

CARBON MATTERS

The Climate Change Supplement to SHE MATTERS from DLA Piper UK LLP

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One of the outcomes of the surprise Conservative victory at the General Election has been the appointment of Amber Rudd as Secretary of State for Energy and Climate Change following the departure of Ed Davey from Government, and indeed Parliament, in consequence of the election results.

Amber Rudd is a DECC insider, having served as Parliamentary Under-Secretary of State since July 2014. She is a strong supporter of progress for a new global agreement on climate change at the Paris COPMOP later this year.

In principle, action on Climate Change is not a party political issue, as all three of what were previously the main political parties supported the Climate Change Act in their manifestos before the General Election. The SNP manifesto also suggested support for annual carbon reduction targets.

The manifesto commitments followed a pledge made in February by Conservatives, Liberal Democrats and Labour to work collaboratively on climate change, regardless of the outcome of the May General Election.

That pledge may prove to be important, as a number of Conservative Backbenchers have sceptical views on the issue of anthropogenic climate change.

Barely a month after the General Election, a grouping estimated as consisting of between 50 and 100 Conservative MP was formed, called “Conservatives for Britain” which aims at putting pressure on the Prime Minister to secure radical changes in the relationship between the UK and the European Union. If radical changes are not achieved, including significant changes to the EU rules on freedom of movement, an independent role for the UK on international trade, and a veto on EU laws, they will campaign for a British exit, the inevitable implication of what they are seeking to attain.

Many of their leaders, including Owen Paterson, a former Secretary of State at DEFRA, are “climate change sceptics.” Given only a small Conservative majority in the new House of Commons, the group could create some significant difficulties for Mr Cameron.

Whilst it is probable that a significant majority still exists in Parliament for the principles underlying the Climate Change Act, it therefore seems quite possible that climate change issues will move more into the mainstream of political debate. We may therefore be in for some interesting times.

THE EU ETS AND THE MARKET STABILITY RESERVE

A compromise seems set to be agreed between the Council of Ministers and the European Parliament over the Market Stability Reserve proposal for the reform of the European Union Emissions Trading system (“EU ETS”).

The EU ETS, which is the largest emissions trading scheme in the world, is a key pillar of EU policy on climate change, aimed at forcing significant carbon emissions reductions by focussing on the largest emitters of CO₂. However, its effectiveness is weakened by a low carbon price, due in particular to a significant surplus of available international credits and emissions allowances in relation to emissions.

The proposal for a Market Stability Reserve (discussed in Carbon Matters Autumn 2014 and Winter 2014/15), would create a reserve into which a proportion of EU ETS allowances would automatically be transferred, taking them off the market, if the surplus of EU ETS allowances and available international credits in relation to emissions exceeded a certain threshold. In principle allowances could also be returned to the market if the surplus falls below a lower threshold.

However, that prospect is currently remote. The current surplus is estimated at more than the equivalent of two billion tonnes of carbon.

The Commission had proposed that the Market Stability Reserve would commence operation in 2021. However, MEPs on the Environment Committee of the European Parliament voted in February to introduce the Reserve early, by 31 December 2018.

This raised concerns amongst the representatives of energy-intensive sectors such as the steel chemical and glass industries, that those businesses which had facilities located in countries subject to the EU ETS would no longer be competitive on global markets. There would

therefore be a risk of “carbon leakage” (Under which production .move to countries with laxer carbon regulation).

Those concerns met with sympathy in some, though not all, Member States and hence also in the Council for Ministers. Accordingly there was a possibility of disagreement on the issue between Council and Parliament. In October last year, however, the UK Government, traditionally in the forefront in calling for action on Climate Change, called for the introduction of the Market Stability Reserve by 2017, and it is understood that Germany was also in favour of earlier action.

Following informal discussions between the Environment Committee and the Council, with the latter acting through the Latvian Presidency, a compromise deal will now allow the Market Stability Reserve to start operating on 1 January 2019. It will take 900 million allowances then, and also any remaining allowances unallocated by the end of the current phase (2013-2020).

However, there will be a review of the EU ETS, and the Commission will propose reforms, with a view in particular to preventing carbon leakage, later this year.

The provisional agreement is expected to be adopted by the whole European Parliament early in July.

