

How Brexit May Harm The US Nuclear Industry

By John Matthews, Morgan Lewis & Bockius LLP

Law360, New York (May 5, 2017, 10:21 AM EDT) -- The British government has determined that its exit from the European Union also must include withdrawal from the European Atomic Energy Community (Euratom). According to a British government white paper, the 2008 EU Amendment Act provides that: "A reference to the EU in an Act or an instrument made under an Act includes ... a reference to [Euratom]."

Thus, once the United Kingdom triggered Article 50 to leave the EU on March 29, 2017, it also triggered leaving Euratom. The U.K. acceded to Euratom in 1973, and for the last four decades, the U.K. nuclear industry's regulation and international acceptability has been intertwined with Euratom.



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The U.K.'s exit from Euratom is a problem for U.S. nuclear suppliers, because exports of nuclear materials, goods and services to the U.K. are authorized through the U.S.-Euratom agreement and the Euratom Cooperation Act of 1958. Essentially, these arrangements are the substitute for a bilateral agreement for cooperation in the peaceful uses of nuclear energy pursuant to Section 123 of the Atomic Energy Act of 1954 (a "123 agreement"), as amended, with each of the 28 member countries of Euratom.

Once the U.K. withdraws, there will be no agreement to authorize U.S. civil nuclear trade to or from the U.K. Of course, the easy solution is to enter into a bilateral U.S.-U.K. 123 agreement, and we understand that the U.S. State Department has already inked a draft. However, the situation is much more complicated than that, because the Euratom issues for the U.K. are much broader than U.S.-U.K. nuclear trade.

The entire U.K. safeguards program is conducted under the auspices of Euratom, including all of the measures applicable to the strategically significant plutonium from past reprocessing activities located at Sellafield. In fact, 25 percent of Euratom's resources are devoted to efforts in the U.K.

The U.K. not only has to replace the Euratom programs and personnel, it will have to enter into a voluntary offer agreement with the International Atomic Energy Agency (IAEA) for its new safeguards regime. This will be a prerequisite not only for a U.K.-Euratom agreement, but also a U.S.-U.K. 123 agreement and the continuation of dozens of other U.K. bilateral agreements that reference Euratom safeguards.

In the meantime, the U.K. will need to figure out how to disentangle itself from the Euratom Supply Agency, and Euratom ownership of plutonium and enriched nuclear material, such as the large stockpile of material at Sellafield.

Foratom, the formidable nuclear industry organization for the EU, has suggested that U.K. participation in Euratom be extended beyond two years in order to facilitate the transition, because it will likely take more than two years to negotiate new arrangements with Euratom. However, doing so would be antithetical to the key requirements of the U.K. government, which include detaching from EU governance. It may be difficult for the government to compromise on this issue for the sake of its nuclear industry.

Once the safeguards issues are resolved, negotiation and execution of a new U.K.-Euratom agreement will be essential for the U.K.'s nuclear trade with the other 27 EU countries. This nuclear trade with Euratom countries is not only important to imports for U.K. nuclear facilities and exports by U.K. nuclear suppliers, but includes the import of critical medical isotopes. Inability to access these isotopes would have public health care implications.

In addition, the U.K. will need to focus on its participation in Euratom research and development activities, which include the Joint European Torus (JET) project located in Oxfordshire, England, and the International Thermonuclear Experimental Reactor (ITER) that is in the initial stages of construction in the south of France. These activities have generated £500 million in business for U.K. suppliers, and are expected to generate another £500 million.

Moreover, the U.K. has interests in intellectual property used and developed in the JET and ITER projects. The U.K. will need to enter into a new R&D agreement to protect the U.K.'s rights in these R&D activities and to govern existing and future contracts for U.K. suppliers.

Both Euratom and the U.K. have a mutual interest in continuing this cooperation. The U.K. benefits from supply contracts, and EU companies such as Électricité de France, which has already poured its first concrete for a new reactor at Hinkley Point C in Somerset, England, have a strong interest in maintaining their access to the U.K. nuclear market. The U.K. is important for many European nuclear suppliers that are interested in its active new build program and £3 billion annual budget for decommissioning.

In summary, the U.K. is facing the daunting task of generating a new safeguards program acceptable to the IAEA, and then negotiating and entering into multiple agreements to restore its nuclear trade and R&D efforts with EU countries both for its own suppliers and for import of nuclear fuel, as well as other goods and services including medical isotopes.

It also will need to negotiate new agreements or amendments to agreements for bilateral relationships with at least 20 countries. Thus, a U.S.-U.K. 123 agreement is not likely to be the U.K.'s highest priority. At best, this effort may be at the top of the list of bilateral arrangements, but it seems unlikely that it would be addressed before the U.K. solves its safeguards issues with the IAEA and resolves its ongoing relationship with Euratom.

One might think that U.S. military cooperation with the U.K. would be a factor. However, unlike civil nuclear cooperation, cooperation with the U.K. on the use of atomic energy for mutual defense purposes is covered by a 1958 U.S.-U.K. defense agreement. This is good news for nuclear suppliers involved in the military industrial complex.

However, it does not heighten the priority for a U.S.-U.K. 123 agreement. The two-year Brexit clock has started ticking, and unless swift action is taken to execute a 123 agreement, the entire civil U.S.-U.K. nuclear trade may grind to a halt on March 29, 2019.

Unfortunately, the U.K. has a significant interest and an imperative to resolve its Euratom issues first. It may be a challenge for the U.S. government to make progress on a 123 agreement given this landscape. Will someone from the U.K. government be available to sit across the table and negotiate an agreement?

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