IN THE HIGH COURT OF JUSTICE **CO/3093/2020**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

B E T W E E N :

THE QUEEN
(on the application of Georgia Elliott-Smith)

Claimant

– and –

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

1st Defendant

– and –

DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND

2nd Defendant

– and –

THE SCOTTISH MINISTERS

3rd Defendant

– and –

MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

4th Defendant

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Leigh Day

FAO: Secretary of State for Business, Energy and Industrial Strategy

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Your Ref:

Our Ref: RWS/00255697/1

Date: 5 August 2020

Dear Secretary of State,

Re: Proposed claim for judicial review against the Secretary of State for Business, Energy and Industrial Strategy

We are instructed by Ms Georgia Elliott-Smith ("the Claimant") in relation to a proposed challenge to the Defendants' recent decisions on the design of a carbon emissions trading scheme for the UK. We write in accordance with the Pre-action protocol for judicial review. Please note that we are requesting your response as soon as possible, and in any event no later than by 4 pm on 19 August 2020.

Proposed Defendants:

(1) Secretary of State for Business, Energy and Industrial Strategy, UK Government

(2) Minister for Agriculture, Environment and Rural Affairs, Northern Ireland Executive

(3) Cabinet Secretary for Environment, Climate Change and Land Reform, Scottish Government

(4) Minister for Environment, Energy and Rural Affairs, Welsh Government

Proposed Claimant: Ms Georgia Elliott-Smith, 36 Chase Court Gardens, Enfield EN2 8DJ

The details of the matter being challenged

1. On 1 June 2020 the Defendants issued: *The future of UK carbon pricing: UK government and devolved administrations' response* ("the Response").[1] This included the following decisions ("the Decisions"):
   (1) Waste Incineration plants will be exempt from the UK's carbon emissions trading scheme;
   (2) The UK's carbon emissions trading scheme will contain an opt-out for installations with emissions lower than 25,000t CO_2e per annum; and
   (3) The UK's carbon emissions trading scheme will allow unused carbon allowances to be "rolled forward", to be sold and used at a later date.

Background facts and law at issue

Primary legislation

2. The relevant provisions of primary legislation are ss.1 and 44 of the Climate Change Act 2008 ("CCA 2008"), which provide:

> **1 The target for 2050**
>
> (1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.
>
> (2) *"The 1990 baseline"* means the aggregate amount of—
>
> (a) net UK emissions of carbon dioxide for that year, and
>
> (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas.

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889037/Government_Response_to_Consultation_on_Future_of_UK_Carbon_Pricing.pdf

44 Trading schemes

(1) The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas emissions.

(2) A "trading scheme" is a scheme that operates by—

(a) limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or

(b) encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere.

Introduction of a UK Emissions Trading Scheme

3. As you will be aware, the EU's Emissions Trading Scheme ("EU ETS") applies within the UK, and will continue to do so until the end of 2020. The EU ETS began in 2005 with Phase 1. It is currently in Phase 3, which will end on 31 December 2020, after which Phase 4 will apply. Instead of Phase 4 of the EU ETS applying within the UK, however, the Defendants have set out the design of a UK Emissions Trading Scheme ("UK ETS") to apply from 1 January 2021 in the Response, which relevantly provides:

"20. This document sets out the UK Government and DAs' decisions on the design of the UK ETS, which could operate as either a linked or standalone system, in light of a wide range of evidence gathered in the consultation.

…

52. We acknowledge respondents' comments regarding expanding the scope of the scheme to include municipal waste incinerators. The complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include

them in a UK ETS. We also acknowledge the CCC's advice to expand the scope to include agriculture and land use. While we agree that emissions from these sectors will need to be abated to meet our net zero target, there may be more appropriate measures than the UK ETS for doing so. This will be for the appropriate government departments to consider following the CCC's advice on the Sixth Carbon Budget and a net zero trajectory, however municipal incinerators will not be included within the scope of the UK ETS for the period 2021 - 2025.

…

160. We will implement a Small Emitter and Hospital Opt-Out for installations with emissions lower than 25,000t CO2e per annum and a net-rated thermal capacity below 35MW which follows the approach in Phase IV [of the EU ETS]. … the UK Government and Devolved Administrations believe that current thresholds support our net zero emissions targets while striking the right balance between reducing the administrative burden on installations and aligning with carbon budgets.

…

230. … We further proposed that unsold allowances at auctions should be 'rolled forward' to the following four auctions …

…

234. As our proposals will help to support a smoother, more stable flow of allowances into the market and protect against the impacts of repeated low demand, we intend to implement them both, in line with the overwhelmingly positive responses to these proposals.

235. We note the concerns of some respondents that these proposals might increase oversupply of allowances at auction compared to the current rules under the EU ETS. … We recognise the CCC's concern, set out

in their advice on a standalone UK ETS from 20 March 2020, that there may be a large reserve of allowances in the long-term."

4. Between 2013 and 2020, one third of the UK's entire emissions came within the scope of the EU ETS (see, the Response, §24).[2] The Defendants' stated position is that "any replacement of the EU ETS would be at least as ambitious environmentally",[3] meaning that the UK ETS will be the principal means of combatting at least one third of the UK's entire emissions.

5. The UK ETS aims to reduce the UK's CO_2 emissions by setting an overall cap on the amount of emissions allowable, which will reduce over time. The allowable emissions will be divided into allowances, given to (or purchased by) installations covered by the scheme. The installations may either use their allowances to account for their emissions, or can sell them (assuming they limit their emissions accordingly) through auctions. Penalties will be imposed on installations that exceed their allowances. The effect is that a financial incentive is created for installations to reduce emissions, but only to the point of the cap set at any given time.

Policy Objective of the UK Emissions Trading Scheme

6. The Response makes clear that the policy objective of the UK ETS is to tackle climate change:

> "12. The UK Government and the Devolved Administrations (DAs) are committed to climate action.
>
> …

[2] We note that the Committee on Climate Change considered the EU ETS to have covered one quarter of the UK's emissions in its letter of 7 August 2019: https://www.theccc.org.uk/wp-content/uploads/2019/08/Letter-from-Lord-Deben-The-future-of-carbon-pricing.pdf

[3] The Response, §50

> 14. Having left the EU, the UK will remain at the forefront of domestic and international action on climate change by committing to go further and faster in our efforts to deliver clean energy and a net zero future.
>
> …
>
> 25. The overall cap for the UK ETS will determine the limit on total emissions allowances. Our UK ETS cap is set to signal our long-term climate commitments while ensuring our economy remains competitive."

7. However, it is clear from the Response that the only aspect of this commitment to climate action that was accounted for by the Defendants in making the Decisions was the 'net zero target' in s.1 CCA 2008: see, for example, §§52 and 160 quoted above in relation to the first two Decisions specifically, and §§12 and 34 in relation to the design of the UK ETS more generally. Notably, the third Decision appears to have been motivated only by considerations of the market, with no regard for climate impact at all.

8. This is borne out by *The Future of UK Carbon Pricing Impact Assessment* of 1 June 2020 ("June 2020 Impact Assessment") accompanying the Response.[4] This makes clear that it is the "legally binding target of net zero emissions by 2050" that informs the Decisions (see, §§3-9), rather than any wider considerations about averting climate change (including in relation to the global warming potential of non-CO_2 emissions) or meeting the rest of the UK's Paris Agreement commitments, as explained below. Similarly, the letter dated 1 June 2020 sent by the Defendants to the Committee on Climate Change underlines the net-zero policy objective:[5]

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4 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889038/The_future_of_UK_carbon_pricing_impact_assessment.pdf

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/889040/Letter_to_CCC_responding_to_advice_on_standalone_UK_ETS_June_2020.pdf

> "We share your view that there is a need to ensure the UK ETS cap is in line with a trajectory consistent with the UK's net zero targets and ambitions. … it is the joint governments' view that for the launch of the UK ETS, it is important to put in place a policy which provides a pragmatic and feasible approach to meeting net zero through the ETS." (emphasis added)

9. In considering only the net zero commitment, the Defendants failed to account for the commitments made by the UK in the Paris Agreement, as explained below. In particular, the Defendants failed to consider the pressing need to reduce emissions in the short to medium-term, as distinct from achieving net zero emissions by 2050.

10. As set out in the grounds of challenge below, the Decisions are unlawful for the same reasons that the Court of Appeal gave when quashing the Defendant's decision in *R (Friends of the Earth) v Secretary of State for Transport* [2020] EWCA Civ 214.

Requirements and relevance of the Paris Agreement commitments

11. The UK has signed and ratified the Paris Agreement, which relevantly provides:

> "Article 2
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

…

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty." (emphasis added)

12. That the Paris Agreement is relevant to the Decisions, and ought to have been considered, is self-evident from the nature of the UK ETS. The purpose of the statutory power at issue, s.44 CCA 2008 quoted above, being the limitation of greenhouse gas emissions with the aim of averting climate change underlines the relevance of this consideration. In any event, the Defendants made clear in the Response itself that averting climate change is the express aim of the UK ETS: it follows that the UK's commitments under the Paris Agreement to achieve that aim are obviously relevant.

13. At no point, however, has the Defendants given any consideration to the Paris Agreement commitments to the extent that they are different to, and go beyond, the net zero target in s.1 CCA 2008. As the Court of Appeal in *Friends of the Earth* made clear, the Paris Agreement commitments relate not only to 2050 target but also to the period after this. Similarly, the Paris Agreement commitments relate to the intervening period before the 2050 deadline for net zero emissions: they require the UK to seek to limit global temperature increases to 1.5°C above pre-

industrial levels and to reach peak global emissions and start to reduce them "as soon as possible".

14. The *Technical Summary* of the Special Report, *Global Warming of 1.5°C*, from the Intergovernmental Panel on Climate Change ("IPCC")[6] makes clear that, for there to be any chance of achieving the 1.5°C limit, very substantial cuts to emissions will have to be made in the short to medium term so that global (rather than merely the UK's) emissions reach net zero by 2050. Given that the Article 4(1) Paris Agreement commitment expressly recognises that developed countries will need to make the largest cuts before developing countries, the 1.5°C limit will require developed countries like the UK to make significant cuts long in advance of 2050. In particular, the IPCC makes clear that the Paris Agreement will require developed countries to frontload their emissions reductions (rather than deferring them to a 2050 deadline):

> "Limiting warming to 1.5°C depends on greenhouse gas (GHG) emissions over the next decades, where lower GHG emissions in 2030 lead to a higher chance of keeping peak warming to 1.5°C (high confidence). Available pathways that aim for no or limited (less than 0.1°C) overshoot of 1.5°C keep GHG emissions in 2030 to 25–30 GtCO2e yr−1 in 2030 (interquartile range). … In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO2 emissions decline by about 45% from 2010 levels by 2030 (40–60% interquartile range), reaching net zero around 2050 (2045–2055 interquartile range). For limiting global warming to below 2°C with at least 66% probability CO2 emissions are projected to decline by about 25% by 2030 in most pathways (10–30% interquartile range) and reach net zero around 2070 (2065–2080 interquartile range).
>
> …

[6] https://www.ipcc.ch/sr15/download/#chapter

> In comparison to a 2°C limit, the transformations required to limit warming to 1.5°C are qualitatively similar but more pronounced and rapid over the next decades (high confidence).
>
> …
>
> Policies reflecting a high price on emissions are necessary in models to achieve cost-effective 1.5°C pathways (high confidence). Other things being equal, modelling studies suggest the global average discounted marginal abatement costs for limiting warming to 1.5°C being about 3–4 times higher compared to 2°C over the 21st century, with large variations across models and socioeconomic and policy assumptions. Carbon pricing can be imposed directly or implicitly by regulatory policies." (p.33)

15. Relatedly, the scientific consensus is that reliance on a long-term emissions reduction target, without differentiating that aim from the need for immediate emissions reductions as well, is based on the flawed assumption that emissions in the short-term can be 'undone' in the longer-term. The fallacy in this assumption is that it overlooks the impact of climate 'tipping points', which occur when a seemingly moderate amount of warming leads to inexorable further increases in global temperatures that cannot be reversed. Acting on the basis of this assumption is clearly incompatible with the UK's Paris Agreement commitments to reduce emission "as soon as possible" and to pursue efforts to limit temperature increase to 1.5°C.

16. The Defendants, however, have failed to give any consideration to these aspects of the UK's Paris Agreement commitments. The sole measure of climate action considered by the Defendants in the design of the UK ETS is the net-zero commitment in s.1 CCA 2008.

17. The consequences of this failure are particularly acute in relation to each of the three Decisions. These all allow higher emission to continue in the short to medium

term than would otherwise be the case, as explained below, and are fundamentally incompatible with the UK's Paris Agreement commitments.

Emissions from municipal waste incinerators

18. The first Decision excludes municipal waste incinerators from the UK ETS. This will mean that huge volumes of emissions are ignored by the scheme and there will be no mechanism to account for, offset, or incentivise the reduction of emissions from incinerators. The scale of these ignored incinerator emissions is staggering: in 2017, UK incinerators emitted 10.95 million tonnes of CO_2 emissions ("$mtCO_2e$"), of which $5mtCO_2e$ were from "fossil sources" such as plastic.[7] By 2019, that had risen to $6.6mtCO_2e$ from fossil sources.[8]

19. Based on the Government's own statistics,[9] in 2017 an estimated $5.2mtCO_2e$ equivalents were emitted from incineration in the energy supply sector (excluding emissions from biogenic waste material), and 0.3 Mt of CO_2e were emitted from incineration in the waste sector. In 2018, an estimated 6.0 Mt of CO_2e were emitted from incineration in the energy supply sector, and 0.3 of CO_2e were emitted from incineration in the waste sector.

20. The emissions from fossil sources are particularly important, as these are emissions that would not be emitted through other forms of waste disposal: plastic waste stored in landfill does not break down and release GHG emissions for an extremely long time, while recycling similarly ensures the carbon stored within the fossil sources is not emitted in the short to medium-term. Obviously, waste reduction in the first place would prevent the need for waste disposal, and thus

[7] https://ukwin.org.uk/files/pdf/UKWIN-2018-Incineration-Climate-Change-Report.pdf
[8] to https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-01-29/HL927/; https://ukwin.org.uk/facts/#co2fromplastic
[9] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2020-01-29/HL927/

the need for emissions from these fossil sources to be managed at all. Inclusion of municipal waste incinerators could also potentially encourage investment in carbon capture technology and in more efficient sorting technology to remove plastics prior to incineration. As the then Resource Minister told Parliament in January 2018: "In environmental terms, it is generally better to bury plastic than to burn it...We need to be careful about what incentives we push."[10]

21. In contrast, incineration causes instantaneous (additional) emissions relative to all other forms of waste management. Despite this, the Defendants have decided that the UK ETS will ignore these emissions.

