat/statistics-explained/images/c/c3/Figure_1-Share_of_energy_from_renewable_sources_2004-2016.png

Among the devolved territories, Scotland has contributed disproportionately to the UK's renewables growth, and thus to its efforts to meet EU obligations. This has been helped by historical investment in hydro-electricity, a favourable landscape and climate for wind energy, and a strong political commitment to promote the renewables sector. The latter has included progressively ambitious renewables targets, bold whole systems energy strategies, a sympathetic planning and consenting regime, investment for renewables research and innovation, support for community action, and high-profile leadership from successive First Ministers, especially under SNP administrations. This is despite very limited constitutional competence in energy, which has necessitated frequent interaction with the UK Government. Though at times frustrating (for example, over the perceived costs to Scottish renewables ambition as a result of the UK's transmission charging system), the two governments have worked cooperatively, especially in securing EU approval for state aid exemptions for renewable subsidies and feed-in tariffs.

Chart 2.2. *Trends in capacity from renewables by country*



Source: BEIS, *Renewable electricity in Scotland, Wales, Northern Ireland and the regions of England in 2016*, p.76

Chart 2.2 reveals both the relative importance of the Scottish contribution as well the steep rise in renewables in England since 2011. By 2016, Scotland accounted for around a quarter of the UK's installed capacity of electricity generated from renewable sources, including 40% of the UK's wind power.[5] Scotland's disproportionate contribution to the UK's EU obligations in energy – even more pronounced before the recent upsurge in England - has helped the Scottish Government to have some influence in energy policy, despite very limited devolved powers in this field.

[5] Dept for Business, Energy & Industrial Strategy, 2017, *Renewable electricity in Scotland, Wales, Northern Ireland and the regions of England in 2016*, Table 2.

In December 2018, the Council adopted a **revised Renewable Energy Directive**, alongside a **revised Energy Efficiency Directive**. Pushed by the European Parliament, they agreed to a Union-binding target of at least a 32% share of renewable energy in gross final consumption, with the Commission charged with assessing whether this target could increase further. There are no binding targets on member states individually beyond achieving the mandatory 2020 targets, which from 2021 will represent the new baseline. However, member states are obliged to set national contributions to ensure the Union as a whole collectively meets the 2030 target, as part of their Integrated National Energy and Climate Plans. The new Energy Efficiency Directive sets an EU-wide target of at least 32.5%, again without setting binding individual targets for member-states but with an obligation to report on progress. A new Regulation on the Governance of the Energy Union is intended to strengthen the Commission's oversight of member states' progress towards 2030 targets.

2.2 Emissions Reduction[6]

Reducing Emissions across the EU

The EU's 2020 Climate & Energy package also committed member states to a collective 20% reduction in GHG emissions (with 1990 as the baseline), with a non-binding target of 20% reduction in energy demand. The latter is supported by the **2012 Energy Efficiency Directive**, with indicative national energy efficiency targets and some binding measures, including energy efficiency obligation schemes. Around 45% of the EU's GHG emissions are covered by the Emissions Trading Scheme (see below). For sectors not covered by the ETS, member states were allocated binding annual national targets in an Effort Sharing Decision. The UK's share was to achieve emissions reductions in these sectors of 16% by 2020, compared to 2005, and in contrast to its progress in renewables, it has already surpassed that target.[7]

Central to the EU's climate policies is the **EU Emissions Trading Scheme (EU ETS)**. Set up in 2005 to provide an EU-wide approach to reducing GHG emissions, it was the first, and remains the biggest, multi-national carbon market. Participation is mandatory for large energy-intensive firms, including power stations and industrial plants, with members accounting for around 45% of EU emissions. It is based on a 'cap and trade' principle: firms receive or buy emission allowances which they can then trade with others; and overall allowances are capped at the total permissible GHG emissions for participating firms, on a downward trajectory towards the EU's targets. Despite the UK's own ambitious emissions reduction programme and pioneering legislation, the EU ETS has been central to the delivery of the UK Government's '**carbon budgets**'.

The scheme will be revised from 2021 as part of the 2030 climate and energy policy framework, including a reduced cap on the total volume of emissions. The new **Effort Sharing Regulation,** agreed in May 2018, also set a new EU-wide target for those sectors falling outside of the EU ETS, and determined how the overall emissions reduction targets would be met by the traded sector and non-traded sectors, carrying 43% and 30% reductions (on 2005 levels) respectively. The regulation also set binding national targets towards this collective goal, ranging from -0% (Bulgaria) to -40% (Luxembourg, Sweden) compared to 2005

[6] With thanks to Brendan Moore for helpful suggestions and clarifications on a previous draft.

[7] Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of member states to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, *OJ L 140, 5.6.2009, p. 136–148*

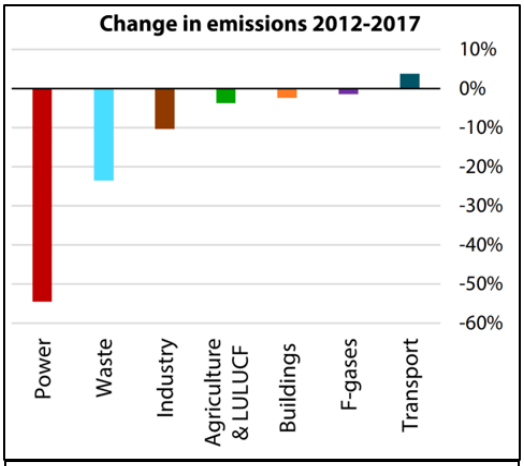
levels. The target set for the UK is -37%.[8] These policies are intended to meet the commitments made by the EU collectively under the **Paris Climate Agreement**.

Emissions Reduction across the UK

The UK has been a leader in EU emissions reduction programmes, often with strong coordination between the UK and devolved governments. The ETS in the UK is implemented via the **Greenhouse Gas Emissions Trading Scheme Regulations 2012**, agreed jointly by the UK Government and the devolved administrations. The latter have policy responsibility for implementing the ETS as part of these arrangements. There are regular intergovernmental discussions among officials on developing, implementing and monitoring the scheme, and any changes are agreed by consent.

The **Climate Change Act 2008** forms the basis of the UK Government's domestic approach to climate change mitigation. The first comprehensive national climate legislation in the world, it commits the UK to achieving reductions in greenhouse gas emissions by at least 80% by 2050 (compared with 1990 levels). Consecutive statutory five-year carbon budgets restrict the amount of greenhouse gases the UK can legally emit and are the route through which this target is to be reached. The ambition underpinning the Act surpassed the UK's EU obligations in emissions reductions.

Chart 2.3



Source: Committee on Climate Change, 2018; Reducing UK emissions 2018. Progress Report to Parliament

UK emissions have reduced by 43% compared to 1990 levels. Three-quarters of the reductions achieved in the 12 years since the Climate Change Act was introduced have come from the power sector.[9] Emission trends within much of that sector are covered by the EU ETS, and the downward trend has also been incentivised by broader EU energy and climate law. Across some other sectors, performance has been poor, and there is growing scepticism regarding the ongoing commitment of the UK Conservative Government to ambitious climate change mitigation.[10] The Committee on Climate Change has warned that the reductions in the fourth and fifth carbon budgets, set out in the **2017 Clean Growth Strategy** and covering the period between 2023-2032, are unlikely to be achieved. The Committee cited government failure to deliver policies and plans, including in energy efficiency and low-carbon heating. Additional risks identified by the Committee include leaving the EU.

