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BREXIT WHITE PAPER CONFUSES EURATOM DEBATE

The 2008 EU Amendment Act is not a justifiable legal basis for the UK government's belief that Brexit must also mean an exit from Euratom, write Jonathan Leech and Rupert Cowen of Prospect Law.

The government's white paper on the UK's "exit from and new partnership with" the European Union published last week confirms its position that "When we invoke Article 50, we will be leaving Euratom as well as the EU." In support of this, the document asserts that the European Union (Amendment) Act 2008 "makes clear that, in UK law, references to the EU include Euratom". This is presumably an assertion that references to the EU in the Referendum Act, the referendum question and the withdrawal bill automatically include Euratom – something both the Leave and Remain campaigns omitted to mention.

The 2008 EU Amendment Act tells us that "A reference to the EU in an Act or an instrument made under an Act includes ... a reference to [Euratom]." The white paper overlooks the point that the 2008 Act does not apply to Article 50 of the Treaty on European Union – which is of course neither an Act nor an instrument made under an Act. This is significant, because there is a good legal argument that triggering Article 50 of the Treaty on European Union will have no legal effect on the UK's membership of Euratom, and that to exit Euratom the government will need to trigger equivalent exit provisions in the Euratom Treaty. This would mean, absent that separate trigger, legally the UK remains in Euratom.

The white paper also states that "The Euratom Treaty imports Article 50 into its provisions." This is correct – to a point. The Euratom Treaty applies a version of Article 50, re-written to refer to Euratom and the Euratom Treaty in place of references to the EU. Again, this supports existence of a separate Euratom exit process that is similar to but is not part of a single EU Article 50 process. This is an important distinction. It gives the government a choice, at least in relation to its approach to the timing of Euratom exit – a choice that it would be unwise to ignore.

The legal meaning of the withdrawal bill is also critical. The bill is the government's response to Supreme Court confirmation that parliamentary authority is required before Article 50 can be triggered. It is highly likely that the government also needs parliamentary authority to trigger exit from Euratom.

Clause 1 is very specific. "The Prime Minister may notify, under Article 50(2) of the Treaty on European Union ..." There is nothing in the 2008 Act to suggest that reference to the Treaty on European Union automatically includes reference to the Euratom Treaty. Arguably the bill as drafted does not therefore give authority to trigger exit under the Euratom Treaty. It would have been preferable to include separate authority for Euratom exit, both to avoid this element of doubt and to provide a clear basis for the government to take additional time before triggering Euratom exit should the government conclude that this is in the national interest.

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In addition to securing parliamentary approval for a Euratom exit, the government will need to be confident that, once triggered, the two-year Euratom exit timetable is sufficient to put in place replacement arrangements to avoid a damaging hiatus for the UK nuclear industry. This is likely to require a good deal of preparatory work before starting the 2-year countdown.

Since the UK accession to Euratom in 1973 the regulation and international acceptability of the UK nuclear industry have been closely entwined with Euratom. The Euratom Treaty sets out eight areas of activity: promotion of research, establishing and policing uniform safety standards, facilitating investment, ensuring a regular supply of ores and fuels (via the Euratom Supply Agency), applying safeguards, exercising rights of ownership over 'special fissile materials', creation of a nuclear common market and establishing relations with other countries and international organisation to foster progress in nuclear energy. Of these areas, safeguards and international relations are likely to place the greatest strain on the exit timetable. Withdrawal also creates vast uncertainty for the future of UK fusion research.

Safeguards are essential to international nuclear commerce – verifying for an international audience that nuclear material is where it should be and is used only for its intended purpose. International safeguards are administered by the International Atomic Energy Agency (IAEA) under the Non-Proliferation Treaty (NPT), which requires that non-nuclear-weapon states accept comprehensive safeguards on all nuclear material. Similar arrangements are in place to safeguard civil nuclear material in nuclear weapon states (including the UK). Currently the UK satisfies its safeguarding obligations via Euratom, with Euratom inspectors carrying out inspections of UK plant and inventories and submitting reports to the IAEA.

Nuclear trade between the UK and other Euratom members relies on common Euratom safeguarding arrangements. Nuclear trade between the UK and other countries relies on either Euratom nuclear cooperation agreements, or bilateral nuclear cooperation agreements predicated on UK continued participation in Euratom safeguards.

Of the circa 50 bilateral nuclear cooperation agreements the UK has entered into since 1956 (when the European Atomic Energy Community came into being), over 30 specifically recite and rely upon UK participation in Euratom safeguards. Without demonstrably adequate safeguards key countries will simply cease trade with the UK in nuclear materials, technology and know-how. For example, absence of a Section 123 Agreement with the US would prevent supply of key components for both the Hitachi-GE ABWR and Westinghouse AP1000 reactors. Absence of a nuclear cooperation agreement with Australia would cut off a key source of uranium imports. Perhaps more crucial would be maintaining supplies of medical isotopes.

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If the government continues to assert that Euratom and EU exit timetables must align then it will have two years to:

- design, resource and implement new UK safeguarding arrangements in line with accepted international standards;
- replace current safeguarding commitments under the NPT (which are also predicated on Euratom membership);
- identify and plan negotiation of replacement nuclear cooperation agreements with every country with which the UK has ongoing nuclear trade; and
- ensure it has the resources to conduct all of those negotiations, and be confident that those negotiations will be concluded successfully before Euratom exit takes effect.

Disentanglement from the Euratom Supply Agency and Euratom ownership arrangement for special fissile materials (including enriched uranium and plutonium) should, hopefully, prove to be predominantly an administrative task, provided that the UK can satisfy continuing Euratom members as to its safeguarding arrangements.

Turning to fusion research, the UK based Joint European Torus experimental fusion facility is dependent on Euratom funding. If the facility is to continue, the UK government will need to negotiate a new basis for UK involvement in the project and new funding arrangements, whether as a “third country”, “associated country” or on some other basis. Exiting Euratom also calls into question UK involvement in the International Thermonuclear Experimental Reactor, in the initial stages of construction in France. In both cases, in addition to protecting UK involvement in ongoing research, UK interests in intellectual property used or created in those projects will require careful consideration if the UK is not to be disadvantaged in future exploitation of fusion technology.

By Jonathan Leech and Rupert Cowen

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