



TransAtlantic

Editorial

The looming UK general election (expected to be on 6 May 2010) is an underlying focus of this TransAtlantic.

Rob Moulton considers the political positioning of the incumbent Labour party against a backdrop of promises for future regulatory reform. Banks and bonuses are at the forefront of the political agenda. New restrictions are being promised, the Bank Payroll Tax (BPT) continues to gather momentum and there are ongoing discussions surrounding the future of the FSA and the possible break up of the largest banks. These key issues will dominate the political debate as we near the election.

Tom Bainbridge considers the renewable energy sector in the UK following a failure to reach a global consensus at the Copenhagen UNFCCC conference. The UK has moved to be the first country to set legally binding targets for CO₂ emissions. The framework of emission targets, the refocus on energy security as well as the Conservatives "Green Investment Bank" ideas are certain to position renewable energy as a key battleground in the upcoming election.

Rachel Bickler considers the new European Union (EU) procurement directive and the new procurement procedures for contractual tendering. Defence will also be a key issue in the forthcoming election.

Also this newsletter provides an update on recent examples of Nabarro involvement in North American transactions and upcoming trips by my colleagues to North America. Please do not hesitate to contact them if you would like to meet with them on one of these trips.

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Banks, bonuses and Obama: Regulatory reform in the UK

Introduction

London has long been one of the world's major international financial centres, leading the way in the development of innovative products of global significance. It also led the way in the credit crisis – the near collapse of Northern Rock, a mid-sized bank, was an early indication of the extent to which the credit crisis would affect UK financial services. The government has been wrestling with the problems of regulatory reform ever since. Some steps have been taken, more are in the pipeline. But the future structure of financial regulation in the UK remains highly uncertain. This article reviews the recent measures and future proposals.

The Turner Review

Lord Turner's reign as chairman of the Financial Services Authority (FSA) started at the same time as the credit crisis. A much respected figure, his long awaited Turner Review, in March 2009, remains perhaps the best review of the causes of the financial crisis, and the options for change, that has been produced. The Turner Review remains the starting point for anyone wanting to understand the likely course of future regulatory reform in the UK.

Whilst Lord Turner thought that steps should be taken to increase the oversight of hedge funds, credit rating agencies, and remuneration policies within banks, they were considered lesser priorities.

The area of long-term reform where Lord Turner (along with the governor of the Bank of England) appeared to be out of step with the UK government is on a question of banks that are "too big to fail". Lord Turner has repeatedly returned to the point that the government has yet to address this issue. It is politically difficult for him to advocate a break-up of banks, or strict limits on their activities, whilst the UK tax payers own majority stakes in two of the very largest banks, Lord Turner simply will not let this matter drop. To that extent, his private views may be closer to the Obama/Volcker plan than the official position of the UK government.

Remuneration

One area of constant political attack in the UK has been on bankers' bonuses. It is perhaps the most high profile political issue of the day. With an election looming (about which more below), Prime Minister Gordon Brown's closest advisor, Lord Mandelson, has apparently said that the reason the government keeps coming back to the topic is that, whenever they run a political focus group, the result is that there are more votes in bashing bankers than anything else.

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Key proposals of the Turner Review

- The quality and quantity of capital in the banking system must be increased, and that related to trading book activities increased by a factor of at least three.
- Banks should be discouraged from risk-taking proprietary trading by increased capital requirements depending upon the size of the bank and the size of the risks.
- Deposit protection rules should be reformed and the system pre-funded.

To that end, new restrictions on bankers' bonuses have been brought in. It is now difficult for a banker to be paid a major bonus by a major bank without expecting at least 60% of it to be deferred for three years, and a significant portion to be paid otherwise than in cash. The key parliamentary committee that looks at financial services matters has said it will call the FSA to account at some point in 2010 for its actions in enforcing these proposals. So it is likely that the topic of bank bonuses will continue to run on.

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Bonus tax

In a similar vein, in December 2009 the government announced the introduction of Bank Payroll Tax (BPT). The scope of the tax is still notoriously unclear, and final proposals have yet to be announced, but it is clear that any major bank paying a bonus of £25,000 will have to pay tax at a rate of 50% of its bonus pool. Put forward as a one-off measure to catch the 2009 bonus season, the tax officially "expires" on 5 April – which is likely to be at the start of a general election campaign. So it is the view of the author that it is possible that the present government will propose, as part of its re-election campaign, that the tax be extended. Again, bonus taxes are likely to remain on the agenda for some time to come.