In contrast to their limited constitutional authority in energy policy, the **devolved governments** have more formal autonomy over climate policy, albeit within the same European and international obligations that constrain the UK Government's climate policies. The devolved governments have used their authority to varying degrees.

[8] *Regulation of the European Council and the European Parliament on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013*

[9] Committee on Climate Change, 2018, *Reducing UK emissions 2018. Progress Report to Parliament*

[10] Farstad, *et al*., 2018, 'What does Brexit Mean for the UK's Climate Change Act?', *The Political Quarterly*, vol.89, no.2: 291-97

Table 2.1: UK administrations' climate targets and progress[11]

	Targets (reductions from 1990 baseline)	Emissions change, 1990-2016	Average annual emissions change, 2009-2016
UK	35% by 2020	-41%	-3.1%
Scotland	56% (actual) by 2020 42% (net) by 2020	-49% (actual) -45% (net)	-4.7% (actual) -4.0% (net)
Wales	27% by 2020 (CCC recommendation) 40% by 2020 (existing non-statutory target)	-14%	+1.4%
Northern Ireland	35% by 2025	-16%	-0.2%

Notes: The Net Scottish Emissions Account (NSEA) adjusts actual emissions to account for trading in the EU ETS. The Scottish targets and emissions to date include Scotland's share of international aviation and shipping (IAS) emissions, as these are included in the measure of Scottish emissions under the legislated targets. IAS emissions are not included for Wales, Northern Ireland and the UK as a whole.

Scotland

From the outset, the model of devolution designed for **Scotland** meant that the Scottish Parliament could legislate in all fields except those explicitly listed in the Scotland Act as 'reserved matters'. Since climate matters were not listed amongst these, the authority to legislate on climate change was by default devolved. The Scottish Government has shared the long-term ambition of the UK government, but successive Scottish administrations have sought to be a step ahead of UK targets. The **2009 Climate Change (Scotland) Act**, passed unanimously by the Scottish Parliament, had higher targets and broader reach than its UK counterpart. It imposed a statutory obligation on the Scottish Government to reduce all greenhouse gas emissions, including emissions from aviation, by 42% by 2020 and 80% by 2050 (on a 1990 baseline). It also provided a legislative framework to regulate the activities of government, the private sector and individuals, and covered a vast array of devolved policies, including forestry, land use, the promotion of energy efficiency, waste reduction, recycling, as well as provisions for adapting to climate change. A new **Climate Change Bill** proposes increasing the 2050 target to 90%, with interim targets of at least 56% for 2020, 66% for 2030 and 78% for 2040.

Northern Ireland

Although Northern Ireland enjoys a similar level of constitutional authority to Scotland, prolonged difficulties in maintaining devolved government, as well as the ideological leanings of the Democratic Unionist Party, have frustrated climate action. The last Executive's Programme for Government included a target of reducing emissions by 35% (compared with 1990) by 2025, but this did not reappear in the more recent draft PfG, and the relatively limited progress in reducing emissions appears to have stalled.[12] Northern Ireland is the only territory within the UK without its own climate change legislation.

[11] NAEI (2018), *Greenhouse Gas Inventories for England, Scotland, Wales and Northern Ireland: 1990-2016*, cited in Committee on Climate Change, 2018, *Reducing UK emissions 2018 Progress Report to Parliament*.

[12] Cave, S, 2017, *Climate Change legislation in Northern Ireland: Is it just a lot of hot air?* Northern Ireland Assembly, Research Matters blog.

Wales

Until 2018, Wales had a 'conferred powers' model of devolution which gave it a more constrained set of powers. A key enabling power in the climate arena has been the statutory sustainable development duty, which legally obliges Welsh Ministers to promote sustainable development across government functions. The **Well-being of Future Generations Act** (2016), extended a sustainable development duty to public bodies, forcing them to think about the consequences of their decisions for future generations. There is currently a non-statutory target of a 40% reduction in emissions by 2020, but the **Environment (Wales) Act 2016** empowered Welsh Ministers to introduce statutory emissions reduction targets. The Act also stipulates at least an 80% reduction in emissions by 2050, backed by five-year carbon budgets, to ensure Wales meets UK and EU obligations. The Committee on Climate Change has advised that a more realistic statutory interim 2020 target would be 27%. Table 2.1 below charts progress in reducing emissions across the UK's territories. It reveals the significant progress achieved in the UK as a whole and in Scotland, but the slower pace of change in Wales and Northern Ireland.

2.3 Market integration

EU Internal Energy Market

EU internal energy market policies are designed to harmonise disparate market and distribution systems and increase grid connectivity. The **Third Energy Package** currently in place was aimed at removing the remaining barriers to free and fair competition and trade. It further opened up energy networks, reinforced harmonisation of rules, enhanced consumer protection, and extended regulatory oversight. It also compelled a structural separation of transmission activities from generation/supply activities (unbundling) to ensure non-discriminatory access to networks, and established new governance forums, including the **European Networks for Transmission System Operators** (ENTSOs) and the **Agency for the Cooperation of Energy Regulators** (ACER). ACER is responsible for promoting cooperation between member states' regulatory authorities, monitoring the development of the internal energy network and investigating market abuses. ENTSO ensures the coordination of grid operations and drafts future network investment plans.

Market Liberalisation and Reform in the UK

Since the privatisation of the electricity supply industry in 1989 and the development of the **British Electricity Trading and Transmission Arrangements** (BETTA) in the early 2000s, the UK has been a leader in energy market liberalisation. As such, it played a key role in promoting the liberalisation of the EU energy market. It has also been a strong supporter of an EU Energy Union as a means to ensure security of supply and reduce consumer costs.[13]

Alongside market liberalisation, the UK Government introduced market mechanisms in 2002 to promote investment in large-scale renewables. The **Renewable Obligation** (RO) placed a legal obligation on energy suppliers to source a gradually increasing proportion of the electricity they supplied to consumers from renewable sources (or to pay into an equivalent buy-out fund to be distributed to holders of Renewable Obligation Certificates [ROCs]). Issued to generators of electricity for free, ROCs could then be traded and used as evidence by suppliers to demonstrate their compliance with the obligation. The RO has been credited

[13] Skjærseth, 'Linking EU Climate and Energy Policies', 512. See also Chatham House, Staying Connected, (2017), p14

with enhancing significantly the UK's development of renewables, especially onshore and offshore wind.[14]

The UK Government set the RO for England and Wales, but although the obligation extended to Scotland, it required separate secondary legislation which gave flexibility to the Scottish Government to design a Scottish RO to match its strategic priorities (with a boost to marine renewables). Despite energy devolution, a Northern Ireland RO operates in step with these, and there is a single UK market both for trading ROCs and sharing the costs, with the latter ultimately borne by UK consumers. As these mechanisms constituted a form of state aid, they required the European Commission's consent as a legitimate use of **state aid for environmental protection**.[15]