22. According to the June 2020 Impact Assessment, the "business as usual" emissions that will be within the scope of the UK ETS in 2021 will be 126-131mtCO_2e. Even assuming that CO_2 emissions from incineration remained at 2017 or 2019 levels (which is unlikely given the uniformly increasing trajectory in incinerator emissions since 2000)[11], the ignored incinerator emissions would equate to up to 8.7% of the entire volume of emissions within the scope of the UK ETS. Given the planned overall size of the UK ETS relative to the UK's entire emissions, the ignored incinerator emissions represent a very substantial portion of the UK's total CO_2 emissions. The exclusion of incinerators means that they face no climate change-related emissions regulations, and are currently subject to no financial or legal punitive measures that would incentivise a reduction in their emissions.

Inclusion of the "Small Emitter" Opt-Out

23. Compounding the exclusion of incinerators from the UK ETS is the fact that there are a very large number in operation in the UK (48 in full operation, with a further 17 under construction as of 2019).[12] These installations are known to calculate

[10] https://hansard.parliament.uk/Commons/2017-01-23/debates/590623BD-398C-4586-A693-FCC1DB5EA444/Non-RecyclableAndNon-CompostablePackaging#contribution-7EF1F971-46FF-46B6-8164-3B09D64D1269
[11] https://ukwin.org.uk/facts/#co2fromplastic
[12] https://ukwin.org.uk/facts/#co2fromplastic

their emissions in such a manner that many assert that they fall below the 25,000t CO_2e per annum threshold and so could also avail of the "small emitters" opt-out if municipal waste incinerators were included within the UK ETS.[13] This is done by reporting low net emissions arrived at by offsetting equivalent CO_2 emissions otherwise produced by gas sources. Setting this threshold and not closing this loophole, in a context where municipal waste incinerators are too easily allowed to calculate their own emissions at such a low level, provides a 'double lock' exclusion of incinerators from the UK ETS.

24. The Response makes clear that, while the Defendants considered the possibility of raising the threshold for the opt-out (which would make it available to a wider range of emitters), no consideration was given to whether a lower threshold should be set. In making this decision, the Defendants considered the net zero target, but failed to consider what would be required so as to meet the UK's Paris Agreement commitments set out above.

25. The effect of this double exclusion of incinerator emissions from the UK ETS is that a substantial portion of the UK's emissions are unnecessarily excluded from the principal means adopted by the Defendants to tackle CO_2 emissions. This lifts the financial cost associated with its emissions from the incinerator industry. This contributes to its financial viability as a means of waste disposal, despite the fact that it undermines waste reduction and recycling efforts.

[13] For example, we are aware that the North London Waste Authority ("NLWA"), who is responsible for the proposed new Edmonton incinerator (third largest in UK), has calculated that it will emit only 28,000tCO_2 per year from a feedstock of 700,000t per year. This is despite the IPCC's advice that when one tonne of municipal waste is combusted approximately 0.7 to 1.7 tonnes of CO_2 is generated. Taking the IPCC's middle point of 1.2tCO_2, Edmonton should be reporting 840,000tCO_2 per year. NLWA arrives at this figure by: subtracting equivalent emissions associated with generating electricity by a gas fired power station and heating produced by gas boilers; and then off-setting further CO_2 based on recovery of metals from the post-incineration bottom ash and the use of some residual ash for road fill or manufacture of breezeblocks.

Allowing unused carbon allowances to be "rolled forward"

26. Under EU ETS, unused emissions allowances are transferred to the Market Stability Reserve, which severely reduces their ability to be rolled forwards and used in future auctions. This means that emissions reductions in one period cannot be used to justify correspondingly higher emissions in a subsequent period. The clear benefit to this is that it maximises the emission reductions that are achievable within the short term, which is an essential commitment made by developed countries under the Paris Agreement.

27. In contrast, however, the Defendants have decided to allow unused emissions under the UK ETS to be rolled forward to the subsequent four auctions. It is clear from the Response that the reason for this decision was the protection of the market, not the need to reduce emissions. This Decision reduces the extent to which the UK ETS will be able to ensure adequate emission reductions in the short to medium term. It is also notable that this feature will directly conflict with the Defendants' stated intention that "any replacement for the EU ETS would be at least as ambitious environmentally".

Grounds of Challenge

28. The Defendants' Decisions are unlawful for the following reasons:

(1) Failure to account for relevant considerations: the relevance of the UK's Paris Agreement commitments to the decision to exclude municipal waste incinerators from the UK ETS;

(2) Failure to account for relevant considerations: the relevance of the UK's Paris Agreement commitments to the decision to set an upper emissions threshold for the "Small Emitter Opt-Out" of 25,000t CO_2e per annum and a net-rated thermal capacity of 35MW in the absence of a robust carbon accounting methodology;

(3) Failure to account for relevant considerations: the relevance of the UK's Paris Agreement commitments to the decision to allow unused carbon allowances to be "rolled forward";

(4) Accounting for irrelevant considerations: the decision to exclude municipal waste incinerators from the UK ETS was on the basis that their inclusion would be "difficult" because of the "environmental requirements" placed them;

(5) Ultra vires s.44(2) CCA 2008; and

(6) Irrational.

Grounds 1-3: failure to consider the UK's Paris Agreement commitments when making the decisions (1) to exclude municipal waste incinerators from the UK ETS, (2) to set an upper emissions threshold for the "Small Emitter Opt-Out" of 25,000t CO_2e per annum, and (3) to allow unsold allowances to be rolled forward

29. As set out above, it is clear from the Response, the June 2020 Impact Assessment and the accompanying documents that the Defendants intend for the UK ETS to address climate change, but in doing so has considered only the net zero commitment in s.1 CCA 2008. The Defendants failed to account for the commitments made by the UK in the Paris Agreement to the extent that they are qualitatively different and measurable against different timescales to the net-zero emissions by 2050 commitment. In particular, the Defendants failed to consider the pressing need to reduce emissions in the short to medium-term, as distinct from achieving net zero emissions by 2050.

30. As noted above, the UK's Paris Agreement commitments were clearly relevant to the Defendants' Decisions, not least because the express policy objective of the UK ETS is that the "UK Government and the Devolved Administrations (Das) are committed to climate action". As the Court of Appeal in *Friends of the Earth* made clear, with such an objective underlining the policy decisions at issue:

> "237. … the only reasonable view open to [the Secretary of State] was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in *Hurst*, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category." (emphasis added)

31. The Defendants' Decisions are unlawful because of the failure to consider the UK's Paris Agreement commitment, particularly those relating to reducing emissions in the short to medium-term.

32. In relation to the Decision to exclude municipal waste incinerators from the UK ETS (ground 1), this failure meant the Defendants failed to consider whether (and to recognise that) the additional emissions released by incineration of municipal waste relative to other forms of waste disposal undermine the UK's short to medium-term Paris Agreement commitments.

33. In relation to the decision to set an upper emissions threshold for the "Small Emitter Opt-Out" of 25,000t CO_2e per annum, this failure meant that the Defendants failed to consider whether (and to recognise that) the diffusion of very substantial emissions from the municipal waste incineration industry across a large number of installations, which report net emissions (after off-setting for equivalent energy produced from gas generation) in order to fall below the threshold, causes substantial short and medium-term emissions to escape the financial incentives to make reductions under the UK ETS.

34. In relation to the decision to allow unsold allowances to be rolled forward, this failure meant that the Defendants failed to consider whether (and to recognise that) this was incompatible with the urgent need to cut emissions "as soon as possible", particularly in the short-term. Allowing unsold allowances to be rolled forward means that net emission reductions will inevitably progress only at the rate set by the UK ETS, as any additional reductions will allow more emissions in the next period than would otherwise be the case (i.e. overall reduction in emissions over the two periods will be at a pre-determined rate, rather than the additional reductions in the first period being 'banked' and used as the baseline for the second period). This significantly undermines the potential for the UK ETS to encourage emissions reductions "as soon as possible", consistent with the commitments under the Paris Agreement.

Ground 4: Accounting for irrelevant considerations when making the decision to exclude municipal waste incinerators from the UK ETS

35. The Response, at §52 (quoted above), made clear that the decision to exclude municipal waste incinerators from the UK ETS was based solely on the assertion that the "complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them".

36. This was an irrelevant consideration:

    a. The "complex environmental requirements" are undefined but it appears to be a reference to the mere existence of regulatory requirements for incinerators. Environmental regulations exist for virtually all the industries and installations covered by the UK ETS. They do not give a reason to exclude these industries any more than they provide a reason to exclude municipal waste incinerators. This is because the environmental regulations do not create a financial incentive to reduce CO_2 emissions, nor

provide a system to monitor and reduce emissions progressively (the fundamental aim of the UK ETS).

b. The asserted diversion of waste from landfill is a flawed and irrelevant consideration as (i) the use of incineration in place of alternative waste disposal (including landfill) leads to increased CO_2 emissions, which is fundamentally inconsistent with stated objective of the UK ETS, and (ii) the diversion of waste from landfill by incinerators is significantly less than the diversion from recycling and reduction of waste efforts.

c. The asserted "difficulties" are undefined, but are necessarily an irrelevant consideration. There are no substantial (let alone insurmountable) difficulties in calculating CO_2 emissions from municipal waste incinerators; once they can be counted, they can be fully included within the UK ETS. To the extent that there are any difficulties at all in calculating CO_2 emissions from municipal waste incinerators, they are no more difficult than the calculations for other industries or installations that are included within the UK ETS. The Defendants has already decided that such difficulties are not a reason to omit these other industries or installations. Accordingly, any difficulties or complexities in the environmental regulations imposed on municipal waste incinerators have no bearing on the extent to which they could be included within the UK ETS. This was an irrelevant consideration and the Decision was unlawful as a result.

37. Alternatively, the Defendants gave excessive weight to this consideration such that the Decision was *Wednesbury* unreasonable.

Ground 5: Ultra vires the Climate Change Act 2008

38. The power to establish the UK ETS is in s.44 CCA 2008. That section empowers the Secretary of State to establish a trading scheme to limit activities that cause greenhouse gas emissions and to contribute to the reduction in such emissions.

The Defendants' stated objective in exercising this power to establish the UK ETS is that it should be at least "at least as ambitious environmentally" as the EU ETS (the Response, §50 and the June 2020 Impact Assessment).

39. In designing the trading scheme under s.44, the Defendants were required to make rational decisions: including industrial emissions and omitting domestic emissions, for example. By deciding to omit municipal waste incinerators from the UK ETS, however, the Defendants acted irrationally. This Decision fails to comply with the purpose for which the s.44 power was conferred (to design a scheme to limit and reduce emissions). The Decision was beyond the scope of the Defendants' powers and was unlawful as a result.

Ground 6: irrationality

40. Each of the Decisions was unreasonable in the sense that they were outside the range of reasonable decisions open to the decision-maker. In circumstances where the UK ETS is intended to be "at least as ambitious environmentally" as the EU ETS (the Response, §50 and the June 2020 Impact Assessment), it covers the majority of industrial emissions, and it is a crucial means through which the UK will have to discharge its Paris Agreement commitments, it was irrational (i) to exclude municipal waste incinerators, (ii) to set an upper threshold of 25,000t CO2e per annum for the Small Emitter Opt-Out, and (iii) to allow unsold emission allowances to be rolled forward.

Details of the action that the Defendants are expected to take

41. The Defendants are requested without delay to confirm that they will review the Response, giving consideration to the UK's Paris Agreement commitment, and issue a revised version. The Claimant's position is that the only rational outcome from that review is that the Defendants will decide to reverse the three Decisions above.

Disclosure of documents and information

42. Pursuant to the Defendants' duty of candour in anticipation of High Court proceeding, the Defendants are invited to disclose the following documents and information:

    (1) Any records of the Defendants' decision-making process leading to the Response relating to the above grounds of challenge, including those documents that the Defendants may later rely on in order to defend those grounds;

    (2) Any information relating to the "complex environmental requirements" placed on municipal waste incinerators referred to in §52 of the Response;

    (3) Any calculations the Defendants carried out before making the Decisions that show the estimated volume of CO_2 between 2021 and 2050 that will not come under the UK ETS due to the exclusion of municipal waste incinerations;

    (4) Any assessment the Defendants made of the extent to which, if municipal waste incinerators were included within the UK ETS, existing rules governing how those incinerators calculate their estimates emissions would allow those incinerators to fall under the small emitter opt-out;

    (5) A copy of the letter dated 20 March 2020 sent by the Committee on Climate Change to the Minister of State for Business, Energy and Clean Growth (and others) in response to that Minister's letter dated 4 March 2020.

ADR Proposals

43. Please also confirm by reply whether the Defendants are amenable to resolving this dispute though ADR.

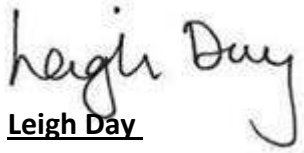
Address for reply and service of court documents

44. Mr Rowan Smith (who has conduct of this matter), Leigh Day, Priory House, 25 St John's Lane, London, EC1M 4LB.

Date for reply

45. We expect a reply promptly and in any event within 14 days of the date of this letter i.e. no later than 4 pm on 19 August 2020. Should we not have received a reply by this time we will issue proceedings for judicial review without further notice to you.

Yours faithfully,



Leigh Day

Leigh Day

FAO: Ms Ellen Richardson

Governmental Legal Department

Copied to: Ms Emma Haughey (Northern Ireland Executive); Mr William Cordingley (Welsh Government); Mr Norman Munro (Scottish Government)

Direct Dial: 020 3780 0474

Email: RowanS@leighday.co.uk

Your Ref: Z2008680/ERI/JD3

Our Ref: RWS/00255697/1

Date: 24 August 2020

Dear Ms Richardson,

Re: R (Georgia Elliott-Smith) v Secretary of State for BEIS & others

Introduction

1. We write again on behalf of Ms Georgia Elliott-Smith ("the Claimant") in relation to a proposed challenge to the Defendants' recent decisions on the design of a carbon emissions trading scheme for the UK. We write in accordance with the Pre-action protocol for judicial review.
2. The purpose of this letter is to put you on notice of two additional grounds of challenge. All the other details contained in our pre-action protocol letter dated 5 August 2020 remain the same for the purpose of this proposed challenge.
3. Given the imminent deadline for a claim to be issued, we do not necessarily expect you to deal with the below points in your substantive response to our first pre-action letter. Either way, we intend to include these points in our statement of facts and grounds, and we will of course consider your response to them (if received after the claim has been issued) in advising the Claimant on which arguments to pursue.

