



Response to the House of Commons Energy and Climate Change Committee inquiry on 'Leaving the EU: implications for UK climate policy'

The UK Environmental Law Association aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study or formulation of Environmental Law in the UK and the European Union. It attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to Government and submissions to inquiries with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Climate Change and Energy Working Party.

UKELA makes the following comments.

1. PRELIMINARY COMMENTS

1.1 UKELA has for some years been taking an active interest in the impact on UK environmental regulation of a possible withdrawal from the EU (Brexit). Following the referendum vote to leave the EU, UKELA issued a public position statement which is available in full on our website at <https://www.ukela.org/brexit>. Two of the principles are particularly relevant here, namely:

- that the level of environmental protection, and the ability of citizens to participate in environmental decisions and take action in the courts where necessary, must not be diminished by any future changes to

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domestic legislation.

- that development of a post-Brexit framework of environmental legislation presents a unique and critically important opportunity for the UK Government and devolved administrations to explore ways of improving and strengthening environmental regulation.

1.2 In the present context this means, amongst other things, maintaining as a minimum the emissions reductions targets under the Climate Change Act 2008¹ and exploring ways of improving and strengthening domestic climate change regulation. Preserving existing climate change regulation is compatible with the post-Brexit interests of the UK, meaning both for business and for the general population, since this corpus of law secures:

- legal certainty;
- health and well-being; and
- a fertile long term environment for UK economic success.

1.3 The negotiated terms of a withdrawal from the EU will dictate the extent to which EU obligations will continue to apply and require ongoing implementation domestically. The possible terms of Brexit are considered in more detail in response to the inquiry questions below.

1.4 Whatever the terms of Brexit, international law will continue to apply. The UK must therefore ensure its domestic climate change legislation and policies enable

¹ Brexit does not imply that the Climate Change Act 2008 is at risk as it is purely national legislation and was not made in response to EU legislation or policy. UKELA has stressed the importance of this legislation because, if a wholesale review of environmental protection and policy in the UK is undertaken to determine what EU driven legislation should be retained, we consider that this is a key piece of legislation that should not be lost.

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continued compliance with existing international obligations and climate commitments. There will need to be an understanding as to the extent to which legislation and measures implementing EU laws such as the EU ETS serve also as mechanisms for complying with international obligations and commitments.

2. RESPONSE TO INQUIRY QUESTIONS

2.1 What role has the UK played within the EU in terms of driving the bloc's international climate change ambitions?

2.1.1 The UK has been widely considered as one of the more progressive EU member states as regards climate change policies and the level of ambition to reduce carbon emissions². The UK's national targets set by the Climate Change Act 2008 have bolstered the EU's ambition on reducing carbon emissions and, arguably, resulted in more demanding targets being negotiated at the Paris COP than might have otherwise been the case. However, UKELA members consider that there has been a noticeable reduction in ambition to tackle climate change since the May 2015 election and the dissolution of the Coalition Government. This is likely to translate into the UK being less of a driving force within Europe on climate change issues.

2.1.2 In particular, the recent loss of the Department of Energy and Climate Change (DECC) with those policy matters now subsumed within a wider business-dominated department may indicate that a lower priority will be given to energy and climate change issues going forward.

² Brexit – the implications for UK Environmental Policy and Regulation, APPG and IEEP (March 2016), page 5 <http://www.ieep.eu/work-areas/environmental-governance/2016/03/implications-of-brexit-for-uk-environmental-policy-and-regulation-a-report-for-appg>

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2.2 What should be the Government's priorities on the EU Emissions Trading System when negotiating the UK's exit from the EU? What would a successful negotiation outcome look like?

2.2.1 If the UK aims to achieve access to the single market under a trade deal similar to that of Norway, then it is likely that it can expect a similar framework to be applied. Given the political blow that Brexit has dealt to the EU, it is unlikely that the EU will want to grant significant concessions to the UK for fear of encouraging remaining member states to seek a renegotiation of their own obligations. UKELA members note however that if the UK does not seek a Norway-style deal it would be unclear whether the Government intends to remain in the EU ETS.