In 2013, the electricity market in GB (but not Northern Ireland) underwent radical market reform. This was prompted by concerns about a lack of investment and rising energy prices, the capacity of the existing market to meet low carbon goals, and security of supply. The latter was exacerbated by the end of life of existing nuclear plants and the impending closure of older coal plants prompted by the EU Large Combustion Plant Directive and the Industrial Emissions Directive.[16] EMR in the UK was designed to be compatible with EU Single Market legislation, and the Commission's new guidelines on State aid for energy and environmental protection[17], as well as the wider EU climate and energy framework. EMR introduced a **carbon price floor** – a tax on fossil fuel generation - set limits to power plant emissions, introduced a **capacity mechanism** to ensure supply matched demand, and replaced the RO with a new subsidy regime. These **Feed-in-Tariffs with long-term Contracts-for-Difference** (FiTs with CfD) involve the UK Government paying the difference between the wholesale price and an agreed 'strike price'. Contracts are auctioned in two pots – one for developed renewable technologies (mainly onshore wind) and one for less-developed technologies like wave and tidal power. After its re-election in 2015, after promising to end subsidies and consents for new onshore windfarms in England and Wales, the Conservative government redirected support to less developed technologies and to new nuclear generation.

In contrast to their authority to set distinctive priorities within the RO, neither the Scottish Government nor the Scottish Parliament had any formal autonomy within the reformed electricity system. This meant they could no longer develop a Scotland-specific incentive to boost particular sectors, such as marine renewables. The change marked the first significant weakening of devolution since 1999. However, as a significant contributor to UK's decarbonisation and renewables goals, the Scottish Government could exercise limited 'soft power' within the inter-governmental arena. This was perhaps most notable in the protracted negotiations that helped secure the agreement of the UK Government, which in turn secured agreement from the European Commission, to provide a subsidy boost to remote island wind

[14] Bunn and Yusupov, 2015, 'The progressive inefficiency of replacing renewable obligation certificates with contracts-for-differences in the UK electricity market', *Energy Policy*, vol.82, p.299

[15] See, for example, European Commission, 2009, State aid N 414/2008 – UK Renewables Obligation – Introduction of a banding mechanism; European Commission, 2009, State aid N 590/2008 – United Kingdom (Scotland) Renewables Obligation – Introduction of a banding mechanism and specific support to wave and tidal stream generation.

[16] Grubb, M and D Newbery, 2018, 'UK electricity market reform and the energy transition: emerging lessons', *Cambridge Working Papers in* Economics, 1834.

[17] European Commission, 2014, Guidelines on State aid for environmental protection and energy, 2014-2020, 2014/C 200/01.

energy. This was directed in particular to the emerging renewables sectors on the Western Isles, Orkney and Shetland.[18]

The Single Electricity Market in Ireland

Northern Ireland is part of the UK market when it comes to financing energy developments through charges and taxation, but it has been part of a single wholesale electricity market with the Republic of Ireland since 2007. The Single Electricity Market (SEM) across the island of Ireland is one of the most obvious and successful initiatives in cross-border cooperation following the **Good Friday Agreement**. The SEM is governed by a joint committee of regulators from both territories, supported by frequent intergovernmental collaboration among government officials. Driven by the EU's drive towards market integration and the requirements of the 'third package', a new wholesale market was launched in October 2018. The **Integrated Single Electricity Market (I-SEM)** marks the introduction of day-ahead, intraday and forward markets as well as fundamental changes to the capacity payment mechanism.

Growing Dependency?

All EU member states are net importers of energy, especially oil and gas. More than half of the EU's energy needs are met from energy imports. The EU's commitment to decarbonisation and interconnection is as much about security of supply as climate change mitigation. Since the turn of the century, the UK has moved from being a net exporter to a net importer of energy, and as indicated in chart 2.4 below, now imports around 40% of the energy it consumes. This change is largely down to the decline in North Sea production. Imports are mainly in the form of oil and gas, but the UK has also been a net importer of electricity for over a decade, mainly via the interconnectors with the Netherlands and France.[19] Meeting domestic low carbon targets and enhancing security of supply implies greater reliance on electricity, with potentially greater challenges of intermittency in the case of renewables. **Enhanced interconnection** is central to the EU's energy union, and in 2014, the European Council set a minimum target of 10% by 2020, and at least 15% by 2030, of installed capacity be transported to neighbouring EU countries.

The UK has relatively low levels of interconnection with the rest of Europe, with GB interconnection currently at around 5%. This is an average percentage subject to fluctuation depending on the balance of demand and supply at any one time. The UK Government and the regulator, Ofgem, have been actively committed to enhancing interconnection, with new links to France, Belgium and Norway expected to double levels of interconnection by the early 2020s.[20] (Norway, although not an EU member state, is within the EU internal energy market.)

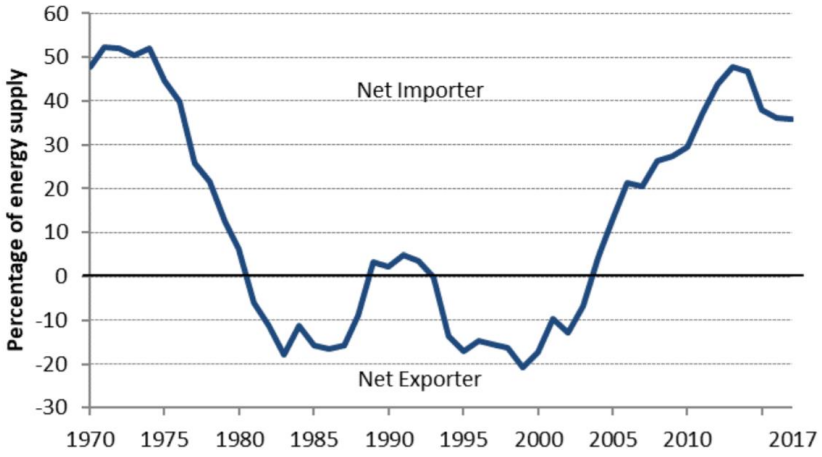
The industry in the UK has complained that EU IEM regulations give an **unfair competitive advantage** to generators outside the UK. Since 2015, these companies have enjoyed the right to bid for contracts in the UK's capacity market auctions on the same basis as domestic generators. But unlike domestic generators, interconnectors are not required to pay for use

[18] As of 2019, CfDs for on-shore wind on remote islands will compete alongside less developed technologies in 'pot 2', instead of having to compete against less expensive 'mainland' on-shore wind.
[19] Digest of UK Energy Statistics (DUKES), 2018, Annex G: Foreign Trade.
[20] European Commission, 2017, State of the Energy Union, Third Report, UK Factsheet.

of the national transmission system. Moreover, they are subject to the tax regime of the member state where power is generated, not where it is consumed. Only UK-based generators are required to pay the UK's carbon tax (the carbon price floor), which is significantly higher than in the rest of the EU – an expression of the UK's commitment to decarbonisation. As a result, electricity imported on the wholesale market is often cheaper and higher carbon.[21]

Increased interconnection is viewed by the government as essential to energy security. Interconnection projects under construction and in development phase have received substantial EU funding as **Projects of Common Interest** (PCIs) in support of the development of an integrated EU Energy Union.[22] The potential to expand interconnection as planned may be constrained by any loss of EU funding sources after Brexit.

