Law Society of Scotland

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# Consultation Response

# The Future of UK Carbon Pricing

## A joint consultation of the UK Government, the Scottish Government, the Welsh Government and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland

11 July 2019

## Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Energy Law and Environmental Law sub-committees welcome the opportunity to consider and respond to *The Future of UK Carbon Pricing: A joint consultation of the UK Government, the Scottish Government, the Welsh Government and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland* (the consultation). Since most of the consultation is aimed at industry, we are responding generally to the consultation.

## General

At the outset, we note the commitment for the UK to maintain both domestic and international efforts to tackle climate change. We also note the commitment to carbon pricing as an effective emissions reduction tool in order to "not just protecting but improving the environment on which our economic success depends. In short, we need higher growth with lower carbon emissions."[1] Ensuring that commitment continues irrespective of the proposed UK exit from the European Union is vital.

Our Energy Law and Environmental Law sub-committees are made up of solicitors who represent various clients' interests in the energy related field and various environmental interests as well as academics specialising in the field.

Our interests reflect Scotland and those of our members' clients working within Scotland. We welcome the commitment within the consultation to work with the Devolved Administrations. We would suggest that should extend to inclusion in discussions regarding the terms of engagement with the EU Emissions

[1] UK Government's 2017 Clean Growth Strategy https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700496/clean-growth-strategy-correction-april-2018.pdf

Trading System (EU ETS) or such other international arrangements over emissions standards that may be made or in contemplation.

The Scottish Government introduced the Climate Change (Emissions Reduction Targets) (Scotland) Bill[2] on 23 May 2018 and has outlined a statutory target date for net-zero emissions of all greenhouse gases. That goes further than the UK Government's proposals which the consultation recognises. Being aware of that target is important when considering what the role of carbon pricing is to be in the future whatever post-Brexit arrangements are made.

We agree with the introduction of a UK Emissions Trading System (UK ETS) which is the preferred approach allowing participants access to a larger market and greater opportunities for more cost-effective emissions reductions. The introduction of a UK ETS would include Scotland.

The consultation also outlines an option in the event of no agreement, to consider alternative options such as a standalone domestic ETC, a carbon tax similar to proposals already set out by HM Revenue & Customs or participation in Phase IV of the EU ETS. As Article 50 has been extended to the end of October 2019, the UK continues to be an EU member, so all potential options remain under discussion to encompass all range of EU exit related uncertainties.

If there is not agreement over a UK ETS, we consider that the UK industry will be at a competitive disadvantage in Europe and internationally. The UK ETS should be linked to the EU ETS to provide for consistency and clarity in the UK sector which, in turn, should lead to greater confidence and investment. We recognise that a link to the EU ETS or membership of a supra-national scheme may provide greater flexibility for trading by UK businesses.

There is precedent for this as Switzerland are in the process of linking their ETS to the EU ETS with Switzerland set to become the EU's linking partner. It has however taken over five years of negotiation to achieve this stage. Linking does mean that the two systems will mutually recognise each other's emissions allowances. When the link becomes fully operational, these will converge, allowing for a level playing field to operate for both Swiss and EU based industry. The Swiss model now has similarities in provisions operating under the EU ETS. Benefits to Switzerland include clearer price formation and price stability.

That may not be the simplest process, as indicated above, as it requires EU ETS approval. It would allow for some of kind of consistency and parity across Europe and presumably Switzerland too.

The UK Government and the Devolved Administrations have stated that they are firmly committed to carbon pricing as an effective tool for achieving carbon emissions reductions targets. By seeking to adopt that type of linking, this should be attainable as the UK ETS would be aligned if not seeking to adopt and committ to a higher standard than those being set out by the EU. In the Clean Growth Strategy, the UK's

[2] https://www.parliament.scot/parliamentarybusiness/Bills/108483.aspx

future approach is seen to be at least as ambitious as the current EU ETS and would provide a smooth transition for relevant sectors.

There also needs to be a commitment, whatever approach is adopted, to ensure that there is a smooth transition to whatever system is to be adopted.

## Other Observations

- Rules for all accounts and Authorised Representatives

Under Paragraph 177 of the consultation, this proposes to allow the UK Registry Administrator to request any information it considers necessary in order to satisfy itself that the applicant or nominated Authorised Representative is fit and proper to participate in the UK Registry. The information to be considered would reflect the information that is currently required by way of the EU Registry Regulations. How is this test intended to work in relation to paragraph 186 of the consultation regarding security and the reference to pending investigations? Should this test cohere with wider practices such as the certification systems operating by the Financial Conduct Authority for financial services or the Anti Money Laundering supervisor regime operated by HMRC or disclosure regimes as they develop around Article 8 (right to family and private life) of the European Commission on Human Rights.

- Security and Preventing criminal activities

Paragraph 186 of the consultation proposes to allow the UK Registry Administrator to take into account any convictions or pending investigations (our emphasis) in the preceding five years for fraud, money laundering, terrorist financing or other serious crimes. This is to apply even if the crimes are not specifically related to allowances or criminal activity in the UK Registry.

We have concerns round the general use of terminology regarding ‘pending’. That seems uncertain and could mean different things to different people depending if it intends to refer a legal context or otherwise. As well as considering if it would mean investigation by the police or HMRC, for instance, or the service of a formal writ, is it appropriate that an application would be refused when an investigation was anticipated in some way? How do the interests of greater protection of the UK Registry from serious criminal activity balance when an investigation may have resulted in no action?

These provisions seem to exceed the scope of current regulations. Under Article 22(2)(b)[3] of the Commission Regulation 389/2013, it is stated that a national administrator may refuse to open an account if:

[3]https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:122:0001:0059:EN:PDF

> "…. Is under investigation or has been convicted in the preceding five years for fraud involving allowances or Kyoto units, money laundering, terrorist financing or other serious crimes…"

"Under investigation" seems somewhat clearer and refers to some sort of direct action. Replicating this should perhaps be contemplated as the more specific terminology. We have no issue with the consultation's wider approach to relevant offences which would not need to be those directly connected with the register.

**For further information, please contact:**
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