It will be interesting to see what new proposals emerge on carbon leakage in due course.

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DEADLINE APPROACHING FOR THE COMPLETION OF ESOS ASSESSMENTS

On 17 July 2014, the Energy Savings Opportunity Scheme Regulations 2014 (“ESOS”) came into force. ESOS places an obligation on larger companies and non-public organisations to undertake an energy saving assessment. Participants are required to calculate their total energy consumption, carry out energy audits and identify where energy savings can be made.

Such an assessment is mandatory for organisations in the UK that meet the one or other of the qualification criteria, that is the organisation:

- employs at least 250 people; or
- employs fewer than 250 people but has an annual turnover over €50 million and an annual balance sheet total over €43 million.

The deadline for carrying out the energy assessment is 5 December 2015 with an ESOS assessment then due in each four year compliance period ending on 5 December 2019, 2023 and so on. Those businesses that are fully covered by the ISO50001 accreditation do not need to carry out the ESOS assessment but instead must notify the Environment Agency of their accreditation.

The Environment Agency, as the regulator for ESOS, can impose civil penalties for non-compliance offences such as failing to carry out an energy audit or failure to maintain records. Financial penalties can be as high as £50,000 and can also include additional daily penalties for the duration of non-compliance. It is therefore important that obligated businesses ensure that their ESOS obligations are met before the December deadline.





Various recent polls indicate however that a large number of businesses have yet to begin to consider the steps needed to undertake an audit. Given that an audit can take between two to three months to complete and requires the collection and analysis of a large amount of data, businesses should not delay for much longer.

As part of the ESOS assessment, a “lead assessor” is required to be appointed who works with the business to confirm that the auditing activities meet the requirements of ESOS. Many in the market point to the fact that given the limited number of assessors compared to the estimated 10,000 businesses within scope of ESOS, this may place additional burdens through lack of availability and increased costs.

Whilst some may be frustrated by the costs of the assessments and potential penalties for non-compliance, the aim of ESOS should be borne in mind: to help organisations implement money saving measures through effective energy management and help reduce carbon emissions.

ESOS implements the requirements of the EU Energy Efficiency Directive in the UK but as a European wide requirement, energy management is something that is becoming increasingly topical. As mentioned above, compliance with the international environmental management standard ISO50001 means that businesses do not have to undertake an ESOS assessment.

The largest number of businesses with this certification are in Germany. This is attributed to the fact that tax incentives are in place there to encourage businesses to be more energy efficient through this certification. It remains to be seen whether similar incentives will be introduced in England (perhaps unlikely), or whether there will be a move by large companies to seek certification rather than go down the route of ESOS assessments for the coming compliance periods.

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THE EU COMMISSION PROPOSALS FOR THE ROADMAP TO THE PARIS COP20

Following on from the climate change conferences in Warsaw and Lima in 2013 and 2014 respectively, members of The United Nations Framework Convention on Climate Change (“**UNFCCC**”) will meet in Paris later this year to discuss European climate change initiatives.

One of the main aims of the conference is to develop a new international climate change agreement. It is expected that such an agreement will detail an ambitious target of a 60% reduction below levels of global emissions by 2050.

Ahead of the Paris conference, a draft negotiating text was agreed in February 2015 and negotiations will continue at the various UN meetings scheduled throughout the year.

As part of the EU’s climate change initiatives, a more long term policy plan or “roadmap” has been prepared to support greater emission cuts and the move to a low carbon economy. Five key areas have been set out:

1. working towards long term goals and policies to achieve greater carbon emissions and a more competitive low carbon European economy;
2. investing and promoting clean technologies in the areas of transport and energy efficiency in buildings to support a low carbon economy;
3. extra investment in renewable energy initiatives to help the transition to a low carbon society which in turn will help provide growth in a wide range of sectors;
4. promoting energy saving and efficiency in both household and business settings and moving to reduce dependency on imports of oil and gas; and
5. greater use of clean technologies to reduce air pollution. The driver for this is not only the environmental benefits but also the health benefits to people.

There are those who doubt whether this will be effective, however. Scepticism was expressed in a paper co-authored by Lord Stern and published in May, as to whether the EU’s pledge to reduce Greenhouse Gas Emissions by at least 40% relative to 1990 levels by 2030, the recently submitted Intended Nationally Determined Contributions (“**INDCs**”) ,and China’s pledge to ensure its emissions peak by around 2030, will together meet the international goal of limiting the rise in global mean surface temperature to 2°C.