Chart 2.4: *UK Import Dependency, 1970-2017*



Source: DUKES, 2018

2.4 EU Finance

The EU is a significant source of funding for those working towards the low carbon transition. Its objective was that climate change-related action will represent at least 20% of the EU's overall budget between 2014 and 2020. Low carbon projects span at least three of the five budget headings, including Economic, Social and Territorial Cohesion; Competitiveness for Growth and Jobs, and (to a lesser degree) Sustainable Growth.

[21] Drax, 2018, Joined at the volts: what role will interconnectors play in Great Britain's electricity future?; see also Houses of Parliament Parliamentary Office of Science and Technology, 2018, Overseas Electricity Interconnection. PostNote, no. 569, February.

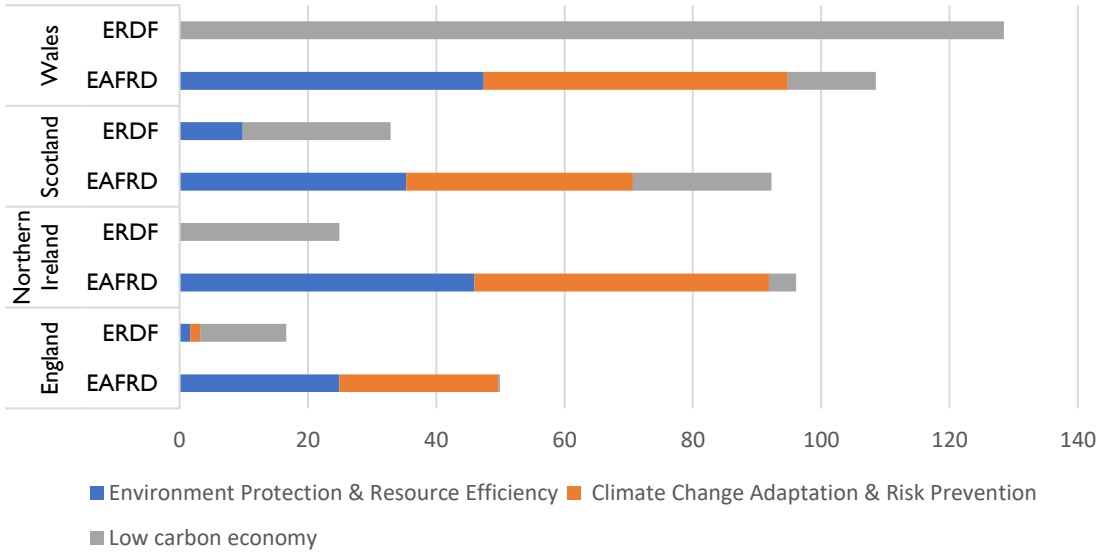
[22] House of Lords, European Union Committee. *Brexit: Energy Security*. January 2018, p34

Table 2.2: ESI Funds

European Regional Development Fund (ERDF)	corrects imbalances in regional development
European Agricultural Fund for Rural Development (EAFRD)	addresses particular challenges facing EU's rural areas
Cohesion Fund (CF)	funds transport & environment projects in countries where per capita gross national income (GNI) is less than 90% of the EU average
European Social Fund (ESF)	supports employment-related projects and human capital
European maritime and fisheries fund (EMFF)	supports sustainable fishing and diversification of coastal communities

Over 40% of EU funding is channelled through ***European Structural and Investment Funds* (ESI Funds)**. More than €114bn from ESI Funds – around 25% of the total - is expected to be targeted towards climate and low carbon energy projects, with particular emphasis on projects to support energy efficiency in buildings, businesses and transport. Around half of that comes from the EAFRD, with the ERDF and Cohesion funding also making significant contributions to climate and energy projects.[23] Among the five ESIF, the **ERDF** accounts for 43.2% of the total allocation and is worth €196bn for the 2014-2020 period. The UK is not eligible for Cohesion funding, but receives significant sums from the remaining four funds, including €2.7bn for the development of a low-carbon economy, €2.7bn for environmental protection and resource efficiency, and €2.4bn for climate adaptation projects.[24]

Chart 2.5: ESI Funding per capita for Energy and Climate Change 2014-2020 (€)



Source: European Commission, European Structural and Investment Funds – Data (8/8/2018)

[23] European Commission, 2015, Contribution of the European Structural and Investment Funds to the 10 Commission Priorities: Energy Union and Climate

[24] European Commission, 2018, European Structural and Investment Funds: Country Data for the UK (updated daily, accessed 7 Aug 2018)

ESI funds represent a small, but significant, proportion of the **devolved governments' budgets**. They are separate from Block Grant funding from the Treasury, and so not subject to the Barnett formula or block grant adjustment rules, although the Treasury can determine how funds are allocated across the UK.[25] They are especially significant for Wales, where funding equates to around €230 per head, compared to €85 per head across the UK as a whole;[26] **West Wales and the Valleys** is one of two regions in the UK to receive additional funding as a 'less developed region', with GDP less than 75% of the EU average (the other is Cornwall). The devolved governments are the Managing Authorities for ESI funds allocated to their territories, giving them the capacity to direct funds towards programmes that meet their own strategic objectives. Chart 2.5 provides an approximate estimate, using Commission data, of how much ESI funding has been allocated for energy, environment and climate change objectives within the constituent territories of the UK. This funding falls within one of three themes related to climate and energy: Low-Carbon Economy; Environment Protection and Resource Efficiency; and Climate Change Adaptation and Risk Prevention covered by ERDF and European Agricultural Fund for Rural Development (EARDF) funding.