Additional Grounds of Challenge

Failure to account for the UK's Paris Agreement commitments in making the decision to set the cap on the emissions allowable under the UK ETS above the projected business as usual emissions for 2021

4. The cap for the UK ETS is, purportedly, intended to reduce in line with the net zero by 2050 commitment. However, by setting the cap for 2021 (at 156 $mtCO_2e$) higher than the level of existing emissions (projected to be 126 to 131 $MtCO_2e$ in 2021), and keeping the cap higher than those existing emissions in the short to medium term (i.e. next 1-9 years, according to the draft Greenhouse Gas Emissions Trading Scheme Order 2020), the UK ETS defers the cuts necessary to meet the 2050 deadline until closer to that date. This overlooks the importance of substantially reducing emissions in the short to medium term, and is fundamentally an error of law by ignoring the relevant considerations of what is required by the Paris Agreement.

Exercise of a power for improper purposes in making the decision to set the cap on the emissions allowable under the UK ETS above the projected business as usual emissions for 2021

5. The purposes for which the powers in s.44 CCA 2008 are conferred are clear from the face of the legislation: to establish a system to regulate GHGs and to limit and reduce emissions. Both the establishment of the scheme and the design of its features must be for those purposes. However, it is clear from the Response that the purpose behind setting the cap <u>above</u> the business as usual emissions for 2021 was owing to "pressures that business currently face as a result of our departure from the EU" (§59). Rather than serving the purposes for which s.44 is conferred (limiting and reducing emissions), the UK ETS will instead serve the purpose of helping businesses to cope with the financial and competitive pressures caused by Brexit. As a result, the Defendants have unlawfully acted for improper purposes.

<u>Next steps</u>

6. We look forward to receiving your substantive response as soon as practicable.

Yours faithfully,

Leigh Day

Leigh Day

Government
Legal Department

Litigation Group **T 020 7210 3000**
102 Petty France
Westminster
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DX 123243, Westminster 12 **www.gov.uk/gld**

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Priory House
25 St John's Lane
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EC1M 4LB

By email only

Your ref: RWS/00255697/1
Our ref: Z2008680/ERI/JD3

26 August 2020

Dear Mr Smith

Proposed claim for judicial review: R (oao Georgia Elliott-Smith) v Secretary of State for Business, Energy & Industrial Strategy & Others

We write in response to your letter, dated 5 August 2020, sent in accordance with the Judicial Review Pre-Action Protocol. We are instructed by the Secretary of State for Business, Energy and Industrial Strategy.

1 The claimant

1. The proposed claimant is Ms Georgia Elliott-Smith of 36 Chase Court Gardens, Enfield EN2 8DJ. The letter before claim does not explain how the proposed claimant would have sufficient standing to bring the judicial review claim proposed, especially in light of the fact that she did not respond to the consultation. It appears that the claimant has very little if any genuine interest in the target of the proposed challenge. The respondent reserves his position to argue that the proposed claimant does not have sufficient standing.

2 From

2. This letter of response is sent on behalf of the Secretary of State for Business, Energy and Industrial Strategy.

3. You have identified the Devolved Administrations as co-defendants in your pre-action protocol letter. This response has been reviewed by the Devolved Administrations who agree with and adopt the response. With regard to the Scotland, we would note that the competent respondent would be the Scottish Ministers or the Lord Advocate.

3 Reference details

4. The reference is set out at the head of this letter. The identity of the lawyer handling this issue is set out at the end of this letter.

4 The details of the matter being challenged

5. The matter being challenged is the decision by the Secretary of State and the Devolved Administrations on the appropriate design of a UK emissions trading system (UK ETS) which was published on 1 June 2020 by way of the document entitled 'The future of UK carbon pricing: UK Government and Devolved Administrations' response' ("the Response").

6. It is not correct to suggest that there were three separate decisions as described in paragraph 1 of the letter before claim each of which may separately be challenged. Whilst consideration was given to particular matters raised in the consultation, there was a single overall decision on the appropriate design of the UK ETS which had regard to a range of factors.

5 Response to the proposed claim

7. The proposed claim is not being conceded, and will be contested in full, for the reasons given below.

Background facts

8. It is apparent that the grounds of challenge set out in the letter before claim are misconceived and founded on false premises. When the correct position is understood, it is clear that the proposed claim cannot even get off the ground.

UK ETS, the Climate Change Act 2008 and the Paris Agreement

9. The policy objective of the UK ETS is not simply to tackle climate change. The objective of the UK ETS, as set out in 'The Future of UK Carbon Pricing Impact Assessment' dated June 2020 ("the Impact Assessment"), is to "incentivise cost-effective emissions reductions for sectors currently in scope of the EU ETS", whilst balancing this with the need to maintain UK business competitiveness and other pressures that businesses currently face as a result of the UK's departure from the EU and covid-19. The ability to deliver a smooth transition to a standalone UK ETS was also a particular consideration, following the position stated in the Clean Growth Strategy in 2017. The UK ETS was designed taking into account a range of factors, not only the objective of addressing climate change.

10. The UK ETS was adopted to ensure that there is a fully functioning UK emissions trading system from January 2021, which gives industry certainty and continues to deliver significant emission reductions in line with current carbon budgets, bearing in mind also the unprecedented covid-19 pandemic and associated economic emergencies (the full and long-term impact of which on traded emissions cannot be assessed). The scheme was designed in order to deliver a UK ETS which can be operational immediately following the end of the transition period on 31 December 2020, ensuring no carbon pricing gap emerges when the UK ceases to participate in the EU ETS. It is a replacement for the EU ETS, to stimulate emissions reduction from large UK emitters within the energy-intensive industry, power generation and aviation sectors currently participating in the EU ETS.

11. The overall reduction in carbon emissions in an ETS is established by setting a limit on the level of available emission allowances (the cap) and the rate by which those allowances are reduced over time (the trajectory). The initial cap has been set with a reduction of 5% compared to the notional cap the UK would have had if it had remained in the EU ETS for Phase IV of the EU ETS. This starting point cap demonstrates clear climate ambition from the start of the UK ETS, whilst also minimising the risks associated with transition from the EU ETS. It provides a balance between a tightening of the cap on emissions and stability and competitiveness for UK business.

12. Under the UK ETS as it currently stands, the initial cap will be reduced annually so that it will remain 5% below where the UK's notional share of the Phase IV EU ETS cap would have been expected to be, year-on-year. The UK ETS is designed to go further and faster than the EU ETS.

13. The initial design of the UK ETS is, however, intended to be purely temporary in nature. The UK ETS has been designed to provide the necessary flexibility to raise the requirements of the UK ETS in the near future. There will be a consultation on the level of and appropriate trajectory for the cap for the remainder of Phase 1 of the UK ETS within nine months of the Committee on Climate Change's advice on the sixth carbon budget being published. This advice is due in late 2020. This advice will inform the evolution of the UK ETS after its initial launch. Any resultant changes will be implemented by January 2023 if possible, and certainly no later than January 2024.

14. In the May 2019 consultation document, it was stated that, in terms of sectors and activities covered, it was proposed that the scope of the UK ETS should align with the EU ETS. It was said that this would deliver continuity. This is relevant because the issues on the scope of the UK ETS about which the claimant complains in the letter before claim are also features of the EU ETS. If they were changed as the claimant wishes, the scope of the UK ETS would not align with the EU ETS.

15. There is, however, a separate commitment to consider the option of expanding the scope of the UK ETS to the most appropriate additional sectors in the first UK ETS review, to be conducted from 2023, to enable implementation of any potential changes to scope by no later than 2026.

16. It is not the case that, in designing the UK ETS, the only aspect of climate action to which regard was had was meeting the 2050 net zero target set out in the amended Climate Change Act 2008. The Response refers to action on climate change generally and not only in the context of the 2050 net zero target (see eg paras 12, 14, 25, 26 and 58). The 1 June 2020 letter to the Committee on Climate Change (CCC) also makes it clear that regard was had to tackling climate change generally and not only in relation to the 2050 net zero target.

17. Moreover, it is apparent that the Paris Agreement itself was taken into account in designing the UK ETS. The Paris Agreement is repeatedly referenced in the consultation document, the Response and the 1 June 2020 letter to the CCC.

18. The extent to which the Paris Agreement was taken into account in the design of the UK ETS is reflected by the fact that the reviews under the UK ETS were designed to align with the Paris Agreement Global Stocktakes. As was stated in the Response, aligning the review points with the Paris Agreement Global Stocktake dates ensures that a UK ETS remains aligned with the UK's global ambitions on carbon (para 151; see also paras 10, 150 and 244).

19. In any event, the UK Government's 2050 net zero target goes beyond the legal requirements of the Paris Agreement. The CCC made it clear in its May 2019 report 'Net Zero: The UK's contribution to stopping global warming' that the 2050 net zero target "meets fully the requirements of the Paris Agreement, including the stipulation of 'highest possible ambition'". The CCC was clear that it did not consider it credible to aim to reach net zero emissions earlier than 2050.

20. The suggestions in paragraph 14 of the letter before claim that the 2050 net zero target means deferring action until 2050, and not making significant reductions in the short to medium term, are simply wrong and a misunderstanding of how the net zero target in the Climate Change Act 2008 works. Section 4 of the 2008 Act provides for the setting of carbon budgets to cap greenhouse gas emissions in a series of five-year periods. Pursuant to s8, the carbon budget for a period must be set with a view to meeting the net zero target for 2050 and the requirements as to level of carbon budgets under s5, and complying with the international obligations of the UK. This framework ensures continued progress towards the 2050 target in the period before that year.

21. The fifth and most recent carbon budget, for example, requires for the period 2028-2032 the equivalent of a 57% cut in emissions against a 1990 baseline. The CCC has advised that changes are not currently required to the fifth carbon budget in light of the net zero amendment.

22. In October 2017, the Secretary of State published the Clean Growth Strategy, setting out the Government's policies and proposals for decarbonising the national economy. This strategy provided for a new UK ETS which would be at least as ambitious as the existing EU ETS and provide a smooth transition for the relevant sectors. Whilst carbon pricing is an important part of tackling climate change, it is only one of a range of actions being planned or taken to tackle climate change. The UK's climate change framework, whilst setting the overall level of ambition, leaves open the determination of how best to achieve it, across the whole economy.

23. It is not the case that, for the design of the UK ETS, especially as it is to run for the initial period from 2021 to 2025, there is anything in the Paris Agreement which is different from and goes beyond the 2050 net zero target. The claimant is wrong to suggest in the letter before claim that the Paris Agreement, as it relates to the initial design of the UK ETS, is more demanding in relation to either timing or extent than the provision in the 2008 Act to meet the net zero target by 2050.

24. The decision-makers did not fail to consider taking action in the period before 2050. Indeed, that was the main purpose of establishing the UK ETS and its design for the initial period of 2021-2025. Moreover, consideration was given to setting the cap and the trajectory in the UK ETS to seek greater reductions in the short to medium term (see eg the Response at paras 58-63). The 1 June 2020 letter to the CCC also makes it clear that there was consideration of tightening the cap on emissions further. Not only is it clear from the Response that regard was had to taking action on climate change generally, consideration was also given to how far the initial design of the UK ETS should go towards meeting that general aim.

25. In addition to this, the UK ETS has been designed bearing in mind that the CCC is due to produce its advice on the sixth carbon budget, for the period 2033-2037, in late 2020. The Response and the 1 June 2020 letter to the CCC make it clear that there is a commitment to review the approach adopted in the initial design of the UK ETS in light of this advice from the CCC.

26. The basis of the proposed claim – that the three elements of the UK ETS complained of are "fundamentally incompatible with the UK's Paris Agreement commitments" – is unsupported by any evidence and is wrong. The entire claim is founded upon a false premise.

Emissions from municipal waste incinerators

27. The proposed claim in relation to municipal waste incinerators is based on the false premise that, unless municipal waste incinerators are included in the UK ETS, there is no mechanism to incentivise the reduction of emissions from such incinerators. This is wrong. Waste management policy interventions to reduce the amount of municipal waste going for incineration are a means of encouraging the limitation of the incineration of municipal waste and thereby reducing emissions from municipal waste incinerators.

28. In England, for example, the December 2018 'Resources and Waste Strategy for England' seeks to maximise the amount of waste sent to recycling instead of incineration (or landfill) and reduce the amount of waste (including municipal waste) that is produced in the first place. Legislation is coming forward in the Environment Bill to provide the legislative framework needed to deliver on many of the commitments in this strategy. There are other similar strategies in the Devolved Administrations, e.g. the Welsh Government's 'Towards Zero Waste' and 'Beyond Recycling' strategies and the Scottish Government's circular economy strategy 'Making Things Last'. The Waste (Wales) Measure 2010 sets increasingly challenging statutory recycling targets for local authorities with the aim of at least 70% of municipal waste being recycled or composted/anaerobically digested by 2025, thus reducing the quantity of material being incinerated or landfilled. In Northern Ireland, the Department of Agriculture, Environment & Rural Affairs is currently developing the 'Environment Strategy for Northern Ireland'. Scotland already restricts the incineration of materials for recycling and the 'Circular Economy Package policy statement' published by the four administrations in July 2020 seeks to increase recycling of municipal waste and restrict the waste materials which can be incinerated.

29. There are also other mechanisms available to reduce greenhouse gas emissions from municipal waste incinerators, such as a potential incineration tax. The potential for an incineration tax was set out in the October 2018 Budget, which said at paragraph 3.58:

> *"The government recognises the important role incineration currently plays in waste management in the UK, and expects this to continue. However, in the long term the government wants to maximise the amount of waste sent to recycling instead of incineration and landfill. Should wider policies not deliver the government's waste ambitions in the future, it will consider the introduction of a tax on the incineration of waste, in conjunction with landfill tax, taking account of the possible impacts on local authorities."*

30. The letter before claim also appears to be predicated on the assumption that incineration of municipal waste leads to the highest level of carbon emissions of all means of dealing with such waste, including landfill. That contention is not accepted.

Small emitter opt-out

31. The UK ETS includes a small emitter opt-out scheme, pursuant to which certain installations can apply to enter a scheme with a reduced administrative burden. Although not subject to emissions trading, installations in this category are still required to monitor and report their emissions and to continue to decrease their emissions through a system of reducing annual emissions targets. This is in line with a feature of the EU ETS.

32. Installations to which the small emitter opt-out applies must reduce their emissions according to targets which reduce annually in line with the trajectory of the overall cap in the UK ETS. Emissions from installations within the small emitter opt-out also still count as part of the overall UK ETS cap. Small emitters within the opt-out therefore face a similar incentive to reduce emissions and decarbonise as larger emitters who fall within the scope of the full ETS. It is an opt-out from the full ETS scheme, not from the obligation to reduce emissions under the UK ETS.

