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BREXIT AND EURATOM: NO RUSH TO EXIT?

As the UK government moves towards the formal process to exit the EU, Jonathan Leech and Rupert Cowen consider the implications of Brexit for the nation's membership of the European Atomic Energy Community (Euratom).

We would challenge the view that withdrawal from Euratom is inevitable, at least at this stage, and consider how the government's approach now may help or harm its ability to minimise disruption to the UK's position within the global nuclear community.

It is clear from Theresa May's speech on 17 January that the government sees little room for compromise in exiting the EU - there is to be no *"partial membership of the European Union, associate membership ..., or anything that leaves us half-in, half-out. ... We do not seek to hold on to bits of membership as we leave."* It is also clear that Government is committed to re-establishing the supremacy of UK law within the UK. *"Leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country. Because we will not have truly left the European Union if we are not in control of our own laws."*

Where does this leave UK membership of Euratom? Created alongside the European Economic Community in 1957, Euratom has long shared the institutions of the EU but continues as a separate and legally distinct entity. Remaining in Euratom would entail partial membership of EU institutions and would leave significant areas of UK law subject to directives and regulations made in Brussels and (ultimately) interpreted in Luxembourg.

A rapid exit from Euratom could however do serious harm to the UK nuclear industry. One of the most significant aspects of Euratom is its role in establishing members' credibility and acceptability within the global nuclear community. Many of the nuclear co-operation agreements relied on by the UK are in fact Euratom agreements. Where the UK has current bilateral nuclear cooperation agreements in place, those agreements are predicated on application of the Euratom safeguards regime within the UK. Nuclear cooperation agreements can take much time to put in place, possibly longer than the two-year negotiating window provided by the Article 50 process.

Without adequate arrangements in place for international cooperation, including safeguards to provide assurance that nuclear materials and technology will be applied only for peaceful purposes, in many cases it would not be a matter of trade on unfavourable terms - but simply of no trade at all. This could have serious implications within the UK for nuclear new build and the nuclear fuel cycle, and also for progress in dealing with the UK's waste and legacy decommissioning liabilities.

Some commentators assert that a UK exit from Euratom is an inevitable consequence of triggering Article 50 to exit the EU. This would place the UK in an invidious position. In

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addition to untangling all other aspects of Euratom without prejudicing UK interests, it would require wholesale replacement of the UK's current nuclear cooperation agreements (including arrangements within the Euratom Treaty itself) within the fixed two-year timetable.

All of this would have to be done in the face of an automatic hard exit at the end of that period unless all other members unanimously agree an extension. It may be that, on a political and practical level, ultimately the UK has no real choice other than to exit Euratom and Theresa May's statements this week certainly point to this. However, put simply, accepting the view that a Euratom exit is automatic would convert the challenge of untangling Euratom within the two-year exit timetable from a shared problem faced by all Euratom members to a UK problem with a UK deadline. This is neither a necessary nor a strong position from which to open negotiations. It is also not what the Euratom Treaty says.

There is no legal link between the triggering of Article 50 under the Treaty on European Union and an exit from Euratom.

The point turns on the meaning of Article 106a of the Euratom Treaty, which states that (amongst other things) Article 50 of the Treaty on European Union "shall apply to this Treaty". Article 106a then goes on to explain how Article 50 is to work in context of Euratom - inserting references to Euratom and the Euratom Treaty in place of references to the EU and EU Treaties. Re-writing Article 50 in this way creates a similar but separate exit process.

If Euratom was to be included in a single Article 50 process then Article 106a of the Euratom Treaty would simply have added references to Euratom into Article 50, retaining references to the EU. It does not do this. Triggering exit from the EU therefore has no legal effect on the UK's membership of Euratom.

There is no legal need for the UK to trigger a Euratom exit at the same time as leaving the EU, or at all.

Aside from the benefits of Euratom membership and the complexity of withdrawal, the objectives set out by the Prime Minister in relation to control of our own laws and control of immigration are of particular relevance to any decision on the need for, and timing of, a UK exit from Euratom.

Remaining within Euratom would of course preserve supremacy of European law over UK law, but only in a very specific field where UK law is ultimately driven by a raft of international treaties and standards and will inevitably remain so.

In the context of immigration, the Euratom Treaty establishes a specific nuclear common market. The freedoms on which the nuclear common market are based are, however, very different from those underpinning the Single Market. Euratom members must not restrict the rights of nationals of any other member "to take skilled employment in the field of nuclear energy" (Euratom Treaty Article 96) or apply "restrictions based on nationality ... to ... persons ... under the jurisdiction of a Member State, where they desire to participate in the

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construction of nuclear installations ...” (Euratom Treaty Article 97). This is far removed from the free movement of persons without internal frontiers required by EU membership.

Given that there is no legal necessity to trigger a Euratom exit now, arguably there is little to gain and much to lose by doing so. That is not to say that long term UK participation in EU institutions solely for the purposes of Euratom would not itself present challenges, but there is no need for the UK to back itself into a corner and face a cliff edge created by an immediate two-year Euratom exit timetable. Neither is there any need to add nuclear law and cooperation to the already vast list of issue to be dealt with in negotiating terms for withdrawal from the EU.

Instead, any Euratom exit could form part of the “phased process of implementation” advocated by Theresa May for areas such as the future legal and regulatory framework for financial services. Crucially this would allow sufficient time for the UK to negotiate replacement nuclear cooperation agreements and address safeguarding and other requirements without the risk of a destabilising hiatus in international nuclear trade and cooperation.

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