ESI funds are thus a significant element of funding in the UK for climate and energy projects, but other EU sources also contribute UK funding in this sphere. Table 2.3 below underlines the significance of EU funding to UK climate and energy initiatives. Many of these funds are offered on a competitive basis. There are at least 106 EU funds available for environmental protection alone. The principal EU funding instrument dedicated to the environment is the **LIFE (Financial Instrument for the Environment)** programme. In addition, **Horizon 2020** funding has been particularly important for supporting low carbon energy research and innovation. Around a quarter of programme funds in the current round are dedicated to climate and energy research, with four out of the six Societal Challenges funded under the scheme focused in whole (climate action; clean and efficient energy) or in part (sustainable agriculture & forestry; 'green' transport) on support for low carbon research and innovation. Chatham House estimates that UK-based projects will have secured around €2.5bn for climate & energy research and innovation in the current spending round.[27]

Table 2.3: *EU Energy and Climate Change funding in the UK*

	EIB/European Fund for Strategic Investments	ESI Funds	ERDF	EU R&D – HORIZON 2020
	2013-2016	2014-2020	2014–2020	2014–2020
UK allocation	€9.3bn for energy projects	€2.9bn for development of low-carbon economy €2.6bn - climate adaptation projects €100m for climate action (LIFE programme)	Approx. €190m for UK projects since 2014 €33bn to fund grid interconnectors (Connecting Europe) & €5.85bn for *Trans-European Networks for Energy (TEN-E)*	Approx. €2.5bn expected for energy & climate R&D in the UK

Source: adapted from Chatman House, 2017, *Staying Connected*, p.29-34

[25] For example, in 2013, the UK Government decided to 'correct' the EU formula for allocating structural funds to 'minimise the impact of sudden and significant cutbacks in Northern Ireland, Scotland and Wales' (Department of Business, Innovation and Skills, 2013, *Government sets out how the UK's allocation of EU Structural Funds will be divided across England, Northern Ireland, Scotland and Wales*, Press Release 26 March 2013.

[26] House of Commons Library, 2016, Effect on Funding for Wales of the UK leaving the EU. CDP 2016/0186, 21 October.

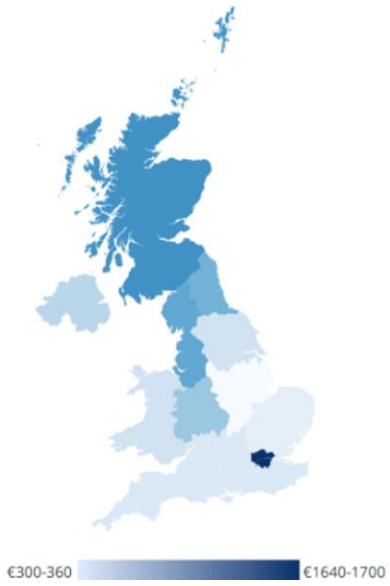
[27] Chatman House – Staying Connected

The **European Investment Bank (EIB)** also helps finance energy projects, by providing typically up to 50% loan funding for new, often high risk, projects supporting the EU's strategic objectives. These include infrastructure projects in energy and transport, research, development and innovation, and the expansion of renewable energy and resource efficiency. In 2015, the EIB provided €13.8bn finance for energy projects, 83% of which was for projects within the EU.[28] A 2017 report claimed that the EIB is financing roughly two-thirds of all European offshore wind capacity.[29] An example is the £525m loan toward the construction of the Beatrice offshore wind farm 14km off the coast of Caithness - the largest single EIB loan for an offshore project to date.

Along with other member states, the UK is a shareholder within the EIB and one of its biggest subscribers. Although a net contributor overall, it has benefited disproportionately from EIB funding into renewable energy projects and grid infrastructure; since 2007, just under €17bn has been invested in UK energy projects.[30] Within the UK, the city of London has been the biggest recipient of per capita EIB funds overall, but as the map indicates, Scottish-based projects have also benefited significantly.

Over 90% of EIB funding is targeted to projects within EU member states, to support the EU's strategic priorities. There has already been a significant drop-off in loan deals since the Brexit referendum, and access to funding once the UK leaves the EU remains uncertain.

EIB finance per capita by UK region, 2001-2016



Source: Institute for Government analysis of EIB, Annual Reports and Statistical Reports, 2001-2016.

[28] European Investment Bank, 2017, *Better Infrastructure, Better Economy*, p.4
[29] *Ibid.*, p.5
[30] European Investment Bank, *Finance Projects, Multi-Criteria List*, last accessed 30 November 2018.

3. The Multi-level Governance of Climate & Energy Policy after Brexit

> *"The UK's exit from the European Union (EU) could have a significant bearing on our future energy system… Being part of the internal European energy market is vitally important, as it safeguards our energy security, means lower costs for households and businesses and helps create jobs and investment."*
>
> Scottish Government, Scottish Energy Strategy, 2017

The impact of Brexit on the multi-level governance of climate and energy policy in the UK is difficult to anticipate, especially while the meaning and scope of Brexit remains unclear. Short and long-term effects will be dependent upon the terms of withdrawal, the duration of any transitional period, and especially the nature of the future UK-EU relationship beyond transition, as well as the behavioural responses of a wide range of institutional actors.

3.1 Short-term Continuity and Change

Legal Continuity

If the UK leaves the EU after a negotiated agreement, we can expect continuity in the short-term. An agreement implies a transition period, providing space for the future UK-EU relationship to be negotiated. Despite being a third country after leaving the EU, during the period of transition the UK and its constituent parts will remain subject to EU legal and regulatory frameworks, including in areas of energy and environmental governance.

Domestically, legal continuity has also been provided for in the **EU (Withdrawal) Act**. As well as legislating for the country's departure from the EU, the Act is designed to transpose EU legislation into domestic law, creating a new category of UK law, known as '**retained EU law'**. The UK Act gives extensive time-limited executive powers to UK ministers to 'deal with deficiencies' in this legislation 'to prevent, remedy or mitigate' any problems in the operation and application of retained EU law as a result of the process of the UK's departure from the EU. The UK Act gives similar, more constrained, executive powers to the devolved administrations to deal with deficiencies in retained EU law falling within devolved competence. It also potentially imposes constraints upon devolved competences by preventing the devolved institutions from modifying retained EU law in some (as yet unspecified) policy areas to be set out in regulations.

Market Integration

During transition, the UK would remain within the EU internal market, including the energy market, and subject to its rules. This entails continuity in the short-term on internal trade, freedom of movement, emissions trading, state aid and tariffs on imports. The UK would also remain subject to upcoming market coupling laws and provisions on network codes. However, EU exit will bring an end to UK membership of the **Agency for the Cooperation of Energy Regulators (ACER)**, the influential EU Agency charged with overseeing energy market integration and regulatory convergence. The key decision-making body within ACER,

the Board of Regulators, is made up of the National Regulatory Authorities of EU member states only.

Although the UK will remain within the Customs Union during transition, and subject to the provisions the EU has agreed with third countries on accessing EU markets, those countries will not be obliged to include the UK in reciprocal arrangements they have negotiated with the EU. The current Withdrawal Agreement commits the EU to request to its trading partners that the UK be treated during transition as if it were still a member state, but there is no obligation for trading partners to comply with such a request. This would present uncertainties and risks for the renewables sector in both manufacturing and the knowledge economy at least in the short-term; the United States, China, Taiwan and Japan were identified by Renewables UK as among the top ten export destinations for UK-based wind and marine companies in 2017.[31] In the longer-term, there are of course potential opportunities to be gained from new trade deals.

Financial Disruption

During a transition period, the UK Government would be committed to honouring its obligations to the EU budget until the end of 2020 and would continue to benefit from funding schemes supported by that budget. However, any extension to the transition period would reach into the next budgetary cycle (the Multiannual Financial Framework 2021-2027). After 2020, even if still in a period of transition and thus subject to EU law, the UK would be regarded as a third country with respect to EU finances, including those intended to promote research and innovation, climate change mitigation, adaptation, renewables and energy market integration. The UK may still be permitted to participate in such programmes, but under the rules designed for third country access.