33. If operators within the small emitter opt-out fail to meet their emissions targets they would pay a penalty equal to the amount of emissions over the target multiplied by the scheme carbon price. Exceeding the target has a cost per allowance corresponding to the average price over a year of buying allowances under the full ETS. There are also civil penalties for under-reporting emissions under the small emitter opt-out and for providing false or misleading information in reporting emissions.

34. The letter before claim is therefore wrong to contend that installations which fall within the small emitter opt-out are excluded from the UK ETS, do not have financial costs associated with their carbon emissions and "escape the financial incentives to make reductions under the UK ETS". The opposite is the case. This entire issue appears to be based on a misunderstanding of the UK ETS by the claimant. It is certainly based on a false premise.

35. In relation to the thresholds for the small emitter opt-out scheme, the consultation proposed aligning the thresholds with the EU ETS, which they will be. The view was taken in the Response that "current thresholds support our net zero emissions targets while striking the right balance between reducing the administrative burden on installations and aligning with carbon budgets" (para 160). It is clear that this encompassed factors tending to suggest that the threshold should be adjusted both up and down, with a balance being struck. The Response did not give express consideration to lowering the threshold for the small emitter opt-out because no respondent to the consultation suggested that the threshold should be lowered for the start of the UK ETS, whereas some did suggest that it should be raised and so that suggestion was addressed expressly in the Response.

36. The point made in the letter before claim about how municipal waste incinerators calculate their CO_2 emissions is academic, as such incinerators are not within the scope of the emissions trading regime in the UK ETS in the first place and so do not rely on the small emitter opt-out. In any event, there is no "loophole" in this respect. The energy generated by municipal waste incinerators offsets emissions from an alternative source which would otherwise have arisen. It is well-established that offsets can be accounted for when calculating the emissions of municipal waste incinerators.

Rolling forward unused carbon allowances

37. The UK ETS includes the ability for unsold allowances at auctions to be 'rolled forward' to the following four auctions, with each auction offering for sale allowances up to a maximum of 125% of those originally intended for sale at that auction. So, unsold allowances are not redistributed more than the next four auctions out and no one auction will have more than 125% of its originally intended allowance volume as a result of the rolling forward of allowances. If successive auctions with unsold allowances result in a redistribution which would cause an auction to be inflated beyond 125% of its originally planned volume, the excess for that auction would be entered into a reserve. The unsold allowances are therefore moved into an allowance reserve if multiple auctions do not fully clear, removing them from auctions. By limiting the extent to which allowances can be rolled forward, and providing a route to reserve where the limits are reached, the design of the UK ETS goes beyond the equivalent provisions of the EU ETS.

38. This element of the design of the UK ETS was not included only to serve the market and with no regard for climate impact. It is in fact more restrictive of the ability to redistribute allowances than the current Phase III of the EU ETS, which does not limit the number of allowances that can be 'pushed forward' into future auctions, nor how far into the future auctions can be inflated. The measures to roll forward unsold allowances in the UK ETS are based on the design of the EU ETS but are more stringent in applying limits to the number of allowances that can be rolled forward.

39. The letter before claim is therefore wrong to contend that there is any contrast between the UK ETS and the EU ETS in this respect which benefits those covered by the UK ETS and to suggest that this is less ambitious environmentally than the EU ETS. In fact, the design for rolling forward allowances in the UK ETS enables greater ambition environmentally than the EU ETS.

40. The letter before claim is also wrong to suggest that the UK ETS will allow more emissions in a subsequent period than would otherwise be the case and that the overall reduction over two periods would be at a pre-determined rate. This entire issue appears to be based on a misunderstanding of the UK ETS by the claimant. It is certainly based on a false premise.

41. Providing this route to reserve for surplus allowances might lead to a build-up of allowances in that reserve. The Response therefore also contained a particular commitment to consult on how appropriately to address any long-term surplus of allowances which may build-up in the UK ETS allowance reserve in the long-term (para 235). However, this is only necessary as a result of the UK ETS including a route to reserve that enables greater ambition environmentally.

Grounds 1-3: Failure to consider the Paris Agreement

42. In Grounds 1-3, it is contended that, when deciding on the initial design of the UK ETS as set out in the Response, there was a failure to consider the "Paris Agreement commitments". It has been explained above that, on the facts of this case, there plainly was no such failure.

43. As in the case of *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004, it is impossible to infer from the Response and the associated documents any failure to have regard to the UK's relevant statutory and policy commitments on climate change. The decision-makers for the UK ETS were plainly well-aware of the UK's determination to contribute to the global goals of the Paris

Agreement, which were factored in when legislating for net zero, and were familiar with what this means in practice. They can be taken to have been fully aware of the Paris Agreement and the 2008 Act and to have taken their provisions into account.

44. In any event, as the Court of Appeal held in *Packham*, even if there was a legal obligation to take the Paris Agreement into account which has not been satisfied in this case, there is no legal duty in relation to the Paris Agreement to go further than considering the 2050 net zero target provided for in the 2008 Act (see paras 98-100).

45. Grounds 1 to 3 set out in the letter before claim allege failures "to account for" and "to recognise" certain matters. These go beyond contentions that matters were left out of consideration and into disagreements with judgements on the underlying merits of the considerations. Such allegations would not amount to errors of law. They would not provide permissible grounds for judicial review.

46. There is, in any event, no evidential basis for the contention that the exclusion of municipal waste incinerators from the UK ETS undermines the UK's ability to comply with the Paris Agreement. That is plainly not the case, for the reasons summarised above. In any event, given the scale and complexity of matters involved, no one single decision could be said to have this effect.

47. Moreover, the formulation of Grounds 1 to 3 is based on a false premise, namely that, if the Paris Agreement had been taken into account, the Response would have concluded that municipal waste incinerators should be included within the full UK ETS. The contention that the Paris Agreement was left out of account is wrong, but, in any event, there is no basis for assuming that this consequence would have followed. Municipal waste incinerators were not excluded from the UK ETS, and the threshold of the small emitter opt-out was not set, as a result of the level of climate ambition which was adopted in the Response for the UK ETS.

48. There were also good reasons for excluding municipal waste incinerators from the UK ETS which would be unaffected by any view taken on climate change ambition. Municipal waste incinerators were excluded for the reasons given in paragraph 52 of the Response and also because to include them would have been incompatible with a fundamental objective of the UK ETS, namely that there must be a smooth transition for industry from the EU ETS to the UK ETS.

49. Additionally, even if it had been concluded that a higher level of climate change ambition should be reflected in the design of the UK ETS, this would not have led to municipal waste incinerators being included within the full UK ETS or a lowering of the threshold for the small emitter opt-out. First, if a higher ambition was required, it would have been achieved through an adjustment to the cap and not to the scope or detail of the UK ETS. Secondly, even if there was to be a change to the scope of the UK ETS, there are areas which would have been considered before municipal waste incinerators were considered. For example, whilst the CCC has not recommended that municipal waste incinerators be brought within the scope of the UK ETS, it has recommended that the scope of the UK ETS could be expanded to include other areas.

50. Grounds 1 to 3 are wholly misconceived and totally without merit.

Ground 4: Taking into account irrelevant considerations

51. This ground contends that irrelevant considerations were taken into account when concluding that municipal waste incineration should remain outside the scope of the UK's initial ETS.

52. Paragraph 35 of the letter before claim is wrong to contend that the decision not to bring municipal waste incinerators within the scope of the UK ETS was "based solely" on the conclusion that "the complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS". It is clear from reading paragraph 52 of the Response as a whole that the conclusion was also based on the view that "there

may be more appropriate measures than the UK ETS" for reducing emissions from municipal waste incinerators. As noted above, such measures could include, for example, waste management policy interventions to reduce the generation of municipal waste in the first place, to reduce the amount of municipal waste going for incineration, as well as taxation, regulation and innovation.

53. This ground is, in any event, misconceived in suggesting that the matters complained about by the claimant were legally irrelevant considerations such that it was an error of law to take them into account. The Court of Appeal made clear in *R (Khatun) v Newham LBC* [2005] QB 37 that where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, then it is for the decision-maker to judge what is relevant subject only to *Wednesbury* review. It was clearly not irrational for the decision-makers in this case to judge they should have regard to the matters set out at paragraph 52 of the Response.

54. Matters which relate to the difficulties arising in relation to including an activity in an emissions trading scheme are plainly relevant considerations when deciding whether or not to bring that activity within the scope of the scheme. The suggestion that this is a legally irrelevant consideration is hopeless. It is absurd to suggest that, when deciding what activities to include within the scope of an emissions trading scheme under the 2008 Act, it is legally impermissible to consider the difficulties arising in relation to including such activities within the scheme.

55. As to paragraph 36(a) of the letter before claim, the "complex environmental requirements placed on municipal waste incinerators" are obvious. It is well-known that waste incineration has been subject to particular and complex requirements for many years, including in particular those arising under European Directives such as 89/429/EEC, 89/369/EEC, 2000/76/EC and 2010/75/EU. The "complex environmental requirements placed on municipal waste incinerators" can perhaps best be described by reference to two categories.

56. First, there are those requirements which apply to the incineration of waste. These are currently found in, for example, Chapter IV of the Industrial Emissions Directive (and the Waste Incineration Directive before it) and the Waste Framework Directive. For England and Wales, for example, municipal waste incinerators would also normally be subject to Schedules 7 (Industrial Emissions Directive) and 13 (waste incineration) to the Environmental Permitting (England and Wales) Regulations 2016. These include a detailed and prescriptive set of requirements which address both processes and emissions.

57. Secondly, there are those requirements which apply to the broader subject of the management of municipal waste, in both law and policy, some of which have been described earlier in this letter.

58. The complexities are increased by the fact that there are different instruments applying in the different administrations of the UK. See, for example, in addition, the Pollution Prevention and Control (Scotland) Regulations 2012, the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013, the Waste (England and Wales) Regulations 2011, the National Waste Management Plan for Scotland Regulations 2007 and the Waste Regulations (Northern Ireland) 2011.

59. Contrary to what is said at paragraph 36(a), the Response did not refer to the "mere existence of regulatory requirements for incinerators". It clearly refers to the difficulties such matters would cause in relation to including municipal waste incinerators in a UK ETS. Nor is there any basis for suggesting that the Response proceeded on the basis that a UK ETS would duplicate pre-existing regulations which contained financial incentives to reduce CO_2 emissions. Further, it is clear that the environmental regulations applicable to the incineration of municipal waste do not apply to other industries and installations covered by the UK ETS. They are different.

60. As to paragraph 36(b) of the letter before claim, it is again obvious that the incineration of municipal waste plays a role in diverting waste from landfill. Some waste is incinerated that would otherwise have been sent to landfill. That is undeniable. Including municipal waste incinerators in the UK ETS would be difficult without creating incentives which run counter to environmental requirements such as reducing the amount of waste sent to landfill. It is obvious that requiring municipal waste incinerators to

purchase credits under a ETS would risk incentivising less waste to be incinerated and more waste to be landfilled. Adding in a new hurdle to the incineration of municipal waste would create a situation which was less effective than otherwise might be the case in diverting waste from landfill. It has been judged better to manage the waste system in its entirety and holistically through waste policy and regulation.

61. The contentions that (1) incineration does not divert waste from landfill, and (2) incineration leads to higher CO_2 emissions than landfill, are unsupported by evidence and are not accepted. They are in any event disagreements on the underlying merits of subject matter which cannot be raised in a claim for judicial review, save as contentions of *Wednesbury* irrationality, which are not made and which would in any event be hopeless.

62. Contrary to what is suggested in paragraph 36(c) of the letter before claim, the difficulties referred to in paragraph 52 of the Response are not "difficulties in calculating CO_2 emissions from municipal waste incinerators". They are policy and practical difficulties that would arise in relation to grappling with a situation where further environmental regulation was added on top of existing complex environmental requirements and where a different set of requirements was added which would, at least to an extent, be in tension with existing waste-related requirements. The issue of whether such matters would make it difficult to include municipal waste incinerators in a UK ETS was a matter of judgement for the decision-makers.

63. In paragraph 37 of the letter before claim it is also contended that the decision-makers gave such excessive weight to the considerations identified at paragraph 52 of the Response that the decision was irrational. This allegation is hopeless. The reasoning for not bringing municipal waste incinerators within the scope of the UK ETS was sound. The decision-makers were entitled to conclude that municipal waste incinerators should not be brought within the scope of the UK ETS. This reflects the conclusion reached by the EU.

Ground 5: *Ultra vires* s44 of the Climate Change Act 2008 and irrationality

64. The letter before claim makes two separate points in relation to this ground.

65. First, it is contended that the decision to adopt a scheme which did not include municipal waste incinerators was outside the power for which s44 of the Climate Change Act 2008 was conferred. This is not accepted. Under ss44-45 of the 2008 Act, there is a wide discretion as to what a scheme may comprise and broad aims for how a scheme may operate. A scheme does not have to include all activities that consist of the emission of greenhouse gases, or that cause or contribute, directly or indirectly, to such emissions. There is no obligation to include any particular activity in a scheme. There is nothing in the 2008 Act to suggest that a scheme may only lawfully be made if it includes municipal waste incinerators within its scope.

66. Secondly, it is contended that the decision to adopt a scheme which did not include municipal waste incinerators was irrational, that is one that no reasonable person in the position of the decision-maker, properly directing himself on the relevant material, could have reached. The decision was plainly not irrational, not least given that the EU ETS does not include municipal waste incinerators either.

Ground 6: Irrationality

67. The decision on the appropriate design of the UK ETS, including in relation to each of the three matters about which the claimant complains, was plainly not irrational. The decision was within the range of reasonable decisions open to the decision-makers. The reasoning for the decision was explained in the consultation document, the Response, the Impact Assessment and the letter to the CCC of 1 June 2020. In relation to the commitment in the Clean Growth Strategy that any replacement of the EU ETS would be at least as ambitious environmentally as the EU ETS, the three aspects of the UK ETS about

which the claimant complains are essentially the same as the EU ETS (the third is somewhat more restrictive). They are therefore at least as ambitious as the EU ETS.

68. Overall, in considering the appropriate design of the UK ETS, questions of judgement arise, particularly in relation to consideration of the extent of inquiry that should be undertaken, the factors that should be taken into account, and as to the weight to be afforded to those factors. The legal test is one of rationality in relation to all of those matters (see eg the *Khatun*, *Plantagenet Alliance*, *DSD v Parole Board* line of cases). The rationality hurdle is extremely difficult to overcome precisely because it reflects, on important constitutional grounds, the primacy of decision-making by the Government and Devolved Administrations. That is all the more so in a context such as this concerning a multi-faceted decision involving a range of policy and political judgements.

