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Underground Drilling Access for UK Shale Developers: The 300 Metre Question

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Since the lifting of the fracking moratorium in December 2012, the UK Government has continued to work with regulators and the industry to develop a clear regulatory regime for shale gas which encourages exploration and investment while protecting public safety and the environment. Steps taken to date include:

- the introduction of tax incentives to support early development of onshore oil and gas projects, including shale gas projects (as described in our [blog post](#)); and
- the publication of the Strategic Environmental Assessment for Further Onshore Oil and Gas Licensing, which assessed the environmental effects of future onshore oil and gas licensing in the UK, as well as the publication of new planning guidance which clarifies the interaction of the planning process with the environmental and safety consenting regimes (as described in our [blog post](#)).

The industry has also sought to make progress and has engaged with the community to endeavour to obtain a "social licence" to operate. This included publication of a Charter prepared by the UK Onshore Operator's Group (the trade body for companies developing shale gas and oil). The Charter sets out the industry's commitment to community engagement and a proposed package of community benefits.

However, on 8 May 2014, the House of Lords Economic Affairs Committee called on the UK Government to do even more to promote the development of the UK's shale industry, which it believes could secure substantial economic benefits and create energy security. Indeed, a report produced by the Institute of Directors in May 2013 estimated that UK shale production could attract annual investment of £3.7 billion and support up to 74,000 jobs. The Committee's biggest concern is that complex regulation may be causing unnecessary delays in the UK.

One answer to the Committee's call to arms may come in the form of the Department of Energy and Climate Change's ("DECC") latest consultation launched on 23 May 2014. The consultation on "Underground Drilling Access" relates to access rights for underground drilling and is particularly applicable to projects involving shale drilling and fracking, as well as geothermal energy extraction. The consultation is open until 15 August 2014.

Existing UK framework for access rights In the UK, mineral rights to petroleum belong to the Crown and the Government issues licences to onshore operators to "search and bore for and get" petroleum. Ownership of freehold land, however, entitles the landowner to rights over land at

the surface and down to the centre of the earth. These competing rights inevitably create tension.

By contrast, in the United States, landowners own the rights to both the land and the minerals and hydrocarbons which it may contain. The landowners are therefore entitled to payment for the hydrocarbons that are extracted from their land, which usually comes in the form of a royalty. This difference in ownership rights incentivises US landowners to permit drilling on or underneath their land, and has been one of the key facilitating factors for the rapid development of the shale industry in the US.

In the UK, the split ownership structure means that after receiving a licence from the Government, an operator must obtain a landowner's permission order to access or operate under any privately owned land. If an operator fails to do so it will be committing a trespass. The trespass occurs even if there is no damage to the land or other property, as established in the Supreme Court case of *Bocardo SA v Star Energy UK Onshore Limited*. In that case, a company engaged in drilling beneath land owned by one of Mohamed Al Fayed's group companies without consent. On final appeal the landowner was only awarded nominal damages of £1,000 for the trespass (despite being awarded £6.9 million at first instance). Notably, the Supreme Court also rejected the argument that the trespass entitled the landowner to a share of the profits from the hydrocarbon reserves in the land.

As a result of the law relating to trespass, operators are required to enter into negotiations with each individual landowner to secure underground access (usually in return for a payment), even though:

- the landowners have no claim to any petroleum which may be extracted (or profits from produced hydrocarbons), as made clear in the Bocardo case; and
- the drilling and use of underground wells (particularly in the case of horizontal shale wells and geothermal wells) are unlikely to affect the landowners' enjoyment of the land.

The process of individual negotiation can be protracted and there is currently no standardised approach. In respect of geothermal extraction, refusal by a landowner is the end of the road as there is no further appeal process. Oil and gas operators can, however, refer the matter to court via the UK Secretary of State, who considers the case and decides whether such a reference to the courts is permitted. The court referral procedure has rarely been used and there are no shale-specific precedents, and, as with any court process, this approach suffers from time delays and potentially high costs. This highlights the primary issue with the existing framework in the UK; an individual landowner may refuse to negotiate with or grant access rights to an operator, even though the Government has awarded exploration rights (and even if the rest of the community is in favour of the project). Projects may therefore be shelved or suffer significant delays. On the basis of the current state of the trespass laws, Greenpeace launched an anti-fracking campaign in October 2013 which urged landowners to veto drilling under their properties. This was followed by some residents in West Sussex mounting a legal blockade in February this year against horizontal drilling under their properties by Celtique Energie Ltd. **Proposed solution** The consultation paper proposes a three-pronged solution to the current issue relating to access rights for developers and aims to allow the industry to drill below private land without first having to negotiate access rights, provided such drilling is at

depths of at least 300 metres. *Right of underground access* DECC's proposal is to grant underground access rights to companies extracting petroleum or geothermal energy from land which is at least 300 metres below the surface. The access would only apply to companies seeking to extract energy, in the form of petroleum or naturally-occurring heat. These companies would still need to obtain all the necessary permissions to commence drilling but the rights of access would not be dependent on any such permissions, removing the issues relating to the law of trespass. *Payment in return for right of access* Under the proposals, landowners would receive a payment in return for the automatic right of access. However, any such payment should be of a nominal value as land at depths below 300 metres is considered to be of little use to landowners. The shale and geothermal industries have suggested a voluntary payment scheme which involves a one-off payment of £20,000 per lateral well that extends by more than 200 metres laterally. DECC supports this proposal but prefers for any such payments to be made to the relevant community body rather than to individual landowners. The industry is urged to present more specific details about the voluntary payment scheme during the consultation period. DECC further agrees that any payments should remain voluntary rather than putting in place a payment statute. However, the Government shall retain a right to enforce payment through regulation if the industry does not abide by the proposed voluntary scheme, although any such new regulation would be subject to a fresh consultation. *Community notification system* A voluntary notification system is proposed to enable companies to notify the public, and in particular the relevant communities, of the relevant areas of underground land that would be accessed by drilling and what payments would be made in return for such access. The notification system would not be used as a mechanism for individual or community objection to particular projects. DECC considers such objections to be more appropriately made as part of the planning or environmental regulatory processes. **What next?** Subject to the outcome of the consultation, the Government has proposed draft legislation in the Infrastructure Bill to enable the proposal to become law, as announced in the Queen's Speech on 4 June 2014, which presents the UK Government's legislative agenda for the year ahead. This solution would remove a significant hurdle for companies involved in shale and geothermal energy projects in the UK by ensuring that, provided all the necessary rights and licences to commence drilling have been obtained, exploration can commence and proceed as planned. If introduced, it would go some way to simplifying the complex regime applicable to shale in the UK and would enhance certainty for the industry. Such a move will be welcomed by both project developers and investors. A copy of the consultation paper can be accessed [here](#).