The European perspective

Against this backdrop of regulatory reform, one point must always be remembered. The UK's position within the EU means that, ultimately, it must comply with future EU regulations in this area. The new European Securities and Markets Authority will soon be given the power to override national regulators. Whilst there is no comprehensive package of EU regulatory reforms at the moment, piecemeal measures are starting to come through. In particular, reforms on remuneration remain on the European agenda. The UK appears to be following its traditional policy of front-running potential future European legislation in order to try to influence its course, but this does lead to the problem of future harmonisation when the European proposals are adopted. That, for the moment, remains some way in the future.

The UK election and the Volcker plan

One matter is certain. The UK must have an election by June 2010, and it is widely assumed that the election will be held on 6 May. Remarkably, regulatory reform is likely to be a key battle ground. It is the view of the author that the current government is likely to campaign that its actions prevented the loss of any UK depositor moneys in the banking crisis. It is also likely to continue to promote its tough line on remuneration and bonuses. But no major regulatory reform is likely to be proposed by the current government – indeed, the current regulatory structure was one of the first matters announced by Gordon Brown when he became Chancellor of the Exchequer under Tony Blair in May 1997.

For that very reason (amongst others), the opposition Conservative party will put forward a very different strategy – to state that the FSA, which was created by Gordon Brown, has been a failure and needs to be abolished. They plan to give new powers to the Bank of England to regulate banks, and to create a new Consumer Protection Agency to fight for consumer rights, rather than regulate the industry. If abolishing the FSA sounds like a controversial proposal it is worth bearing in mind that, like Barack Obama, the FSA is currently more popular abroad than at home – indeed, the FSA has been something of a figure of fun over the last couple of years. And whilst the government has distanced itself from the Volcker proposals, the opposition appear ready to embrace them.

So the forthcoming election may well prove the biggest impetus for regulatory reform in the UK, and of the type that aligns it more closely with the US than with the EU. 2010 will be a very interesting year for those following developments in regulatory reform in the UK.

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Defence procurement: Changes to doing business in the EU defence market

Summary and implications

In 2009, a new European Union (EU) Defence Procurement Directive 2009/81 (Defence Directive) was adopted which will change the way the EU defence industry does business. EU member states have until 20 August 2011 to implement the new Defence Directive into national law. Following implementation, the procurement of works, supplies and services for the EU defence industry will be broadly split into three categories:

- non-military specific purchases (such as tyres for an armoured vehicle) will continue to fall under the general procurement rules set out in Directive 2004/18/EC (Public Procurement Directive) and implemented in the UK by the Public Contracts Regulations 2006;
- military and security purchases (such as ammunition) that are not exempted under the 'essential security interest' test will be subject to the new Defence Directive and implementing national legislation; and
- highly sensitive defence or security purchases which meet the 'essential security interest' test under Article 346 of the Treaty on the functioning of the EU (formerly Article 296 EC Treaty) and are therefore exempt from the procurement rules.

What do the new rules mean for suppliers?

The Defence Directive is expected to change purchasing practices in the defence and security sector **over the next** few years in the following ways:

- reducing the scope for reliance on the 'essential security interest' test;
- suppliers will require a greater understanding of the procurement rules for compliance purposes and to compete effectively in the market;
- there will be greater emphasis on ensuring confidentiality of information and security of supply; and
- there is likely to be greater competition in EU defence and security markets in areas which previously were difficult to penetrate.

Procurement procedures under the Defence Directive

Contracts for works, supplies and services above a certain value threshold (€412,000 for supply and service contracts and €5,150,000 for works contracts) are required to be advertised in the official journal and to follow certain tender procedures. The tendering rules under the Defence Directive are similar to those under the Public Procurement Directive but have been adapted for the requirements of the defence and security sector.

Ask a question

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The key features of these rules include:

- contracting authorities must advertise their requirements but can choose between the open, restricted, negotiated or competitive dialogue procedure;
- suppliers may be required to guarantee security of information against unauthorised access for the duration of the contract and beyond;
- contracting authorities may require assurances on security of supply particularly during times of crisis or armed conflict;
- there are specific rules on research and development contracts;
- there are special rules on sub-contracting which include an option for contracting authorities to require contractors to competitively tender sub-contracts; and
- there must be effective legal remedies protecting the rights of candidates taking part in the award procedure.