The move in Europe is to now focus not only on short term efficiency measures but those that will result in a long term carbon reductions. It remains to be seen how the negotiations will proceed and whether they ultimately prove to be successful in terms of reaching agreement on the text of a new global climate change treaty. For the time being details about the implementation of the proposals set out in roadmap remain vague, but businesses should follow the developments to keep abreast of any changes that may alter the regulatory landscape.

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FRACKING UPDATE

Shortly before the General Election, the Infrastructure Act 2015 received the Royal Assent.

The Act contains important provisions relating to hydraulic fracturing or “fracking”.

These include provisions (discussed in Carbon Matters Autumn 2014) which would grant a general right of access to land below 300 metres from the surface for operators searching for or exploiting petroleum (including shale gas) or for geothermal energy. The purpose of these provisions is to remove a potential legal obstacle to such activities arising from the right possessed by landowners, at least in principle, to bring trespass proceedings against subterranean operations under their land, even if carried out at great depth. In theory, licensees under the Petroleum Act 1998 could already apply for compulsory rights to carry out such activities under the Mines (Working Facilities and Support) Act 1966, as applied by the 1998 Act, but the procedure under that legislation is cumbersome and unworkable as regards modern “horizontal drilling” operations.

The new right of access under the 2015 Act will include the right to leave deep-level land in a different condition, including by leaving infrastructure or substances in the land.

The new rights will be subject to a payment scheme, and a system of prior notification. These are expected to be delivered under a voluntary industry agreement, but the Government has taken reserve powers to make regulations in case the relevant scheme is not honoured.

There are also legal safeguards for landowners to protect them from any liability in tort in respect of loss or damage attributable to the exercise or proposed exercise of the right of use of land under these access rights by another person. This means that any redress by way of legal proceedings will lie against the operator.

There are two other important sets of provisions in the Act relevant to fracking:

There is provision for the Secretary of State to request the Committee on Climate Change to provide advice under section 38 Climate Change Act 2008 on the likely impact on the carbon budget of onshore activities for obtaining petroleum.

There are also amendments made to the Petroleum Act 1998 to provide safeguards in respect of onshore hydraulic fracturing.

These include requirements for well consents for onshore petroleum licences in England and Wales to be subject to conditions making hydraulic fracturing associated with petroleum operations, and exceeding certain thresholds, subject to a consent regime, and indeed prohibited at depths of less than 1,000 metres. There will also be conditions relating to the protection of “protected areas” such as national parks, areas of outstanding natural beauty, groundwater source protection zones and sites of special scientific interest.

During the passage of the Bill through Parliament, the Labour Opposition tried to amend the Bill by introducing amendments excluding “fracking” entirely under such

areas. There were also amendments requiring mandatory environmental impact assessments and the monitoring of emissions other than methane.

Those amendments were however overridden, with the effect that drilling will now be allowed to proceed horizontally under protected zones such as national parks, provided that the surface entry point is outside the relevant area.

That would seem sensible, as the most significant environmental impacts of onshore petroleum operations carried out under current UK regulatory regimes, including those which involve “fracking”, are likely to be mainly those experienced at the surface, in the form of noise, traffic movements etc. connected with the wellhead operations, rather than any resulting from the drilling operations at depth.

An industry-funded task force on Shale Gas, chaired by Lord (Chris) Smith has recently published an interim report which calls for a dedicated “one-stop shop” regulator for fracking operations, which would act in place of the Environment Agency HSE and DECC.

The current system is considered too cumbersome and unapproachable. However it would seem that the Government is unlikely to favour this suggestion,

as a recent DECC response to a report by the House of Commons Environmental Audit Committee expressed the view that the current regulators in England were already working together effectively.

The proposal would seem only likely to be relevant and viable, if there were to be a large number of applications in future for consents for operations including fracking for shale gas, which might overload the current regulatory system.

That does not seem very likely at present, however. While there are some planning applications now in the pipeline for England, progress on these is likely to be slow, and fracking is currently subject to a moratorium in both Wales and Scotland.

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