Once the UK leaves the EU, it will cease to be a member of the European Investment Bank, even during the transition period. UK-based projects may be eligible to apply from outside of the EU, but as noted above, around 90% of the EIB's funding is targeted at EU member states to support the strategic objectives of the EU. UK-based projects, including in ambitious offshore renewables and energy infrastructure, have benefited significantly from EIB funds to date, with around £17bn since 2007 (see p.16). The current **Withdrawal Agreement** provides that the UK Government will receive a refund of its paid-in capital in 12 annual instalments, but there is no guarantee that these funds would be directed towards renewable energy project finance in the UK.

These continuities and changes will apply to the implementation of the **revised Renewable Energy Directive and Energy Efficiency Directive**, adopted in December 2018, and the **Effort Sharing Regulation** agreed in May 2018. These place obligations on member states to work towards 2030 targets and create incentives to support progress. For as long as the UK remains in a period of transition, it will be expected to continue to face the obligations created by EU climate and energy policies and will remain subject to EU energy and environmental governance. However, the UK would lack the capacity to participate in the decision-making that shapes such policies and will not have the access that is afforded to member states to the funding programmes underpinning them.

Of course, there will only be a transition period if there is an agreement on withdrawal. Leaving without a deal remains a possibility. Under such a **'No deal' scenario**, the EU Treaties would cease to apply to the UK on exit day, and all EU energy, environmental and

[31] UK Renewables, 2018, *Export Nation: a Year in UK Wave and Tidal Exports*

Single Market law would cease to apply directly to the UK, unless incorporated into domestic law by the EU (Withdrawal) Act. The broad scope of retained EU law within that legislation, coupled with the UK's continued commitments as a signatory to international climate agreements, suggests that there may still be extensive legal continuity even under a no deal scenario. Greater rupture may be felt with respect to the energy market and trade, including carbon trading. The effects include an immediate de-coupling of the UK and EU energy markets, no access to the EU ETS, an end to the rules governing cross-border trade in energy across interconnectors and an urgent need to establish new alternative trading arrangements, as well as an end to the broader rights and obligations of the EU internal market. In the scenario it painted in *Trading Electricity if there's No Brexit Deal*[32], the UK Government implied that continuing to trade within the EU internal energy market would require significant additional bureaucracy and costs for a wide range of market participants.

3.2 Long-term Uncertainty: the Future UK-EU Relationship

Anticipating the effects of Brexit in the climate and energy sectors in the longer term remains challenging, not least because we still have little idea of what the nature of the longer-term UK-EU relationship will be. The Withdrawal Agreement, if implemented, sets the terms of exit and the rights and obligations to be applied during the period of transition, with some lasting obligations attached to decisions taken prior to and during that period. The accompanying **Political Declaration** sets out a framework for agreeing a future relationship, but it is non-binding and, in any case, so vaguely worded as to leave all options on the table for future negotiations.

The **white paper** published by the UK Government in July 2018 set out its negotiating priorities.[33] Within the energy and climate sector, the paper underlined the UK Government's commitment to continued cooperation, noting the UK's leadership on climate change mitigation and energy market liberalisation. Although the paper underlined the commitment to leaving the Single Market, it appeared to remain open to the possibility of remaining within, or at least 'participating in', the EU Internal Energy Market. The white paper also foresaw advantages in remaining closely associated with EU energy governance forums, noting that it will seek participation in the Inter-Transmission System Operator Compensation Mechanism for the UK's TSOs (National Grid, Scottish Power, SSE, and the System Operator for Northern Ireland). This mechanism, created by a European Commission regulation, provides compensation to cover costs and losses associated with cross-border trade in electricity. The white paper also sought continued membership for the UK's TSOs in the European Networks of Transmission System Operators for Electricity (ENTSO-E) and Gas (ENTSO-G). ENTSO-E includes TSOs from non-EU member states, while ENTSO-G gives observer status to eight affiliated countries committed to EU energy market integration and the wider EU energy and climate agenda.

However, the UK Government has repeatedly declared its commitment to leaving the Single Market and the Customs union, with negotiating 'red lines' including an end to freedom of movement, regulatory autonomy and an end to the jurisdiction of the European Court of Justice. The Political Declaration appears to incorporate these priorities within the context of 'an ambitious, broad, deep and flexible partnership' that balances rights and obligations.

[32] UK Government, *Trading Electricity if there's No Brexit Deal*

[33] UK Government, 2018, *The Future Relationship between the United Kingdom and the European Union*.

These would, it states, preserve 'the autonomy of the Union's decision making and be consistent with the Union's principles, in particular with respect to the integrity of the Single Market and the Customs Union and the indivisibility of the four freedoms'. Equally, it would preserve 'the sovereignty of the United Kingdom and the protection of its internal market, while respecting the result of the 2016 referendum including with regard to the development of its independent trade policy and the ending of free movement of people between the Union and the United Kingdom'.[34]

The Political Declaration provides little detail on the future relationship with respect to energy, beyond a commitment to continued cooperation 'to support the delivery of cost efficient, clean and secure supplies of electricity and gas, based on competitive markets and non-discriminatory access to networks', continued mechanisms for interconnection and technical cooperation.[35] With respect to the latter, it mentions ENTSO-E and G, but there is no mention of ACER.

The white paper had previously proposed a **'common rulebook'** to cover carbon pricing and technical rules for electricity trading, such as market coupling, but noted that 'the UK does not believe that participation in the IEM should require a common rulebook on wider environmental and climate change rules'.[36] In practice, isolating the technical and regulatory energy arrangements from the other elements would be challenging given the integrated and interconnected priorities of the EU climate and energy framework. Remaining within the EU Emissions Trading Scheme (ETS) - an option noted in the white paper which could maintain consistency in carbon pricing - would imply accepting the jurisdiction of the ECJ and the monitoring and compliance oversight of the European Commission, without having the influence to shape the scheme's development. Remaining within the Inter-Transmission System Operator Compensation Mechanism requires oversight by ACER, despite having no UK representation on ACER's Board of Regulators. Even Norway, fully integrated into the Internal Energy Market and the wider EU internal market despite not being a member state of the EU, has no representation at ACER. Concerns over ACER's influence over Norwegian energy policy now and in the future have sparked heated debates in Norway.[37]

Moreover, the Withdrawal Agreement – which, in contrast to the Political Declaration, is legally binding if implemented – includes the commitment to ensure that common levels of environmental protection provided by law, regulations and practice at the end of the transition period are maintained as a baseline thereafter, including in relation to climate change and emissions reduction. While appearing to signal the UK's intention of leaving the EU ETS, it also requires the UK to implement 'a system of carbon pricing of at least the same effectiveness and scope'.[38] More broadly, Brexit could affect investor confidence and supply chains in the renewables sector if the future relationship one that keeps the UK at a distance from the EU internal market and Customs Union. The recent upsurge in renewables in England is largely a reflection of the growth of offshore wind, where the UK is a recognised

[34] *Political Declaration Setting out the Framework for the Future Relationship between the European Union and the United Kingdom*, para. 4.
[35] *Ibid.*, paras 66-67
[36] Op cit., Para.140
[37] https://www.montelnews.com/en/story/acer-deal-clouds-future-of-norwegian-cross-border-cables/899895
[38] Withdrawal Agreement., Article 2 (5).

leader. But the suppliers of the parts used to build wind farms originate mainly in the rest of the EU.