Other matters

Undue delay and lack of promptness

69. Under CPR r54.5, a judicial review claim must be brought promptly and in any event within three months of the decision challenged. Moreover, under s31(6) of the Senior Courts Act 1981, the court can refuse permission or relief if there has been undue delay in making the application and there would be substantial hardship or prejudice, or detriment to good administration.

70. The courts have repeatedly stressed the need for promptness in bringing proceedings for judicial review. Promptness means that applications for judicial review have to be made as speedily as possible. Promptness and the three month long-stop are separate requirements. The pre-action protocol for judicial review records that compliance with the protocol does not affect the time limit for bringing a claim.

71. There has been a lack of promptness in this case. The Response was published on 1 June 2020. The pre-action protocol letter was not even sent until 5 August 2020, more than two months later. There is no explanation for the delay of this scale, and nor could there be any justification for it.

72. It is also relevant that the proposals for the UK ETS – including all three elements about which the claimant complains – were published in the consultation document in May 2019, some 15 months ago. It has been clear for all this time that it was not proposed that the UK ETS would cover municipal waste incinerators.

73. The claimant has also unduly delayed in bringing a claim in terms of s31(6) of the Senior Courts Act 1981. Permission (or if necessary relief) should be refused on the basis of the prejudice and the detriment to good administration that would be likely to arise.

74. The prejudice and detriment to good administration arises as follows. The decision was published on 1 June 2020. The draft Order in Council to establish the UK ETS in line with the Response was laid before Parliament and the Scottish Parliament on 13 July 2020, and before the Northern Ireland Assembly and Senedd Cymru on 15 July 2020, under paragraph 11 of Schedule 3 to the Climate Change Act 2008, for approval by resolution of each House of Parliament, the Scottish Parliament, the Northern Ireland Assembly and Senedd Cymru. This Order includes provision for the design of the UK ETS as set out in the Response, including the scope of the UK ETS (not including municipal waste incinerators) and the threshold of the small emitters opt-out.

75. It is too late now to lay a new draft Order in Council before the legislatures in order to have a new UK ETS established for 1 January 2021. If the draft Order does not proceed, then there will be no ETS in place for 1 January 2021.

76. Moreover, since the publication of the Response on 1 June 2020, confirmed by the publication of the draft Order on 13 July 2020, operators would have understood from the statements in the Response that a UK ETS was to be established and what its design and scope was to be. The importance of allowing operators to be ready to work with the new UK ETS by 1 January 2021 is plain but was stressed in the Response. If the UK ETS was to be halted or delayed, or the scope or design of the UK ETS was to be reconsidered or revised (including the threshold for the small emitter opt-out), then the affected operators would be prejudiced.

77. This amounts to both prejudice and detriment to good administration.

78. There is no requirement for the prejudice and detriment to be caused by the delay, but in this case there has been prejudice and detriment caused by the delay specifically. Had the claimant's letter before claim been sent earlier than it was, and/or had a judicial review been commenced earlier, it would have been possible to review the position adopted in the Response in light of the grounds and, if thought appropriate, lay a different draft Order. It is now too late to do that in time for 1 January 2021. The claimant's delay means that either the UK ETS proceeds as set out in the Response or there will be no UK ETS for 1 January 2021.

Discretion

79. The claim, and all the grounds of challenge except Ground 3, are directed towards seeking the inclusion of municipal waste incinerators within the scope of the full UK ETS. It is highly likely that the outcome in this respect would not have been substantially different if the conduct complained of had not occurred. Under s31 of the Senior Courts Act 1981 therefore the court would be obliged to refuse to grant permission and to grant relief even if any of those grounds was made out.

80. This is because including municipal waste incinerators within the scope of the UK ETS from the start of Phase 1 would have been incompatible with a fundamental objective of the UK ETS, which was set out clearly in the May 2019 consultation, namely that there must be a smooth transition for industry from the EU ETS to the UK ETS.

81. The scope of the UK ETS stated in the Response, following the consultation, would not have gone beyond the sectors currently in scope of the EU ETS, ie not municipal waste incinerators (see eg the consultation document at para 6). The consultation only referenced "the potential to expand scope in later years of UK ETS operation" (p11).

82. Additionally, even if it had been concluded that a higher level of climate change ambition should be reflected in the design of the UK ETS, this would not have led to municipal waste incinerators being included within the full UK ETS. This has been explained above.

83. Moreover, there is a commitment to consider the option of expanding the scope of the UK ETS to the most appropriate additional sectors in the first UK ETS review, with a report setting out the review's conclusions to be published before 31 December 2023, to enable implementation of any potential changes to scope by no later than 2026. There is therefore an alternative route for the claimant to pursue the remedy she seeks, namely the inclusion of municipal waste incinerators within the UK ETS.

84. As further points, the very limited extent of the claimant's interest in the subject matter of the claim, and the prejudice and detriment to good administration, both as set out above, would also be relied upon as reasons why the court should refuse to exercise its discretion to grant a remedy in this matter, even if the claim is made out.

Aarhus Convention

85. The letter before claim did not state that the proposed claim would be an Aarhus Convention claim. The Secretary of State agrees that it would not be an Aarhus Convention claim. An Aarhus Convention claim is a claim which is within the scope of Article 9(1), 9(2) or 9(3) of the Convention. The proposed claim would not fall within the scope of any of these provisions. If a claim is commenced and it is said to be an Aarhus Convention claim, then the Secretary of State reserves his position to contest this and/or to seek to vary or remove the limit on the costs recoverable following provision of information on the claimant's financial resources as required by the Civil Procedure Rules.

6 Details of any other Interested Parties

86. There are no further interested parties to be identified. Regulations are to be made by HM Treasury under the Finance Act 2020 in relation to auctions but it is not considered necessary to identify HM Treasury as an interested party in a challenge to the Response.

7 ADR proposals

87. No proposals for ADR were made in the letter before claim. The Secretary of State does not make any.

8 Response to requests for information and documents

88. In paragraph 42(1) of the letter before claim you ask for disclosure of documents showing the decision-making process leading to the Response. We will not be disclosing such documents. We do not accept that we are under a duty to disclose documents to you. Judicial review is not a vehicle for seeking access to Government information or documents. There are of course other statutory mechanisms, with their own limits, for that. Judicial review exists to correct legal error and requires at the first stage an arguable case to be made out. There is in any event no general duty of disclosure in judicial review and disclosure is not a requirement of meeting the duty of candour, even where the duty of candour applies.

89. With the consultation document, the Response, the Impact Assessment and the letter to the CCC of 1 June 2020, the decision and the reasons for it have been clear and in the public domain since 1 June 2020. We have in this letter addressed the particular issues you raise in the letter before claim. The disclosure sought is not therefore necessary. Moreover, there are no relevant factual disputes arising from the letter before claim. Disclosure of documents is not necessary to resolve any of the issues between the parties.

90. As to paragraph 42(2), the complex environmental requirements placed on municipal waste incinerators have been explained above.

91. As to paragraph 42(3), no calculations were carried out before publication of the Response that show the estimated volume of CO_2 between 2021 and 2050 that will not come under the UK ETS due to the exclusion of municipal waste incinerations. As to paragraph 42(4), no assessment was made before publication of the Response of the extent to which, if municipal waste incinerators were included within the UK ETS, existing rules governing how those incinerators calculate their estimated emissions would allow those incinerators to fall within the small emitter opt-out.

92. You asked in paragraph 42(5) for a copy of the CCC's letter of 20 March 2020. This is available online at: https://www.theccc.org.uk/wp-content/uploads/2020/05/CCC-to-Kwasi-Kwarteng-Future-of-carbon-pricing.pdf.

9 Address for further correspondence and service of court documents

93. The address for further correspondence and service of court documents is that at the head of this letter.

Yours sincerely

Ellen Richardson
For the Treasury Solicitor

D +44 (0)20 7210 3038
F +44 (0)20 7210 3001
E ellen.richardson@governmentlegal.gov.uk

Leigh Day

FAO: Ms Ellen Richardson

Governmental Legal Department

Copied to: Ms Emma Haughey (Northern Ireland Executive); Mr William Cordingley (Welsh Government); Mr Norman Munro (Scottish Government)

Direct Dial: 020 3780 0474

Email: RowanS@leighday.co.uk

Your Ref: Z2008680/ERI/JD3

Our Ref: RWS/00255697/1

Date: 27 August 2020

Dear Ms Richardson,

Re: R (Georgia Elliott-Smith) v Secretary of State for BEIS & others

1. We write specifically in reply to paragraph 85 your letter dated yesterday (26 August).
2. For the avoidance of doubt, this is quite obviously an Aarhus Convention claim, as defined by r. 45.41(2)(a) of the Civil Procedure Rules ("CPR"), because the Claimant is challenging the legality of a decision within the scope of Article 9(3) of the Aarhus Convention, namely one which contravenes provisions of national law relating to the environment (here the Climate Change Act 2008 and/or common law). As such, the Claimant will proceed with the benefit of the costs protection (as set out in r. 45.43(2)(a) of the CPR) that brings.
3. We also note that your letter did not address the additional grounds of challenge raised in our letter dated 24 August. If your client intends to do so before 1 September, we would be most grateful if you could respond by no later than 4pm on 28 August.

Yours faithfully,

Leigh Day

Leigh Day

Government
Legal Department

Litigation Group **T 020 7210 3000**
102 Petty France
Westminster
London
SW1H 9GL

DX 123243, Westminster 12 **www.gov.uk/gld**

Rowan Smith
Leigh Day
Leigh Day Solicitors
Priory House
25 St John's Lane
LONDON
EC1M 4LB

By email only

Your ref: RWS/00255697/1
Our ref: Z2008680/ERI/JD3

27 August 2020

Dear Mr Smith

Proposed claim for judicial review: R (oao Georgia Elliott-Smith) v Secretary of State for Business, Energy & Industrial Strategy & Others

We write further your letters of 24 August 2020 and of today's date, which you have described respectively as "supplemental" and "further supplemental" pre-action protocol letters.

We confirm that we are taking instructions on the two additional grounds set out in your first supplemental pre-action protocol letter dated 24 August 2020. It is regrettable that these points have been raised so late in the day and in the context of a case in which there has, for the reasons set out in our letter of 26 August 2020, already been unjustifiable delay. We will not be in a position to respond by 1 September 2020, but will do so as soon as possible thereafter.

With regard to your letter of today's date, we note that you are now contending that this is an Aarhus Convention claim and are surprised that you are raising this only now. In any event, our position remains as set out in our letter of 26 August 2020. If a claim is commenced and it is said to be an Aarhus Convention claim, then the Secretary of State reserves his position to contest this and/or to seek to vary or remove the limit on the costs recoverable following provision of information on the claimant's financial resources as required by the Civil Procedure Rules.

Yours sincerely

E. A. Richardson

Ellen Richardson
For the Treasury Solicitor

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F +44 (0)20 7210 3001
E ellen.richardson@governmentlegal.gov.uk

Judicial Review
Claim Form

Notes for guidance are available which explain how to complete the judicial review claim form. Please read them carefully before you complete the form.

In the High Court of Justice Administrative Court	
Help with Fees - Ref no. (if applicable)	H W F – –

For Court use only	
Administrative Court Reference No.	
Date filed	

Seal

HIGH COURT OF JUSTICE ★ ADMINISTRATIVE COURT ★

Is your claim in respect of refusal of an application for fee remission? ☐ Yes ☑ No

SECTION 1 Details of the claimant(s) and defendant(s)

Claimant(s) name and address(es)

name
Georgia Elliott-Smith

address
C/o 36 Chase Court Gardens
Enfield
London
EN2 8DJ

Telephone no.

Fax no.

E-mail address
georgia@element-4.co.uk

Claimant's or claimant's legal representatives' address to which documents should be sent.

name
Leigh Day

address
25 St. John's Lane
Farringdon
London
EC1M 4LB

Telephone no.
020 7650 1200

Fax no.
020 7253 4433

E-mail address
postbox@leighday.co.uk

Claimant's Counsel's details

name
David Wolfe QC and Ben Mitchell

address
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Matrix Chambers
Griffin Building
Gray's Inn
London WC1R 5LN

Ben Mitchell
11KBW
11 King's Bench Walk
Temple
London EC4Y 7EQ

Telephone no.
+44 (0)20 7404 3447 (DW)
+44 (0)20 7632 8500 (BM)

Fax no.

E-mail address
DavidWolfe@matrixlaw.co.uk
Ben.Mitchell@11kbw.com

1st Defendant

name
Secretary of State for Business, Energy and Industrial Strategy, UK Government

Defendant's or (where known) Defendant's legal representatives' address to which documents should be sent.

name
Ellen Richardson

address
Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

Telephone no.
02072103000

Fax no.

E-mail address
ellen.richardson@governmentlegal.gov.uk

2nd Defendant

Minister for Agriculture, Environment and Rural Affairs, Northern Ireland Executive; The Scottish Ministers; Minister for Environment, Energy and Rural Affairs, Welsh Government

Defendant's or (where known) Defendant's legal representatives' address to which documents should be sent.

name
As above

address
As above

Telephone no.
As above

Fax no.

E-mail address
As above

SECTION 2 Details of other interested parties

Include name and address and, if appropriate, details of DX, telephone or fax numbers and e-mail

name
N/a

address

Telephone no.

Fax no.

E-mail address

name

address

Telephone no.

Fax no.

E-mail address

SECTION 3 Details of the decision to be judicially reviewed

Decision:
See paragraph 6 of the Statement of Facts and Grounds.

Date of decision:
1 June 2020

Name and address of the court, tribunal, person or body who made the decision to be reviewed.

name
See Defendants details (section 1)

address
Secretary of State for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

SECTION 4 Permission to proceed with a claim for judicial review

I am seeking permission to proceed with my claim for Judicial Review.

Is this application being made under the terms of Section 18 Practice Direction 54 (Challenging removal)?	☐ Yes	☑ No
Are you making any other applications? If Yes, complete Section 8.	☐ Yes	☑ No
Is the claimant in receipt of a Civil Legal Aid Certificate?	☐ Yes	☑ No
Are you claiming exceptional urgency, or do you need this application determined within a certain time scale? If Yes, complete Form N463 and file this with your application.	☐ Yes	☑ No
Have you complied with the pre-action protocol? If No, give reasons for non-compliance in the box below.	☑ Yes	☐ No

Have you issued this claim in the region with which you have the closest connection? (Give any additional reasons for wanting it to be dealt with in this region in the box below). If No, give reasons in the box below.	☑ Yes	☐ No

Does the claim include any issues arising from the Human Rights Act 1998?
If Yes, state the articles which you contend have been breached in the box below. ☐ Yes ☑ No

SECTION 5 Detailed statement of grounds

☐ set out below ☑ attached

SECTION 6 Aarhus Convention claim

I contend that this claim is an Aarhus Convention claim ☑ Yes ☐ No

If Yes, indicate in the following box if you do not wish the costs limits under CPR 45.43 to apply.

