



Response by the UK Environmental Law Association (UKELA) to the House of Commons Energy and Climate Change Committee inquiry on 'Leaving the EU: implications for energy policy'

Introduction

UKELA 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.

Scope

We have noted that the Committee is inviting responses to three separate questions.

The first question for consideration would be the first question listed, i.e. which parts of UK energy policy have been 'driven' by the EU and hence may potentially be undermined by Brexit.

It seems to us that logically the third question ought perhaps to be considered next, i.e. which aspects of EU energy policy and directives are beneficial to the UK and should be retained.

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



The final issue, namely what should be the aim of any exit negotiations, can then be resolved by reference to the answers to the first two questions.

We should emphasise that we are lawyers and not policy makers, and to the extent that this inquiry concerns the implications of Brexit for UK energy policy we are not perhaps best qualified to offer comprehensive or categorical answers. However it may be of assistance to the Committee if we endeavour to summarise the relevant legal framework, i.e. the key features of EU energy law insofar as they bear upon the above questions. We will endeavour to do this acknowledging the help we have received from various public sources and legal texts.¹

We shall also attempt to indicate what the consequences are likely to be in relation to this corpus of law as a result of the Brexit decision. In very general terms, it can be said that the entry of the UK into the EU was from a legal point of view achieved in two main ways and at two different levels. Firstly, at an international level the UK became a party to the Treaty arrangements under which the EEC (as it then was) functioned. Secondly, at a domestic level Parliament enacted the European Communities Act 1972 under which (and only under which) the corpus of European law including Directives, Regulations and binding decisions of what is now the CJEU became part of our law. Brexit will be achieved at an international level through the route now offered by Article 50 TEU, and it seems clear that at a domestic level it will inevitably lead to the repeal of the European Communities Act 1972. It also seems probable that, not least for practical reasons, Parliament will be invited to re-enact in some suitable manner large parts of EU law which are regarded as (at least in the short term) beneficial.

¹ A key resource is Marta M Roggenkamp et al (eds), *Energy Law in Europe* (OUP 2016, third edition).

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



Against this background, and in the energy law context, it seems to us that our review of EU energy law ought if possible to achieve two objectives. First, to identify some at least of the key features of EU energy law which ought to be re-enacted, and second, to identify those features of EU energy law which cannot sensibly be re-enacted, because for instance they impose obligations upon some or all of the other Member States, or upon persons or organisations within those Member States, over which our Parliament plainly has no legislative jurisdiction.

If the Committee, with the benefit of advice, not only from us but no doubt from many others, is able to reach clear conclusions on the above, then it should be reasonably apparent what the Government's negotiating priorities ought to be.

We propose to consider the relevant issues under the following headings:

1. The internal electricity and gas markets
2. Trans-European energy networks
3. Upstream Hydrocarbons Sector
4. Nuclear energy
5. Renewable energy sources
6. Energy efficiency and energy savings
7. Climate change and emissions trading
8. Carbon Capture and Storage
9. Security of Energy Supply
10. Taxation, Financial Markets, and Transparency in Energy Markets

1. The internal electricity and gas markets

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



Under the so-called Third Energy Package the EU in 2009 adopted new Directives² (and supplementary Regulations) relating to electricity and gas supply. It is these 2009 Directives and supplementary Regulations which form the core of the current regulatory framework for the electricity and gas sectors, along with additional EU legislation effecting these sectors such as the rules on public procurement and technical harmonisation. The Directives provide that consumers have a right to have their gas and/or electric supply by a supplier of their choice subject to the conditions of the company's supply agreement, and that this freedom of supply entails the freedom to switch supplier regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading and network balancing rules. The Directives also provide that Member States need to take appropriate measures to protect final customers, in particular vulnerable customers. The Regulations impose on all transmission system operators ('TSOs') the obligation to operate at EU level in order to promote the completion and functioning of the internal electricity and gas markets and to promote cross-border trade and supply. There are European networks of TSOs for electricity and for gas, and these networks have produced network codes several of which have been adopted. A network code relating to cross-border trade and transmission was due to apply as from 1 May 2016.

Based on this extremely selective summary above it can be seen that major issues arise in relation to this topic. The Committee will need much more detailed advice as to the extent to which the above matrix of regulation needs to be re-enacted domestically. Even more importantly, as regards negotiations, the Committee will need advice as to the form of agreement which the Government will need to seek and achieve if future

² Directive 2009/72/EC relating to electricity and Directive 2009/73/EC relating to gas

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



cross-border trading in gas and electricity between the UK and other Member States is to continue on anything like its present scale.

2. Trans-European energy networks

By a Regulation³ made in 2013 the EU has strengthened its regime relating to this topic, by creating 'priority corridors and areas of trans-European energy infrastructure'. The object is to encourage the development of projects of common interest and therefore the 2013 Regulation contains general rules about the award of permits for such projects.

In general the issue here is whether by negotiation the Government can preserve for the benefit of the UK the commitments on the part of other Member States embodied in this aspect of EU regulatory law.

3. Upstream Hydrocarbons Sector

There is a Directive⁴ on hydrocarbons licensing which lays down general principles on which national licensing regimes should be based. This Directive relates to exploration and production of oil and natural gas including shale gas. Environmental assessment must be undertaken for individual projects on the basis of the Environmental Impact Assessment Directive⁵, or in the case of public plans or programmes on the basis of the Strategic Environmental Assessment Directive.⁶ The main issue under this heading would appear to be to ensure that this legislation has been adequately transposed into domestic UK law.