2.2.2 UKELA considers that the EU ETS is a flagship, albeit a battered one and the UK should still aim to remain part of it. The EU ETS still faces many hurdles before the final shape of Phase IV emerges after reforms. The UK has, and still is, playing a major role in its design, and its best features are now being copied across the world from the US regionally to China. If the UK were to pull out, that would send a very negative and destabilising signal to the EU and internationally. UKELA considers that the UK must, therefore, state its intention to remain in the EU ETS as soon as possible. It should be noted that even as an European Economic Area (EEA) member, the UK would lose the ability to vote on future changes to the EU ETS if they happen after Brexit takes effect although there may still be the possibility of influencing policy formation before legislative proposals for the scheme are formed.

2.2.3 Issues around continued EU ETS participation that would need to be resolved include:

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- Whether the mechanics (e.g. the UK registry, the national auction platform and the small emitters opt-out scheme etc.) that have been set up to allow UK entities to participate in the EU ETS would continue to function as at present if the UK became an EEA member?
- How the EU ETS will interact with the Climate Change Act 2008 going forward?
- How the UK might be able to influence allocation of allowances going forward – particularly in light of the cap being tightened in Phase IV?
- How the UK might be able to represent the needs of UK energy intensive industry (EII) and prevent carbon leakage if it is an EEA member and unable to vote on any legislative proposals to amend the EU ETS?
- How VAT issues might be dealt with if the UK removes VAT on carbon credits post its exit?

2.2.4 If the UK decides not to become an EEA member, the question is whether it wants, or indeed is able, to negotiate an agreement that allows it to continue as part of the EU ETS. The point made above about the probable unwillingness of the EU to grant any concessions in relation to EU ETS participation is still relevant in this situation.

2.2.5 If the UK decides not to participate in the EU ETS, then the following questions will need to be addressed:

- Will the UK set up a national trading system for the relevant sectors (a revived UK ETS?)
 - Would some other policy mechanism be appropriate? It would be important to have some policy mechanism to cover these sectors as they represent a large slice of the UK's emissions and failure to incentivise
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emission reductions from such sectors would jeopardise UK targets under the Climate Change Act 2008 and Paris Agreement. Given the recent decision to scrap the Carbon Reduction Commitment (CRC) on the grounds of the administrative burden it placed on participants and also the Brexit supporters concerns about EU bureaucracy, a new trading scheme would potentially face similar problems and would place a significant regulatory burden on scheme participants as well as take up a great deal of Government time to set up.

2.3 Non-EU ETS sectors

2.3.1 A related issue is what should be done for the non-EU ETS sectors under the EU burden-sharing agreement? Consideration needs to be given as to how Brexit will affect the UK's non-EU ETS sector targets, remaining member states' targets and the overall target under the 2030 Framework? UKELA members consider that the UK should make it clear that it will adopt a greenhouse gas (GHG) reduction target in line with the 37% target proposed for it at EU level for the sake of stability. Of course, how the UK delivers on that target is very much a national matter, as indeed it is for remaining Member States.

2.3.2 If the UK were to commit to meeting a non-EU ETS sector target similar to its target under the 2030 Framework, would the EU still accept joint mitigation actions by the UK and remaining member states?

2.4 What are the implications of the UK's exit from the EU on both the UK's and the EU's COP21 pledges? What will be the UK's future role within the United Nations climate change processes?

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- 2.4.1 As it is not known precisely when the Article 50 process under the Lisbon Treaty will be activated, what agreement will be reached with the EU and how long it will take, it is difficult to determine what impact Brexit will have on the UK and EU pledges. Assuming a scenario where Article 50 was activated and within 2 years the process had been concluded leaving the UK outside the EU (although potentially within the EEA) that would mean that by the 2018 Conference of the Parties (COP), the UK would be participating at the COP on its own. Presumably, in tandem with the Article 50 negotiations, the UK would ratify the Paris Agreement and submit its Nationally Determined Contribution (NDC).
- 2.4.2 At the time of writing neither the EU nor the UK have submitted their NDCs. The EU pledged to reduce its emissions by 40% by 2030 over 1990 levels.
- 2.4.3 UKELA members consider that uncoupling the UK from the EU's pledged target could result in less ambitious NDCs submitted by either or both of the UK and EU. It is possible that once the UK is no longer an EU member, pressure from remaining EU members such as the Visegrad Group (the Czech Republic, Hungary, Poland and Slovakia) may force a revision of the EU target. UKELA members note that the UK has committed to maintaining key climate policy objectives³ and, in particular, to ratify the Paris Agreement as soon as possible. These commitments, the existing national targets under the Climate Change Act 2008 and the Fifth Carbon Budget, indicate that the UK's targets will not be altered. However, as environmental issues have not seemed to be a high priority for the present Conservative Government UKELA members have expressed concern that the pledge could be revised. UKELA considers that any downward revision would