If you have indicated that the claim is an Aarhus claim set out the grounds below, including (if relevant) reasons why you want to vary the limit on costs recoverable from a party.

This is an Aarhus Convention claim, as defined by r. 45.41(2)(a) of the Civil Procedure Rules ("CPR"), because the Claimant is challenging the legality of a decision within the scope of Article 9(3) of the Aarhus Convention, namely one which contravenes provisions of national law relating to the environment (here CCA 2008 and/or common law). As such, the Claimant proceeds with the benefit of the costs protection (as set out in r. 45.43(2)(a) of the CPR) that brings

SECTION 7 Details of remedy (including any interim remedy) being sought

See paragraph 83 of the Statement of Facts and Grounds.

SECTION 8 Other applications

I wish to make an application for:-

SECTION 9 Statement of facts relied on

See Statement of Facts and Grounds attached.

Statement of Truth

I believe (~~The claimant believes~~) that the facts stated in this claim form are true.

Full name Rowan Smith

Name of claimant's solicitor's firm Leigh Day

Signed _____ Position or office held Solicitor

Claimant ('s solicitor) (if signing on behalf of firm or company)

SECTION 10 Supporting documents

If you do not have a document that you intend to use to support your claim, identify it, give the date when you expect it to be available and give reasons why it is not currently available in the box below.

Please tick the papers you are filing with this claim form and any you will be filing later.

☑ Statement of grounds	☐ included	☑ attached
☑ Statement of the facts relied on	☐ included	☑ attached
☐ Application to extend the time limit for filing the claim form	☐ included	☐ attached
☐ Application for directions	☐ included	☐ attached
☑ Any written evidence in support of the claim or application to extend time		
☐ Where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision		
☑ Copies of any documents on which the claimant proposes to rely		
☐ A copy of the legal aid or Civil Legal Aid Certificate *(if legally represented)*		
☑ Copies of any relevant statutory material		
☑ A list of essential documents for advance reading by the court *(with page references to the passages relied upon)*		
☑ Where a claim relates to an Aarhus Convention claim, a schedule of the claimant's significant assets, liabilities, income and expenditure.	☐ included	☑ attached

If Section 18 Practice Direction 54 applies, please tick the relevant box(es) below to indicate which papers you are filing with this claim form:

☐ a copy of the removal directions and the decision to which the application relates	☐ included	☐ attached
☐ a copy of the documents served with the removal directions including any documents which contains the Immigration and Nationality Directorate's factual summary of the case	☐ included	☐ attached
☐ a detailed statement of the grounds	☐ included	☐ attached

Reasons why you have not supplied a document and date when you expect it to be available:-

Signed  Claimant ('s Solicitor) Rowan Smith

PB 47

CO/ /2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

CLAIMANT'S STATEMENT OF FACTS AND GROUNDS

References are to tabs and pages of the Claim Bundle in the form [CB/tab/page]

Essential Reading

- The future of UK carbon pricing: UK government and devolved administrations' response **[CB/D/355]**
- The future of UK carbon pricing June 2020 Impact Assessment **[CB/D/423]**
- The Claimant's witness statement **[CB/B/43]**
- Correspondence between the Defendants and the Committee on Climate Change dated:
    - 2 May 2019 [**CB/D/219]**
    - 7 August 2019 [**CB/D/297]**
    - 4 March 2020 **[CB/D/339]**
    - 20 March 2020 [**CB/D/351]**
    - 1 June 2020 [**CB/D/353]**

The Claim

1. This is a challenge to the legality of the Defendants' decision in relation to the new UK Emissions Trading Scheme ("UK ETS"), which is scheduled to replace the existing EU

Emissions Trading Scheme at the end of the transition period for the UK's departure from the EU ("Brexit").

2. An emissions trading scheme is a means to address greenhouse gas ("GHG") emissions by using a market mechanism to determine where emissions reductions take place across multiple sectors of the economy. The fundamental issue here is that the Defendants failed to have regard to the short and medium term requirements of the Paris Agreement, namely the need to reduce emissions "as soon as possible" and to aim to limit global warming to 1.5°C above pre-industrial levels. Instead of accounting for these obligations, the Defendants focused on the commitment to achieve net zero emissions by 2050, which is a different and notably less demanding obligation.

3. This is evident in three features of the decision: (i) the exclusion of municipal waste incinerators from the UK ETS (incineration causes substantial additional GHG emissions relative to other forms of waste disposal, particularly in the short and medium term), (ii) the permitting of allowances to be rolled forward (so that emission reductions in one period can be used to authorise additional emissions in a subsequent period), and (iii) the setting of the 'cap' on the allowable emissions under the UK ETS above the level of existing emissions (so that GHG emissions may even be able to increase under the UK ETS).

4. The Claimant, an industry expert, environmental consultant and (more recently) environmental protection campaigner, submits that these features of the decision are unlawful because (in outline) they:

    a. Were made without regard for the UK's commitments under the Paris Agreement, which were obviously material to the decision because of the purpose of the UK ETS and the statutory power at issue, and (in relation to the exclusion of municipal waste incinerators) based on irrelevant considerations;

    b. Are ultra vires the statutory power under which the UK ETS will be made (as they will not serve the statutory purpose) and instead serve an improper purpose (namely, according to the Defendants themselves, in order to alleviate "pressures that business currently face as a result of our departure

from the EU", rather than to achieve emission reductions in the short to medium term).

5. The relevant features of the decision are set out in the Defendants' response to a consultation on the UK ETS. In pre-action correspondence the Defendants appeared to say that these features were settled upon in advance of the consultation (and not in the Defendants' response). If that is in fact the case, the Claimant also submits that the Defendants failed to carry out a lawful consultation exercise.

Decisions

6. On 1 June 2020 the Defendants issued: *The future of UK carbon pricing: UK government and devolved administrations' response* ("the Response") **[CB/D/355]**, along with an accompanying Impact Assessment ("June 2020 Impact Assessment") **[CB/D/423]**. These set out the following ("the Decision"):

   (1) Waste Incineration plants will be exempt from the UK ETS;

   (2) The UK ETS will allow unused carbon allowances to be "rolled forward", to be sold and used at a later date;

   (3) The cap on the total number of allowable emissions during the first period of the UK ETS (until either January 2023 or January 2024) will be higher than the UK's projected "business as usual" emissions during that time.

7. This followed a consultation between May and July 2019 by a similar name **[CB/D/221]**. The Response makes clear that substantive decisions were made on 1 June 2020. These are the decisions under challenge. The Defendants have also published a draft Order to establish the UK ETS on 14 July 2020: *The Greenhouse Gas Emissions Trading Scheme Order 2020* ("the Draft Order") **[CB/E/487]**. This will remake the same decisions and so take effect as a fresh public law decision, repeating the same legal errors, in respect of the same matters. Consequently, in the event that the Draft Order is made before the determination of this claim, the Claimant is minded to seek permission to amend her grounds and relief sought to cover the remade decisions in that Order.

The Law

8. The relevant provisions of domestic primary legislation are ss.1 **[CB/E/483]** and 44 **[CB/E/484]** of the Climate Change Act 2008 ("CCA 2008"), which provide:

> "**1 The target for 2050**
>
> (1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.
>
> (2) *"The 1990 baseline"* means the aggregate amount of—
>
> (a) net UK emissions of carbon dioxide for that year, and

(b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas.

…

44 Trading schemes

(1) The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas emissions.

(2) A "trading scheme" is a scheme that operates by—

(a) limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or

(b) encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere." (underlining added)

9. The EU ETS is provided for in EU Directives (principally, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC), implemented domestically by secondary legislation (principally, Greenhouse Gas Emissions Trading Scheme Regulations 2012/3038).

Pre-Action Correspondence

10. Regrettably, the Defendants failed to comply with the pre-action protocol for judicial review (the "Protocol"). The Defendants were due to respond within 14 days of the pre-action letter, namely by 4pm on 19 August 2020. However, the Defendant only provided a substantive response on 26 August 2020 **[CB/C/94]**. This is despite the Claimant's legal representatives agreeing to an extension, but requesting a substantive response by 9am on 24 August 2020, which the Defendants refused [**CB/C/88]**. Accordingly, the Claimant is treating the Defendants' actions as a breach of the Protocol, and reserves the right to bring this non-compliance to the Court's attention in respect of any subsequent case management directions and/or costs sanctions (see: paras.7, 20-21 of the Protocol). Further, the Claimant sent a

supplemental pre-action letter on 24 August 2020 relating to two other grounds **[CB/C/85]**. This has not been replied to substantively. The Claimant sent a further supplemental pre-action letter on 27 August 2020 **[CB/C/107]** confirming her view that this is a claim under the Aarhus Convention, which the Defendants appear to dispute **[CB/C/108]**.

Factual Background

Climate crisis and the Paris Agreement

11. The UK has signed and ratified the Paris Agreement **[CB/E/485]**, which relevantly provides:

> "Article 2
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> > (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> …
>
> Article 4
>
> 1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty." (emphasis added)

12. The two fundamental aspects of the UK's commitments under the Paris Agreement that are relevant to this claim are: to seek to limit global temperature increases to 1.5°C above pre-industrial levels ***and*** to reach peak global emissions and start to reduce them "as soon as possible". Unlike the commitment to achieve "net zero" carbon emissions by 2050, both of those commitments require substantial reductions in emissions in the short and medium terms, as opposed merely to on a trajectory to a 2050 deadline.

13. The Paris Agreement was made by the parties to the United Nations Climate Change Convention ("UNFCCC"). Under the Paris Agreement, states determine the GHG emissions reductions they will achieve, known as Nationally Determined Contributions ("NDC"). The Intergovernmental Panel on Climate Change ("IPCC"), which provides advice and analysis under the UNFCCC, analyses these NDCs and sets out whether the parties are on track to achieve the Paris Agreement commitments. The IPCC has made clear on numerous occasions that the Paris Agreement requires substantial emissions reductions to be made in the short term.

14. For example, in chapter 2 (*Mitigation Pathways Compatible with 1.5˚C in the Context of Sustainable Development* **[CB/D/140]**) of the IPCC's Special Report, *Global Warming of 1.5˚C*, the IPCC explains:

> "Under emissions in line with current pledges under the Paris Agreement (known as Nationally Determined Contributions, or NDCs), global warming is expected to surpass 1.5°C above pre-industrial levels, even if these pledges are supplemented with very challenging increases in the scale and ambition of mitigation after 2030 (*high confidence*). This increased action would need to achieve net zero CO_2 emissions in less than 15 years. Even if this is achieved, temperatures would only be expected to remain below the 1.5°C threshold if the actual geophysical response ends up being towards the low end of the currently estimated uncertainty range. Transition challenges as well as identified trade-offs can be reduced if global emissions peak before 2030 and marked emissions reductions compared to today are already achieved by 2030. {2.2, 2.3.5, Cross-Chapter Box 11 in Chapter 4}" (p.95) **[CB/D/142]**)

"The later emissions peak and decline, the more CO_2 will have accumulated in the atmosphere. Peak cumulated CO_2 emissions – and consequently peak temperatures – increase with higher 2030 emissions levels (Figure 2.12). … Based on the implied emissions until 2030, the high challenges of the assumed post-2030 transition, and the assessment of carbon budgets in Section 2.2.2, global warming is assessed to exceed 1.5°C if emissions stay at the levels implied by the NDCs until 2030 (Figure 2.12). The chances of remaining below 1.5°C in these circumstances remain conditional upon geophysical properties that are uncertain, but these Earth system response uncertainties would have to serendipitously align beyond current median estimates in order for current NDCs to become consistent with limiting warming to 1.5°C." (pp.126-127) **[CB/D/145]**)

15. The IPCC details this further in the *Technical Summary* of the Special Report **[CB/D/150]**, emphasising that for there to be any chance of achieving the 1.5°C limit, very substantial cuts to emissions will have to be made in the short to medium term:

> "Limiting warming to 1.5°C depends on greenhouse gas (GHG) emissions over the next decades, where lower GHG emissions in 2030 lead to a higher chance of keeping peak warming to 1.5°C (high confidence). Available pathways that aim for no or limited (less than 0.1°C) overshoot of 1.5°C keep GHG emissions in 2030 to 25–30 $GtCO_2e$ yr^{-1} in 2030 (interquartile range). … In model pathways with no or limited overshoot of 1.5°C, global net anthropogenic CO_2 emissions decline by about 45% from 2010 levels by 2030 (40–60% interquartile range), reaching net zero around 2050 (2045–2055 interquartile range). For limiting global warming to below 2°C with at least 66% probability CO_2 emissions are projected to decline by about 25% by 2030 in most pathways (10–30% interquartile range) and reach net zero around 2070 (2065–2080 interquartile range).
>
> …
>
> In comparison to a 2°C limit, the transformations required to limit warming to 1.5°C are qualitatively similar but more pronounced and rapid over the next decades (high confidence).

…

Policies reflecting a high price on emissions are necessary in models to achieve cost-effective 1.5°C pathways (high confidence). Other things being equal, modelling studies suggest the global average discounted marginal abatement costs for limiting warming to 1.5°C being about 3–4 times higher compared to 2°C over the 21st century, with large variations across models and socioeconomic and policy assumptions. Carbon pricing can be imposed directly or implicitly by regulatory policies." (p.33) **[CB/D/151]**

16. Similarly, the *Emissions Gap Report* by the UNFCCC warns that unless global GHGs fall by 7.6% each year between 2020 and 2030, the parties will fail to meet the 1.5°C temperature goal they committed to in the Paris Agreement **[CB/D/304]**.

17. This necessity led the UN Secretary General, António Guterres, to observe on 9 March 2020 **[CB/D/348]**:

> "If we are going to limit global heating to 1.5 degrees Celsius, we need to demonstrate, starting this year, how we will achieve emissions reductions of 45% from 2010 levels this decade, and how we will reach net-zero emissions by mid-century."