Implementation in the UK

The UK's Ministry of Defence's consultation on the implementation of the Defence Directive has just closed and feedback is being analysed. Once the results are published a second round of consultation will take place on the basis of draft regulations.

Driving renewable energy investment: Where does the UK stand?

Summary and implications

The failure to reach any substantive agreement at the Copenhagen UNFCCC conference has left governments with the dilemma of 'going it alone' without a global consensus, whilst businesses struggle to decide whether or not to invest in the renewable/low carbon sector without a clear political or market signal.

The United Kingdom is in a unique position, having set the first legally binding targets for CO₂ emissions at a nation-state level, co-existing within an EU framework, and having an active, if not mature, carbon trading market. However, despite these measures, there is still a long way to go in order to actually meet those targets and encourage meaningful investment in the UK's low carbon and renewable energy sector.

This article outlines the impact of:

- a 'failed' Copenhagen treaty;
- a framework of emissions targets; and
- a refocus on energy security,

on driving the future development of the UK's renewable energy sector.

Failure at Copenhagen

In December, member states of the UN Framework Convention on Climate Change (UNFCCC), failed to reach a legally binding agreement to tackle climate change. The accord produced had neither rules to legislate the commitments contained within it nor any means to enforce compliance.

Consequently, following the conference, there has been a great deal of uncertainty surrounding international commitments to set carbon emissions reduction targets. At an EU level, leaders have, after some deliberation, kept the target CO₂ emission levels at a reduction of 20% by 2020 rather than 30% (compared to 1990 levels). This has been justified on the basis that other countries have not been sufficiently ambitious on targets to justify the additional burden. Having said that, work is now underway to see if the EU could actually 'go it alone' at 30%.

Carbon markets have also felt the impact, with the benchmark EUA contract falling by more than 10%. Other nations failed to commit to their own emissions trading schemes and those schemes which were in early legislative stages before Copenhagen, notably in the US and Australia, have encountered difficulties.

The impact such uncertainty creates is clear. The message from over 450 investors meeting at the Ceres Green Investment Network at the UN in

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January, was that individual governments must take immediate action to implement regional and domestic policy change to stimulate the creation of a low-carbon economy. Policy change will have to come from the bottom up. Peter Dunscome, Chairman of the Institutional Investors Group on Climate Change, warned governments that, if they did not act swiftly, there is a grave risk that investors will not deploy the required capital on the scale needed.

A framework of targets

The UK has couched its climate change policy within the framework of self imposed domestic, as well as EU, carbon targets. Going well beyond its EU target of a 20% reduction in emissions by 2020, the UK has set its own target of 32% by 2020. Recent UK policy initiatives, such as the introduction of the CRC Energy Efficiency Scheme, the Feed-in-Tariff and the future Renewable Heat Incentive, intend to contribute to reducing energy consumption and increasing renewable energy production and, consequently, reducing carbon emissions.

It is unclear, however, whether such schemes will ever achieve the reductions in emissions necessary. Layering the new schemes on top of the existing Renewables Obligation and Climate Change Levy, the UK's climate change policy is becoming increasingly complicated with overlapping and sometimes conflicting policies. Further, some question whether the incentives created by the new schemes are sufficient to make any real impact on renewable energy/energy efficiency investment.

The effectiveness of existing market mechanisms to incentivise low carbon investment has also been questioned by a number of power companies. Chief executive of power company Iberdola, Ignacio Galan, has said customers are going to have to consume less and pay higher energy bills to enable companies to make the investments needed to ensure that the carbon-intensity of the electricity sector is reduced, claiming "unless the companies expect a proper return, no bank is going to invest, and the country is going to have a problem".

"Unless the companies expect a proper return, no bank is going to invest, and the country is going to have a problem"

Nuclear power has been hailed by the Labour Government (in a complete u-turn from its historic stance) as one of the key solutions to reducing carbon emissions. However, the market incentives to encourage nuclear power do not yet exist in the UK either. Nuclear firm, EDF, has said that a £40 levy will need to be added to every customer's annual energy bill to make nuclear viable. It argues one approach is that there should be a floor on the carbon price to create enough certainty that nuclear and other low carbon power can be sold competitively in the future, claiming that the current, low price of carbon in the EU Emissions Trading Scheme is not enough to make nuclear or (with the exception of wind) other low carbon build competitive with carbon-heavy generation such as coal or gas.