³ Hansard 18 July 2016, debate on the Carbon Budget Order 2016
<https://hansard.parliament.uk/lords/2016-07-19/debates/16071952000288/CarbonBudgetOrder2016>

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send a very poor message about the UK's environmental credentials to trading partners.

2.4.4 At the very least, the uncertainty surrounding the timing and methodology of the UK's exit and whether the pledges will be maintained is likely to distract the relevant policymakers and civil servants in both the UK and the EU from the work of implementing the pledges.

2.4.5 As regards the UK's future role within United Nations (UN) processes, we consider that the UK will have to accept that it will have a smaller voice and less clout than when it was negotiating as part of a larger economic bloc. The upside to negotiating on our own is that it should be quicker to formulate a policy position. However, it is noted that the Devolved Administrations may have different views on targets and the level of climate change ambition so formulating a UK-wide strategy may not be as easy to formulate now as it might have been a few years ago.

2.5 What should be the Government's priorities in deciding which EU-led climate policies and legislation to retain?

2.5.1 This question presupposes that the UK will not seek an EEA membership. If the UK does decide to seek an EEA membership the UK will have much less choice on which EU-led policies and legislation it wants to retain.

2.5.2 The following priority list reflects UKELA's overarching concerns that the UK must continue to implement its international legal obligations and commitments, and that the level of environmental protection including emissions reduction targets must not be diminished (see our Preliminary Comments, above).

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Legislation	Reasoning	Priority (<i>High/Medium/Low</i>)
Paris Agreement	UK needs to ratify the Agreement and maintain its pledge in order to retain credibility on climate change issues with its trading partners.	High
EU ETS (Principally Directives 2003/87/EC and 2009/29/EC 2008/101/EC)	Flagship mechanism for reducing emissions in key sectors.	High
EU 2030 Climate and Energy Framework	Key to set a target for other non-EU ETS sectors.	High
Renewable Energy Directive (Directive 2009/28/EC)	Renewables are a key area for tackling emissions.	High
Carbon Capture and Storage Directive (Directive 2009/31/EC)		Medium
Energy Labelling Directive (Directive 2010/30/EU)		Medium
Energy Efficiency Directive (Directive 2012/27/EU)	Energy efficiency is a key way of tackling emissions.	Medium
Energy Performance of Buildings Directive (Directive 2010/31/EU)	Emissions associated with buildings represent a large slice of the UK's emission are still not under control.	Medium
EU Ecodesign for Energy-Related Products Directive 2009 (Directive 2009/125/EC)	Key as sets standards for products on the single market.	Medium
Fuel Standards Directive (Directive 2009/ 30/2009)		Low

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Car Emissions Regulation (Regulation 443/2009)		Low
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3. OTHER COMMENTS

3.1 Energy infrastructure issues

3.1.1 UKELA members have expressed concern that the UK will lose access to structural funds and to European Investment Bank (EIB) funding, which are both highly important to energy infrastructure. This could be very damaging, and could push up the cost of finance, together with the threat from falling exchange rates to import costs (energy, fuels and other engineering materials). Outside the single market, interconnector investment will be much harder, reducing ability to trade in renewable electricity and to help deal with growing intermittence and shortage in supply. Obviously, anything that impacts on the supply of renewable energy will risk the UK's emission reduction targets under the Climate Change Act 2008 and the Paris Agreement. The challenge here will be to maintain as simple a legal framework as possible in cross-border transactions and projects that can be used for more than one EU neighbour at a time to cut duplication of effort and reduce both financial and other barriers to investors.

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Contact: Becky Clissmann

Convenor Climate Change and Energy Working Party

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Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



email: becky@clissmann.com

telephone: 00 353 868181842

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