³ Regulation 347/2013

⁴ Directive 94/22/EC

⁵ Directive 2011/92/EU

⁶ Directive 2011/42/EC

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



4. Nuclear energy

Two main topics seem to arise under this heading. The first is health and safety, as there is a wide range of Directives on matters such as radioactive contamination levels in food stuffs and accident and emergency notification procedures. Again the issue will be whether there has been adequate domestic transposition.

Secondly, a key continuing policy issue is nuclear waste management and decommissioning. A Council Directive in 2011⁷ established a community framework for the responsible and safe management of spent fuel and radioactive waste, requiring Member States to have a national policy and programme for the disposal of nuclear waste. However, there does not yet exist in the EU a single final repository for immediate and high-level radioactive waste such as spent fuel from nuclear power plants, though there are plans for such geological repositories to be commissioned in Finland, France and Sweden. The issue here will be whether the Government can negotiate any opportunity for the UK to have the right to deposit waste under this regime. If not, there will be an enhanced need to develop nuclear waste storage facilities within the UK, an issue which has proved immensely controversial in the past.

5. Renewable energy sources

The 2009 Renewable Energy Sources Directive⁸ is the main Directive driving the development of renewables. The scope of the Directive is to establish a common framework for the promotion of energy from renewable sources. Mandatory national targets are set for the overall share of energy from renewables in gross final energy consumption. There are a range of financial support schemes and the Commission has

⁷ Directive 2011/70/EURATOM

⁸ Directive 2009/28/EC

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



encouraged Member States progressively to open up their support schemes to renewables from other Member States. The CJEU jurisprudence has considered whether such support schemes must be considered state aid and/or a barrier to trade between Member States, but the repeal of the ECA 1972 will remove this concern. However, the Committee may wish to recommend the replication in domestic law of the kind of obligations imposed by this regime, and indeed such measures may be crucial in contributing to the attainment by the UK of its international carbon emissions reduction obligations (see below).

6. Energy efficiency and energy savings

The relevant Directives here include the Energy Efficiency Directive of 2012,⁹ the Energy Performance of Buildings Directive of 2010¹⁰ and the Energy Efficiency Labelling of Products Directive of 2010.¹¹ Again, the Committee may wish to insist on confirmation of full national transposition.

7. Climate change and emissions trading

For the sake of brevity we would like to refer the Committee to our response dated 22 August 2016 to its inquiry on implications for UK climate policy.

8. Carbon Capture and Storage

It is perhaps not well known that there is an EU Carbon Capture and Storage Directive.¹² Under this Directive Member States have been required to transpose the Directive into national law to to submit reports assessing the national implementation of the Directive

⁹ Directive 2012/27/EU

¹⁰[2010] OJ L153/13

¹¹ Directive 2010/30/EU

¹² Directive 12009/31/EC

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



to the Commission. Given the importance of this topic and the Government's reluctance to approve relevant investment the Committee may wish to insist on appropriate and possibly strengthened replication of these provisions.

9. Security of Energy Supply

Under a 2009 Directive¹³ Member States have obligations for the maintenance of sufficient oil stocks. Under a 2005 Directive¹⁴ there are provisions relating to security of electricity supply but these are regarded as insufficiently clear and detailed. A 2010 Regulation¹⁵ concerns measures to safeguard gas supply. The Committee may wish to ensure that Parliament enacts appropriate domestic legislation imposing an obligation on the UK Government to take measures sufficient to guarantee security of necessary supplies of the energy sources in a post-Brexit context.

10. Taxation, Financial Markets, and Transparency in Energy Markets

Under this heading reference should be made to the Energy Taxation Directive¹⁶ which aimed to harmonise energy taxes. Consideration is required as to whether Parliament should enact constraints upon the power of government to impose energy taxes post-Brexit. Further European legislation relates to market abuse.¹⁷ Again, the Committee will wish to ensure that there is adequate domestic legislative provision relating to these matters.

Conclusions

¹³ Directive 2009/119/EC

¹⁴ Directive 2005/89/EC

¹⁵ Regulation 994/2010

¹⁶ Directive 2003/96/EC

¹⁷ Regulation 596/2014 and Directive 2014/57/EU

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill



We venture to repeat that the foregoing review cannot and is not intended to be comprehensive. It does however give a picture of the complexity of EU energy law and policy, and of the extent to which necessary elements of energy policy are achieved or at least partly achieved through the mechanism of EU law. Time and space do not permit us to explore fully the pre-existing domestic law provisions which will of course be the starting point for any post-Brexit reconstruction of UK law. We have however tried to set out the main areas of concern, and in particular the policy areas where domestic law may need to be enhanced, and also the policy areas where (since they are beyond the reach of domestic law) an internationally negotiated outcome may be required.

21 September 2016

Contact: **Stephen Hockman QC**

Convenor Climate Change and Energy Working Party

email: stephenhockmanqc@6pumpcourt.co.uk

UK Environmental Law Association: better law for the environment

Registered charity 299498, company limited by guarantee in England 2133283
Registered office: One Glass Wharf, Bristol, BS2 0ZX www.ukela.org

President: Rt Hon Lord Carnwath CVO of Notting Hill