3.3 The Northern Ireland Backstop and the SEM

Limiting the impact of Brexit on the Irish border – especially between Ireland and Northern Ireland – has been a priority for all sides throughout the negotiations. As well as the broader implications for cross-border mobility, trade and security, there have been specific concerns regarding the all-island electricity market. The white paper underlined the UK Government's commitment to ensuring that the Single Electricity Market (SEM) across the island of Ireland will be maintained irrespective of the broader UK-EU energy relationship. This is protected in the Withdrawal Agreement as an element of the Northern Ireland backstop.

The **'backstop'** – the Protocol on Ireland/Northern Ireland included as part of the Withdrawal Agreement – would have the effect of maintaining an open border on the island of Ireland. It provides for a single customs territory for the UK and the EU and would ensure that Northern Ireland remained closely integrated with key aspects of the EU internal market, and subject to EU law. With respect to energy, specifically electricity, Article 11 of the Protocol stipulates: '*The provisions of Union law governing wholesale electricity markets listed in Annex 7 to this Protocol shall apply, under the conditions set out therein, to and in the United Kingdom in respect of Northern Ireland*'. These provisions include the Directive establishing common rules for the internal electricity market, regulations governing cross-border access to electricity networks, the Directive that established the ACER, the industrial emission Directive on pollution prevention and control, and the Directive establishing the EU emissions trading scheme. The protocol does not include the Renewables and Energy Efficiency Directives which are a critical element of the EU's energy ambitions, and key to its climate ambitions.

The Protocol is intended as a fall-back for the end of the transition period, to be replaced in whole or in part by agreements on the future UK-EU relationship. However, scepticism about the immediate prospect of such a deal have generated deep concerns among a diverse range of voices that the backstop may be here to stay. Brexiters fear it ties the whole of the UK into a Customs Union with the EU. Unionists in Northern Ireland fear that protecting the frictionless border on the island of Ireland will create barriers at the border between Northern Ireland and the rest of the UK which will undermine the Union. Scottish Conservatives also fear the impact of Northern Ireland exceptionalism on the Anglo-Scottish Union, while the SNP Government has criticised the competitive advantage it gives Northern Ireland, and the anticipated negative repercussions this may have for the Scottish economy. The prospect that the backstop may establish permanent or semi-permanent arrangements from which the UK cannot unilaterally withdraw presents the biggest hurdle to the Withdrawal Agreement securing the consent of the UK parliament.

4. Climate & Energy after Brexit: Implications for Devolution

4.1 Devolution and the Repatriation of EU competences

The process of negotiating Brexit has generated an unprecedented intensification of intergovernmental relations between the UK Government and the devolved governments, including new inter-ministerial fora such as the **Joint Ministerial Committee (EU Negotiations)**. Yet despite the extent of engagement, the devolved governments have been largely marginalised from the Brexit process, with little opportunity to shape the UK's negotiating position. Both the Scottish and Welsh Governments have opposed strongly the UK Government's ambition to leave the Single Market and the Customs Union, but their concerns have gained little traction in Whitehall.

Yet, there is considerable intersect between the competences currently exercised by the EU and areas of devolved competence, including the environment, climate policy and – to a lesser extent – aspects of energy policy. In addition, both the Scottish and Welsh Governments have set out ambitious renewables and climate change agendas, with devolved policies shaped and incentivised by EU directives, regulations and funding.

The UK Government has argued that the repatriation of EU competences will bring considerable new powers to the devolved institutions, enabling them to take decisions in many areas of devolved competence that were previously under the jurisdiction of the EU. However, the EU (Withdrawal) Act, discussed above, will prevent the devolved institutions from making changes to retained EU law in policy fields set down in regulations. (The original version of the bill gave the UK parliament competence over *all* areas of retained EU law, including those within devolved competence).

It's not yet clear the extent to which the regulations will constrain the policy autonomy of the devolved institutions, but these provisions were among the reasons why the Scottish Parliament withheld its consent for the Withdrawal Bill during the legislative process, and instead passed its own 'Continuity' legislation. That legislation was subsequently referred by the UK Government to the UK Supreme Court. Although the Court ruled that, at the time of its passing, the Bill was largely within the competence of the Scottish Parliament, most of it has been rendered beyond competence now that the EU (Withdrawal) legislation has been enacted.[39] Some key elements remain, however, including ministerial powers that would permit the Scottish Government to 'keep pace' with EU law after Brexit. This could have the potential for creating policy divergence in repatriated policy areas, especially if the UK policy diverges from EU policy.

4.2 Common Frameworks

The regulations restricting devolved competence have yet to be laid but are expected to be limited to policy areas where the UK Government, after discussion and negotiation with the devolved governments, believes that UK-wide legal and regulatory frameworks remain

[39] Chris McCorkindale and Aileen McHarg, 2018, 'Continuity and Confusion: Towards Clarity? – The Supreme Court and the Scottish Continuity Bill'. *UK Constitutional Law Association blog*

necessary. Determining when common frameworks are necessary, and which institutions have a role in deciding and governing these, has created both collaboration and confrontation in relations between the governments. A preliminary analysis by the UK Cabinet Office identified 153 policy areas where EU law intersected with devolved competence. Of these, they identified 49 policy areas where no further action is required, 82 policy areas where non-legislative common frameworks may be required, and 24 policy areas where a common legislative framework may be necessary.

Table 4.1: *UK Government Analysis of Areas of EU Climate and Energy law that intersect with devolved competence in Scotland, Wales and Northern Ireland*

No action required		***Non-legislative frameworks***		***Common legislative frameworks***	
Carbon capture and storage	NI, S, W	Efficiency in energy use	NI, S, W	Environmental quality - ozone depleting substances and F-gases	NI, S, W
Energy Performance of Buildings Directive	NI, S, W	Environmental law concerning energy planning consents	NI*, W*	Environmental quality - waste packaging and product regulations	NI, S, W
Environmental law concerning energy industries	NI*, S*, W*	Environmental quality - marine environment	NI, S, W	Implementation of EU Emissions Trading System	NI, S, W
Heat metering and billing information	NI, S*	Environmental quality - waste management	NI, S, W		
High efficiency cogeneration / Combined Heat and Power (CHP)	NI*	High efficiency cogeneration / Combined Heat and Power (CHP)	S		
Internal energy market / Third Energy Package	NI	Radioactive waste treatment and disposal	NI*, S*, W*		
Onshore hydrocarbons licensing	NI, S, W				
Renewable Energy Directive	NI*, S*				

Notes: *Areas marked with an * are identified as those where the devolution intersect requires more detailed discussion.*

Sixteen of the areas identified relate directly to climate and energy policy, though many more address related fields, especially environmental policy, land use and transport.[40] However, as set out in Table 4.1, only three of these are identified as requiring common legislative frameworks. The analysis is not definitive: it had the status of a working document and was

[40] For a risk analysis of Brexit on broader environmental policy, see Burns, *et al.*, 2018, UK Environmental Policy Post-Brexit: A Risk Analysis, a report for Friends of the Earth, Brexit and Environment, March 2018.

not co-produced by the devolved governments. Perceptions of the necessity of common frameworks will vary between territories and will, in any case, be influenced heavily by the future UK-EU relationship.