18. Under the UNFCCC, annual meetings are held by the states, known as Conferences of the Parties ("COP"). The UK is the host of the next COP (COP26). The first Defendant is the President of COP26 and has expressly recognised that the Paris Agreement requires states to make substantial emission reductions in the short term, beyond those already promised:

> "We all know that the current commitments made under the Paris Agreement fall far short of what is required. … we want all countries to submit more ambitious Nationally Determined Contributions, committing to further cuts in carbon emissions by 2030. With all nations committing to reaching net zero emissions as soon as possible. … And let me be clear, this is not about the UK pointing the finger, we know we also need to do more ourselves. … Last week, I had the opportunity to speak with one of my childhood heroes: the

broadcaster and naturalist Sir David Attenborough. His message was simple. We must act now." **[CB/D/342]**

19. The premise of the Paris Agreement is that global (including but not limited to, the UK's) emissions need to reach peak and reduce as soon as possible. Given that the Article 4(1) Paris Agreement commitment expressly recognises that developed countries will need to make the largest cuts before developing countries, achieving the 1.5°C target under the Paris Agreement will require developed countries like the UK to make significant cuts long in advance of 2050.

Climate Change Act 2008 and the UK's carbon budgets

20. In pre-action correspondence, the Defendants have highlighted that the UK has set carbon budgets for periods of time ahead of the 2050 deadline (under s.4 CCA 2008), such that there will be some emission reductions in the interim. The Defendants have sought to argue from this that the net zero by 2050 commitment is co-extensive with the Paris Agreement. This is wrong. The carbon budgets are merely a mechanism for the implementation of the CCA 2008; they are based on a trajectory of gradual reduction in emissions towards that Act's 2050 deadline. They are not tailored to, or even account for, either of the fundamental features of the Paris Agreement commitments relevant to this claim (the 1.5°C temperature goal or the need to make substantial reductions in emissions "as soon as possible"). These Paris Agreement commitments, if they are to be honoured by the UK, require more substantial reductions in emissions on a faster timeline than the carbon budgets currently set.

21. This is particularly evident in relation to the UK's fifth carbon budget (for the years 2028-2032). This was set in 2016 based on the recommendations of the CCC in 2015. This pre-dates the Paris Agreement. It also pre-dates the creation of the net zero by 2050 commitment in the CCA 2008. It was set when the commitment in s.1 CCA 2008 was to achieve an 80% reduction in emissions. Despite being tailored to a lower ambition than both the Paris Agreement and the existing net zero commitment, the UK Government has announced in Parliament that it will not be revised.[1] Notably, this

[1] https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2020-02-05/12820/

is inconsistent with the advice of the CCC in its July 2019 progress report on the need for immediate action **[CB/D/294]**.

22. The fourth carbon budget (for the years 2023-2027) is similarly outdated and tailored to an 80% reduction by 2050, having been set in May 2009. This demonstrates that the UK's carbon budgets are not co-extensive with the Paris Agreement commitments; they are far less ambitious than what the Paris Agreement requires.

23. In any event, it is widely accepted that the UK will dramatically exceed its forthcoming carbon budgets. The Defendants cannot plausibly claim to have taken full account of, let alone be acting consistently with, the Paris Agreement commitments in circumstances where the UK will not even meet the (less demanding) carbon budgets. As the CCC set out in its January 2018 report (*An independent assessment of the UK's Clean Growth Strategy* **[CB/D/122]**) (and later reaffirmed in its July 2019 report):

> "Gaps to meeting the fourth [2023-2027] and fifth [2028-2032] carbon budgets remain. These must be closed. Whilst the [Clean Growth] Strategy sets out a '2032 Pathway' for sectoral emissions that would just meet the fifth carbon budget, there is no clear link to the policies, proposals and intentions that the Strategy presents. Our assessment of the policies and proposals set out in the Strategy indicates that, even if these deliver in full, there remain gaps of around 10-65 $MtCO_2e$ to meeting both the fourth and fifth carbon budgets on the basis of central projections." (p. 9) **[CB/D/123]**)

> "Policies and proposals compared to the requirements of the carbon budgets The Clean Growth Strategy contains a '2032 Pathway' for levels of emissions in the fifth carbon budget period that would result in actual UK emissions in 2030 that are 62% below 1990 levels. This is in-line with the Committee's scenarios and would meet the fifth carbon budget after allowing for trading of emissions allowances within the EU ETS. However, as acknowledged by the Government, the current set of policies that can be considered as firm – including new policies announced in the Clean Growth Strategy (Box 3) – fall well short of achieving this pathway and meeting the fourth and fifth carbon budgets. Many of these have risks associated with delivery." (p. 13) **[CB/D/127]**)

24. The simple reality is that both the net zero by 2050 commitment and the interim carbon budgets fall far short of what the Paris Agreement requires, as Anderson, Broderick and Stoddard have shown in a recent paper **[CB/D/313]**:

> "As such, and despite the adoption of a net-zero target, the key conclusion of this analysis remains unchanged. The UK emissions pathway implies a carbon budget at least a factor of two greater than the UK's Paris-compliant budget estimated here." **[CB/D/321]**

The EU Emissions Trading Scheme

25. The EU ETS currently applies within the UK, and will continue to do so until at least the end of 2020 (with the position after then depending on the outcome of discussions currently taking place between the UK and EU). It is the law for the purposes of this claim. It was the world's first, and remains the largest, emissions trading scheme. The EU ETS has evolved across various phases. It began in 2005 with Phase 1. It is currently in Phase 3, which will end on 31 December 2020, after which Phase 4 will apply.

26. The EU ETS covers various sectors (broadly, power and heat generation, energy-intensive industries and aviation). Participation is mandatory for companies and installations within these sectors, subject to limited exceptions. The EU ETS sets an EU-wide cap on the total emissions allowable from these sectors, measured in million tonnes of CO_2 equivalents ("$mtCO_2e$"). The total cap is divided into allowances. Each allowance permits the holder to emit 1 tonne of CO_2 equivalent ("tCO_2e") of GHGs. The GHGs covered by the EU ETS are (to varying extents) CO_2, N_2O, CH_4, SF_6, hydrofluorocarbons and perfluorocarbons.[2]

27. The allowances are distributed to individual installations through a combination of free allowances and allowances purchased through auctions or from other installations. Installations whose emissions exceed their allowances in a given year are subject to financial penalties. Installations whose emissions are less than their allowances can sell their surplus allowances. The EU-wide cap gradually reduces over time. The EU's stated expectation is that over time this will make it harder and more

[2] Carbon dioxide, nitrous oxide, methane, sulfur hexafluoride.

expensive for installations to continue purchasing allowance and, thus, incentivise them to reduce their emissions.

28. The stated rational for permitting installations to trade unused allowances is that the market will determine where the most economically efficient emissions reductions can be made. However, the consequence of this policy is that, overall, installations are only incentivised (let alone required) to reduce emissions: (i) to the extent of the EU-wide cap that applies at a given time, (ii) to the extent that the purchase of allowances is more expensive than making emissions reductions, and (iii) to the extent that the financial penalties for exceeding their allowances are more burdensome than the costs of implementing emission-reductions measures. In other words, it is not enough to have the mechanism in place; what also matters is the parameters by which the mechanism is operated. What also results is that large emission reductions made by one installation can easily be off-set by increased emissions by another installation. As a result, the level at which the cap is set is determinative of the level of emissions reductions from installations within the scope of the scheme. The level of the cap, therefore, is of fundamental importance to the effectiveness of the scheme at reducing emissions and tacking climate change.

29. According to the Defendants, between 2013 and 2020, one third of the UK's entire emissions came from installations within the scope of the EU ETS (see, the Response, para.24 **[CB/D/362]**).[3] Across the EU, the EU ETS covers roughly one half of the EU's total emissions **[CB/D/109]**.

The UK Emissions Trading Scheme

30. The Defendants plan for the UK to leave the EU ETS at the end of stage 3 (31 December 2020) and to establish a similar domestic system. This coincides with the end of the transition period for the UK's departure from the EU.

31. The Response **[CB/D/355]** makes clear that the policy objective of the UK ETS overall is to tackle climate change:

[3] We note that the Committee on Climate Change considered the EU ETS to have covered one quarter of the UK's emissions in its letter of 7 August 2019 **[CB/D/297]**

"12. The UK Government and the Devolved Administrations (DAs) are committed to climate action.

…

14. Having left the EU, the UK will remain at the forefront of domestic and international action on climate change by committing to go further and faster in our efforts to deliver clean energy and a net zero future.

…

25. The overall cap for the UK ETS will determine the limit on total emissions allowances. Our UK ETS cap is set to signal our long-term climate commitments while ensuring our economy remains competitive."

32. This is reflected in clause 16(2) of the draft Order **[CB/E/499]** (reflecting the language of the enabling statute, s.4 CCA 2008), which provides:

> (2) The purpose of the UK ETS is to limit, or encourage the limitation of, the emission of greenhouse gases in the trading period from the carrying out of—
>
> (a) regulated activities by operators of installations; and
>
> (b) aviation activities by aircraft operators.

33. In pre-action correspondence, the Defendants have disputed that this is the aim of the UK ETS. They argue "[t]he UK ETS was designed taking into account a range of factors, not only the objective of addressing climate change". It is clear, however, that the range of factors identified by the Defendants (such as business competitiveness) are really only countervailing factors (limiting their climate ambition) and are not the underling purpose of the UK ETS.

34. The Defendants set out the design of the UK ETS in the Response. It will be broadly similar to the EU ETS in the industries, installations and GHGs covered, the requirement to hold an allowance equivalent to 1tCO_2e, the existence of penalties for installations that exceed their allowances and the use of a market structure to allow the trading of allowances. The Response **[CB/D/355]** set out the features under challenge as follows:

"20. This document sets out the UK Government and DAs' decisions on the design of the UK ETS, which could operate as either a linked or standalone system, in light of a wide range of evidence gathered in the consultation.

…

52. We acknowledge respondents' comments regarding expanding the scope of the scheme to include municipal waste incinerators. The complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS. We also acknowledge the CCC's advice to expand the scope to include agriculture and land use. While we agree that emissions from these sectors will need to be abated to meet our net zero target, there may be more appropriate measures than the UK ETS for doing so. This will be for the appropriate government departments to consider following the CCC's advice on the Sixth Carbon Budget and a net zero trajectory, however municipal incinerators will not be included within the scope of the UK ETS for the period 2021 - 2025.

…

59. The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs [energy intensive industries] and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap.

60. To balance these objectives, the cap for a UK ETS will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to around 156 million allowances in 2021. These cap figures include our proposed aviation scope.

…

230. … We further proposed that unsold allowances at auctions should be 'rolled forward' to the following four auctions, and that each auction should offer for sale allowances up to a maximum of 125% of those originally intended for sale at that auction. …

…

234. As our proposals will help to support a smoother, more stable flow of allowances into the market and protect against the impacts of repeated low demand, we intend to implement them both, in line with the overwhelmingly positive responses to these proposals.

235. We note the concerns of some respondents that these proposals might increase oversupply of allowances at auction compared to the current rules under the EU ETS. … We recognise the CCC's concern, set out in their advice on a standalone UK ETS from 20 March 2020, that there may be a large reserve of allowances in the long-term."

35. In relation to the second feature of the Decision (permitting allowances to be rolled forward), the Defendants have decided to allow unused emissions under the UK ETS to be rolled forward to the subsequent four auctions. The only limit on this is that each auction cannot put for sale more 125% of the originally intended allowances. This means that emission reductions in one period can be used to justify higher emissions in a subsequent period. This reduces the extent to which the UK ETS will be able to ensure adequate emission reductions in the short to medium term.

36. It is clear from the Response that the reason for this decision was the protection of the market, not the need to reduce emissions.

37. In relation to the third feature of the Decision (the level of the cap during the initial period of the UK ETS), the June 2020 Impact Assessment **[CB/D/423]** provides that this will be in place at least until a review by either January 2023 or January 2024 (at para.21). It also makes clear that this cap will be higher than the projected business as usual emissions from the installations covered by the UK ETS during 2021:

"22. In the meantime the UK ETS will be initially set at 5% below the UK's expected notional share of the EU wide cap in Phase IV of the EU ETS (hereafter referred to as the 'notional minus 5%' cap).

23. In 2021 this notional minus 5% cap level equates to around 156 $MtCO_2e$ (based on the assumed scope of the policy set out earlier). This is higher than our BAU emissions projections in that year (ranging from around 126 to 131 $MtCO_2e$). However, there is significant uncertainty over these projections and market participant behaviour in this initial period could lead to significant demand for allowances above BAU emissions. This in turn means there is uncertainty over the level of demand for allowances in these years relative to supply, and therefore risk of extreme high or low prices."

38. The draft Order details this further, providing that the "base" (which is largely determinative of the level of the cap)[4] for every scheme year until 2029 will be higher than the business as usual emission for 2021 of 126 to 131 $mtCO_2e$ (see Table B of Clause 22) **[CB/E/500]**. The effect of this is that the UK ETS will not even attempt to reduce emissions below their present levels until 2029 (subject to a proposed review by January 2023 or 2024). This is because the market mechanism means emission reductions can only be achieved to the level of the cap (as any additional cuts made by individual installations are almost certainly to be entirely offset by emissions from the additional allowances that these cuts make available to other installations), unless an extremely high price for each allowance is set.

39. Instead of requiring reductions in that time, the cap as set in the draft Order will allow emissions to <u>increase</u> above their current level throughout almost the entirety of the next decade. This is long past the date by which developed countries must reduce their emissions dramatically in order to comply with their Paris Agreement commitments.

[4] The cap is calculated by multiplying the base for a given scheme year by the "small emitter reduction factor" (clause 20). The effect of this is that the base is the total emissions for all installations within the scheme (i.e. both those who are required to hold allowances and those who can avail of the small emitter opt out).

40. Unsurprisingly, the CCC was critical of setting the cap at this level in its letter of 20 March 2020, noting that it is incompatible with the net zero by 2050 commitment **[CB/D/351]**:

> "However, the interim proposals for the scheme set out in your letter are inconsistent with the UK's Net Zero ambitions in some respects, primarily relating to the relatively high level of allowed emissions under the proposed cap. … The cap as currently proposed would begin the scheme in 2021 with considerably higher allowed emissions from stationary sources of 150 MtCO2 (around 17% above the actual emissions in 2018). That implies a large surplus continuing until the point when a revised cap in line with the sixth carbon budget advice comes into force (e.g. 2023)."

41. Given that it is incompatible with the 2050 target, it is necessarily also incompatible with the more demanding shorter term aspects of the Paris Agreement.