Refocusing on energy security

In recent years, the UK, along with many other countries, has been turning its attention to security of energy supply. With aging generating

assets and an aging grid system that cannot support the projected levels of new generation needed, nor cope with the intermittency of major increases in offshore wind, and an overreliance on imported fossil fuels from unstable countries, there is an added incentive to invest locally in securing efficient low carbon energy supplies. Ofgem, the UK's energy regulator, has estimated that something in the order of £200 billion needs to be invested in energy infrastructure by 2020.

Such a shift may also see an increased reliance on decentralised energy. This will require massive investment to provide a grid 'smart' enough to deal with such a change, to incentivise a move away from large, centralised energy providers and to enable better demand management.

Investment funds may provide some of the solution. The incumbent Labour government recently introduced the UK Innovation Investment Fund which plans to leverage almost £1 billion of venture capital into new leading technology companies and established a new infrastructure co-ordination body, Infrastructure UK. We may see more of such initiatives even with a government change, with elections looming in May. The Conservative party proposes to establish a Green Investment Bank to promote the use of new green financial products, such as green bonds and other types of securitised financial instruments.

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The future

The framework for investing in renewable and low carbon energy and a secure energy supply for the UK is developing. Layering additional market mechanisms on top of existing incentive schemes on top of regulations does give the market greater confidence, but creates undue complexity. Ironically, the prospect of policy instruments being rationalised itself then gives rise to uncertainty.

Could higher and more certain carbon pricing provide the simplest and clearest cut solution? The simplest approach would be a carbon tax but that is not yet seen as politically acceptable. What if the suite of policy instruments do **not** create the right market signals, will businesses act unilaterally? Some seem to think so. Richard Branson, at the launch of his 'Carbon War Room', a corporate think tank providing a 'global warming remedy by business, for business', announced "if the government can't deliver, its up to industries themselves... we have to make it a win-win for all concerned".

Nabarro: A selection of recent legal matters involving our North American clients

[Ian Lowe](#) has been acting for Sun Microsystems Inc in a grey market goods case (*Sun Microsystems Inc v M-Tech Data Ltd and other*), obtaining summary judgment for Sun in the High Court.

[Warren Taylor](#) is acting for management on the acquisition by Ontario Teachers' Pension Plan's private equity business of Acorn Care & Education Limited, the special needs schools and fostering business, from Phoenix Equity.

[Matthew Jones](#) has been acting for Brookfield in their successful bid for New South Glasgow Hospital. Once complete, the scheme will be one of the largest "health campuses" in Europe. The tender process was governed by EU procurement rules and the scheme is being directly financed by the NHS with a reported value of £840m (US\$1,240m).

[Ciaran Carvalho](#) has acted for GI Partners, a trans-Atlantic private equity firm and the financial backers of the new real estate company Urban & Civic, set up by industry figureheads Nigel Hugill and Robin Butler, in Urban & Civic's first major purchase. Urban & Civic, has made a £27.5 million investment into a 1,100 acre site at Alconbury Airfield and some adjoining land. Nabarro advised GI Partners on the tax structure, the joint venture arrangements and all aspects of the transaction to acquire the large site just outside Cambridge, which has approximately 100 tenancies and consent for 7m sq. ft. of commercial development.

Nabarro: Upcoming trips to North America

[Ciaran Carvalho](#) and [Kevin Stimpson](#), partners in our real estate team at Nabarro will be visiting clients in New York between 12–14 April.

[Julie Quinn](#), an employment partner at Nabarro will be speaking at the ABA "Executive Compensation in the wake of the financial crisis: What Next?" seminar on the 14 April in New York.

[Brian Sher](#), an EU & Competition partner at Nabarro will be in Washington to attend the ABA Anti-trust Law Spring Meeting (21-23 April). Brian will also spend some time preceding this conference in New York.

[Louise Gellman](#) has been appointed as Chair of the International Trademark Association's Madrid sub-committee for 2010/11, [Guy Heath](#) has joined the Trademark Reporter committee and [Eesheta Shah](#) has joined INTA's India group. Louise, Guy and Eesheta will be attending the INTA Annual Meeting in Boston in May 2010.

If you would like to meet with any of our partners above during their trips please email direct by clicking on their name.

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