The devolution intersect and the anticipated need or otherwise for a common framework also reflects variations in the extent of devolved powers. Energy powers are more extensive in Northern Ireland than in Scotland and Wales, with the powers of the National Assembly for Wales the most constrained. Notwithstanding the numerous areas marked as requiring further discussion, including the Renewable Energy Directive, perhaps the most notable is the anticipated need for UK-wide legislation should the UK decide, or be required, to leave the EU Emissions Trading Scheme. The reduction in the power sector fostered by the ETS and other EU (and UK) energy and climate policies have been central to the progress made to date in reducing emissions in Scotland.

4.3 Towards Shared Governance after Brexit?

All governments are agreed that there will be some areas where it makes sense to operate uniformly across the UK (or Great Britain, with separate arrangements for Northern Ireland). For the UK Government, common frameworks are necessary to preserve the UK's internal market. The devolved governments are as keen as the UK Government to avoid new internal barriers to trade and mobility. The issue has been about the extent to which such frameworks would constrain devolved competence, who gets to decide on their scope and implementation, and whether the process would be based on consent rather than imposition.

The debate on common frameworks feeds into a wider review of shared governance after Brexit. The Joint Ministerial Committee - in a plenary format that brings together the Prime Minister and First Ministers – initiated a review of the machinery and processes of intergovernmental relations in response to criticisms that the system was not fit for purpose. The outcome of this review is yet to be determined, but one option may be an enhanced role for the devolved governments over policy areas that are reserved to the UK parliament, such as energy regulation, trade and competition, perhaps as a quid pro quo for an acceptance of some limits to their policy autonomy in devolved matters, including the environment. (An alternative outcome which imposed the latter constraint on autonomy without the additional influence over reserved matters is unlikely to be welcomed by the devolved governments).

Concerns have also been raised, especially by the environmental lobby, about a '**governance gap'** after the UK leaves the EU, with calls for new institutions to coordinate environmental policy and oversee its implementation and enforcement across the UK, not least to help ensure the UK continues to adhere to climate commitments.[41] It is not yet clear whether such bodies will be created on a GB or UK-wide basis, and if so, whether and how they can hold governments to account and/or constrain their capacity to follow distinctive policy paths. Given the sovereignty of the UK parliament and the absence of sovereign authority in the devolved parliaments, it's possible that the devolved institutions could face greater regulatory constraints.

[41] For further analysis, see Burns, C., Carter, N., Cowell, R., Eckersley, P., Farstad, F., Gravey, V., Jordan, A, Moore, B. and Reid, C., 2018. *Environmental policy in a devolved United Kingdom: Challenges and opportunities after Brexit*

The draft Withdrawal Agreement included extensive shared governance arrangements between the UK and the EU, with the implementation of the commitments it entails, as well as amendments and disputes, overseen by an **EU-UK Joint Committee**. The Agreement includes commitments relating to customs arrangements, emissions trading, and a level playing field in environmental standards, employment rights and state aid, some of which fall within devolved competence. It also includes oversight of the Northern Ireland backstop. As noted above, the backstop would ensure that Northern Ireland would remain in regulatory alignment with the EU Single Market, including those laws and rules of the EU internal energy market necessary to underpin the single electricity market on the island of Ireland.

The Joint Committee is to be co-chaired and composed of 'representatives of the Union and of the United Kingdom'. The role and representation of the devolved governments is not considered. The Agreement does note that the Joint Committee will have oversight over a variety of specialised sub-committees, including a Committee on issues related to the implementation of the Protocol on Ireland/Northern Ireland. Article 16 of the Protocol requires that committee to consider representations and proposals presented to it from the North-South Ministerial Council (which includes ministers from the Northern Ireland Executive and the Irish Government), the North-South Implementation Bodies, and equality and human rights commissions in Northern Ireland. In an apparent further concession to Northern Ireland, the Prime Minister pledged to provide the Northern Ireland Executive and Assembly with 'a role' in relation to the UK-EU Joint Committee's oversight of the backstop, in light of 'the unique circumstances of Northern Ireland'. This vague commitment, rendered all but meaningless in the face of the prolonged absence of an Executive and functioning Assembly in Northern Ireland, also implies limited opportunities for the Scottish and Welsh Governments to engage meaningfully with the Joint Committee.

4.4 Lost opportunities?

In the longer term, Brexit poses significant risks for the climate and energy ambitions of the devolved nations. As was clearly indicated in Chart 2.5, the devolved territories have benefited disproportionately from European Structural and Investment Funds targeted at climate and low carbon energy policies. All three devolved territories have received higher per capita funding than England from the European Regional Development Fund and the European Agricultural Fund for Rural Development, with Wales the most exposed. The UK Government could, in theory, opt to replace these funds, but there are no guarantees that such funds would be provided at equivalent levels, with similar allocation models, and similar strategic objectives. Uncertainty also surrounds the future of competitive funding for research & innovation, as well as the availability of programme funding and finance from the EIB for infrastructure projects. The Scottish renewables sector, in particular, has benefited disproportionally from competitive EU funding. In these cases, it may be possible for the UK to negotiate participation in exchange for a contribution to funds, but this will be a matter for future negotiations. Beyond direct funding, the potential losses in investment as well as the heightened costs of trade are difficult to quantify.

The EU policy framework has incentivised the growth and development of the low carbon sector. As a front-runner in low carbon energy, Scotland within the EU could have capitalised on opportunities afforded by the new Renewable Energy Directive. In particular, the revised RED acknowledges that '*Local and regional authorities often set more ambitious renewable targets in excess of national targets*', suggesting that the initiatives designed to support these should be

expanded. The RED further underlines support for "frontrunner regions" to develop joint services and projects, as well as supporting and incentivising 'renewable energy communities'.[42] It is not difficult to imagine Scotland, in particular, capitalising on such initiatives, but outside of the EU, these opportunities are lost.

There may, of course, be some advantages to Brexit in the longer term. Leaving the EU ETS could pave the way for a more integrated UK approach to carbon pricing. In theory at least, a UK state aid regime could be better tailored to UK strategic priorities and geographic needs. Brexit also presents an opportunity to reboot the system of multi-level government with a genuine sharing of power between the UK's territories. Much will depend on the road taken by the UK as a nation-state outside of the EU, and whether it can retain all of its constituent territories on the journey. But from this vantage point, the risks to the climate and low carbon energy sector appear more apparent than the opportunities.

[42] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. *Official Journal of the European Union*.