Municipal waste incineration industry

42. The UK's municipal waste incinerators generate energy from the combustion of waste. In the process, they release substantially more CO_2 emissions per kWh as compared to other forms of fossil fuel energy (as explained in the Claimant's witness statement).[5]

43. Despite this, the first feature of the Decision excludes municipal waste incinerators from the UK ETS. This will mean that huge volumes of emissions are ignored by the scheme and there will be no mechanism to account for, offset, or incentivise the reduction of emissions from incinerators. In pre-action correspondence, the Defendants disputed this, arguing that "waste management policy interventions" can be used to reduce the amount of waste sent to incinerators and thereby to reduce their emissions. These policies, however, only address the volume and types of waste sent to incinerators; they do not address the manner in which incinerators handle emissions once operating (such as investing in carbon capture technology, improving

[5] The Claimant has serious concerns about the inaccurate manner in which emissions from municipal waste incinerators are calculated by the industry. As this is not directly relevant to this claim, the Claimant does not seek to challenge that here. But she should not be taken as accepting the industry approach.

of sorting of waste pre-incineration or creating a financial disincentive to release certain emissions).

44. The scale of these incinerator emissions ignored by the UK ETS is staggering: the CCC reported this year that 6.8 $mtCO_2e$ were emitted from incineration **[CB/D/467]**. Based on the Government's own statistics **[CB/D/312]**, in 2017 an estimated 5.2$mtCO_2e$ were emitted from incineration in the energy supply sector (excluding emissions from biogenic waste material), and 0.3 $mtCO_2e$ were emitted from incineration in the waste sector. In 2018, an estimated 6.0 $mtCO_2e$ were emitted from incineration in the energy supply sector, and 0.3 $mtCO_2e$ were emitted from incineration in the waste sector **[CB/D/312]**.[6]

45. The emissions from fossil sources are particularly important, as these are emissions that would not be emitted through other forms of waste disposal: plastic waste stored in landfill does not break down and release GHG emissions for an extremely long time, while recycling similarly ensures the carbon stored within the fossil sources is not emitted in the short to medium-term. Waste reduction in the first place would prevent the need for waste disposal, and thus the need for emissions from these fossil sources to be managed at all. In contrast, incineration causes instantaneous (additional) emissions relative to all other forms of waste management. As the then Resource Minister told Parliament in January 2018: "In environmental terms, it is generally better to bury plastic than to burn it ... We need to be careful about what incentives we push." **[CB/D/118]**

46. Despite this, the Defendants have decided that the UK ETS will ignore these emissions.

47. According to the June 2020 Impact Assessment, the "business as usual" emissions that will be within the scope of the UK ETS in 2021 will be 126-131$mtCO_2e$ **[CB/D/424]**. Even assuming that CO_2 emissions from incineration remained at 2017 or 2019 levels (which is unlikely given the uniformly increasing trajectory in incinerator emissions since 2000) **[CB/D/469]**, the ignored incinerator emissions would equate to up to 5.4 to 8.7% of the entire volume of emissions within the scope of the UK ETS. Given the

[6] See also, according to researchers from the UK Without Incineration Network: in 2017, UK incinerators emitted 10.95 $mtCO_2e$, of which 5$mtCO_2e$ were from fossil sources **[CB/D/161]**. By 2019, that had risen to 6.6$mtCO_2e$ from fossil sources **[CB/D/472-473]**

planned overall size of the UK ETS relative to the UK's entire emissions, the ignored incinerator emissions represent a very substantial portion of the UK's total CO_2 emissions. The exclusion of incinerators means that they face no climate change-related emissions regulations, and are currently subject to no financial or legal punitive measures that would incentivise a reduction in their emissions. The omission of municipal waste incinerators from the UK ETS also obviates any incentive operators have to investment in carbon capture technology and in more efficient sorting technology to remove plastics prior to incineration.

48. This lifts the financial cost associated with its emissions from the incinerator industry. This contributes to its financial viability as a means of waste disposal, despite the fact that it undermines waste reduction and recycling efforts (as explained in the Claimant's witness statement).

Grounds of Claim

49. The Claimant submits that the Defendants' Decision is unlawful on the following grounds:

    (1) Unlawful failure to account for relevant considerations: the relevance of the UK's Paris Agreement commitments to:
        a) the decision to exclude municipal waste incinerators from the UK ETS;
        b) the decision to allow unused carbon allowances to be "rolled forward";
        c) the decision to set the cap on the emissions allowable under the UK ETS above the projected business as usual emissions for 2021;
    (2) Unlawful accounting for irrelevant considerations: the decision to exclude municipal waste incinerators from the UK ETS was on the basis that their inclusion would be "difficult" because of the "environmental requirements" placed them;
    (3) Ultra vires s.44(2) CCA 2008;
    (4) Exercise of a power for improper purposes: the decision to set the cap on the emissions allowable under the UK ETS above the projected business as usual emissions for 2021 was in order to alleviate "pressures that business currently face as a result of our departure from the EU";
    (5) Irrationality; and
    (6) Failure to carry out a lawful consultation exercise.

The Claimant's standing

50. In pre-action correspondence, the Defendants disputed the Claimant's standing to bring this claim. The Claimant's witness statement sets out the substantial personal and professional involvement she has had with environmental protection, business and engineering consultancy, and opposition to the incineration industry over many years. By virtue of that, and the universal effect of GHG emissions on the climate and the impact of climate change, the Claimant has demonstrated sufficient interest to bring this claim.

Timing

51. In pre-action correspondence, the Defendants have indicated that they intend to argue that the Claimant has not issued her claim promptly. The Defendants argue that they will be prejudiced by the fact that the Brexit transition period ends on 31 December 2020, after which the EU ETS will cease to apply within the UK. This argument cannot be sustained:

    a. The Claimant does not oppose the introduction of the draft Order. The relief sought by the Claimant would not prevent the Order being made, nor prevent the UK ETS from operating. If the Decision is found to be unlawful after the UK ETS has been introduced, then the Order may need to be amended, but could continue to operate until that point. There is no prejudice at issue.

    b. The Brexit referendum took place in 2016 and the UK Government's policy has been to leave the EU ever since. As a result, it was clear from 2016 that the EU ETS would need to be replaced. Despite this, the Defendants waited until the latter half of 2019 to conclude a consultation on a UK ETS, and waited until six months before the end of the transition period to make the Decision. Any prejudice has been cause by the Defendants' own delay.

52. The Claimant has, in any event, acted promptly:

    a. The Defendants' consultation asked consultees whether they agreed with the proposed UK ETS, including the features under challenge. This clearly indicated that decisions on these features had not yet been made (though the Defendants' pre-action correspondence appears to argue that these decisions

had, in fact, already been made before this, which would indicate that the consultation was disingenuous).

b. The decisions were made on 1 June 2020.

c. The Claimant sent her pre-action letter to the Defendants on 5 August 2020.

d. The Defendants' response was due on 19 August 2020. The Defendants failed to comply with the Protocol and did not reply until 26 August 2020.

e. The Claimant waited in order to consider the Defendants' response and issued her claim on 1 September 2020.

Ground 1: Unlawful failure to consider the UK's Paris Agreement commitments when deciding (a) to exclude municipal waste incinerators from the UK ETS, (b) to allow unsold allowances to be rolled forward, and (c) to set the cap on the emissions allowable under the UK ETS above the projected business as usual emissions for 2021

53. It is clear from the Response, the June 2020 Impact Assessment, the draft Order and the accompanying documents that the Defendants intend for the UK ETS to address climate change, but in doing so has considered only the net zero commitment in s.1 CCA 2008. The Defendants failed to account for the commitments made by the UK in the Paris Agreement to the extent that they are qualitatively different and measurable against different timescales to the net-zero emissions by 2050 commitment. In particular, the Defendants failed to consider the pressing need to reduce emissions in the short to medium-term, as distinct from achieving net zero emissions by 2050.

The Paris Agreement commitments are wider than the net-zero by 2050 commitment

54. As set out at paras.11-19 above, the Paris Agreement is not simply addressed to achieving net zero emissions by 2050. Fundamentally, the Paris Agreement is about averting catastrophic climate change by, *inter alia*, "Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels" (Article 2(a)) and reaching "global peaking of greenhouse gas emissions as soon as possible" (Article 4(1)).

55. The binding net zero commitment in s.1 CCA 2008 does not occupy an identical space to the Paris Agreement. It is simply one feature of the UK's application of its Paris Agreement commitments. As well as concern with the volume of emissions in 2050, the Paris Agreement is also concerned with the periods both before and after 2050, and with the volume of GHG emissions and their effect within these periods. This is especially the case for emissions in the short to medium terms: it is only by achieving huge GHG emissions within the short to medium term, and particularly in the next 5 years, that the UK and the international community will have any chance of meeting their commitment of "pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels", as set out above. According to the IPCC, for pathways that limit global warming to 1.5°C with no or limited overshoot, CO_2 emissions must peak this year in order to stand a chance of being reduced to net zero globally around 2050. [**CB/D/149]**

Relevance of the Paris Agreement

56. The Paris Agreement is the cornerstone of global efforts to tackle climate change. It has been signed and ratified by the UK. The UK's Paris Agreement commitments were clearly relevant to the Defendants' Decision. This is for at least two reasons.

57. First, the express policy objective of the UK ETS is to take "climate action" and reduce GHG emissions so as to avert climate change (see the introduction to the Response).

58. Second, the statutory power under which the UK ETS will be established provides that its purpose is to limit or reduce GHG emissions, which cause climate change (s.44 CCA 2008).

59. As the Court of Appeal in *R (Friends of the Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 made clear, with such an objective underlining the decisions at issue:

> "237. … the only reasonable view open to [the Secretary of State] was that <u>the Paris Agreement was so obviously material that it had to be taken into account</u>. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account

in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in *Hurst*, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category." (emphasis added)

60. In relation to each feature of the Defendants' Decision, the aspects of the Paris Agreement that go beyond and are different to the net zero by 2050 commitment were specifically relevant:

    a) Decision to exclude municipal waste incinerators from the UK ETS (ground 1(a)): the additional emissions released by incineration of municipal waste relative to other forms of waste disposal are inconsistent the UK's short to medium-term Paris Agreement commitments. The scale of additional short term emissions from incineration are staggering, as set out above at para.43-45 and in the Claimant's witness statement. They are released instantaneously by incineration of fossil sources. No other waste disposal provides such instantaneous emissions. On the contrary, all other available forms of waste disposal provide a carbon store, at least in the medium term. Consideration only of the 2050 net zero target, and not also the short to medium term aspects of the UK's Paris Agreement commitments, fails to recognise the importance of reducing these emissions.

    b) Decision to allow unsold allowances to be rolled forward (ground 1(b)): allowing unsold allowances to be rolled forward reduces the ability of the UK ETS to limit GHG emissions, as any additional reductions (i.e. giving the installation unused allowances, which it can sell on) will allow more emissions in the next period than would otherwise be the case. Permitting allowances to roll forward, therefore, allows additional emissions in the following period. This significantly undermines the potential for the UK ETS to encourage emissions reductions "as soon as possible", consistent with the commitments under the Paris Agreement. Consideration only of the 2050 commitment, and not also the short and medium term aspects of the

Paris Agreement commitments, means the Defendants overlooked the impact of reducing these additional short term emissions.

c) Decision to set the cap for the UK ETS at 156 mtCO2e for 2021, which is above the Defendants' own projected business as usual emissions of 126-131 mtCO2e for 2021, and to set subsequent caps by reference to the 2021 cap (ground 1(c)): By setting the cap in the short to medium term (i.e. at least until 2023-2024 and possibly for the next 9 years, according to the draft Order) higher than the level of existing emissions, the UK ETS defers the cuts necessary to meet the 2050 deadline until closer to that date. This overlooks the importance of substantially reducing emissions in the short to medium term. Notably, the cap is not even in line with the 2050 net zero commitment, as the CCC made clear in its letter of 20 March 2020, let alone the short and medium term aspects of the Paris Agreement.

The Defendants' failure to consider the Paris Agreement commitments

61. Despite the clear relevance of the short to medium term aspects of the Paris Agreement, at no point have the Defendants given any consideration to the Paris Agreement commitments to the extent that they are different to, and go beyond, the net zero target in s.1 CCA 2008. The Response, June 2020 Impact Assessment and the associated documents and correspondence all make clear that the only environmental factor considered by the Defendants was the net zero commitment by 2050 (see in particular, paras.52 **[CB/D/366]**, 59-60 **[CB/D/368]**, and 160 **[CB/D/384]** of the Response and paras.20-26 of the June 2020 Impact Assessment **[CB/D/427-8]** in relation to the Decisions). In pre-action correspondence, the Defendants confirmed that they did not calculate the volume of CO_2 emissions excluded from the UK ETS as a result of the omission of municipal waste incinerators. The Defendants gave no consideration at all to the need to make substantial reductions in emissions in the short to medium term, which is what is uniquely required in order to stay in line with the Paris Agreement.

62. In pre-action correspondence, the Defendants have disputed this and refer to (i) mentions of the Paris Agreement at some points in the Response and the documents, and (ii) the Defendants' planned reviews of the UK ETS coinciding with the Global

Stocktake dates under the Paris Agreement (when the parties assess collective progress under the agreement).

63. Neither of these addresses the fundamental point of this claim, which is that the Defendants did not consider the relevant aspects of the Paris Agreement, namely, the need to reduce emissions "as soon as possible" and the steps necessary to meet the 1.5°C temperature goal:

    i) The references to the Paris Agreement in the documents relate to general features of the agreement, such as the dates for specific events and the need for global cooperation. They do not relate to the substance of the commitments the UK made when signing and ratifying the Paris Agreement.

    ii) The simple fact of aligning reviews of the UK ETS with the Paris Agreement stocktakes is irrelevant. This alignment is, presumably, intended to make it administratively easier to comply with the procedural aspects of reporting and stocktaking under the Paris Agreement. It has nothing to do with the substance of the UK's commitments.

64. The Defendants' decisions are unlawful as a result.

65. In pre-action correspondence, the Defendants disputed this in reliance on *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004. *Packham* is of no assistance to the Defendants in this case for two reasons.

66. First, only a low intensity review of the decision at issue there was considered appropriate in that case because it related to the exercise of a non-statutory power, for which the Defendant was accountable to Parliament (paras.47-48). That is not the case here. The power at issue is a statutory one which, on its face, indicates relevant considerations. The Defendants have (rightly) not sought to argue that such a standard is applicable here.

67. Second, in *Packham*, the Paris Agreement was not a relevant consideration as the review of the HS2 scheme in issue was merely an advisory one for the Government, which had itself drafted the terms of reference for the review and had not included

the Paris Agreement within them (para.94). In contrast, this case relates to a statutory power under the CCA 2008, which clearly relates to the Paris Agreement, and the Response itself and the Defendants' pre-action correspondence make clear that the Paris Agreement informed some of the design features of the UK ETS (namely, the dates for certain reviews, although crucially not its substance). The Paris Agreement was thus treated as "obviously material" and relevant by the Defendants, albeit that its substance was not lawfully taken into account. This claim is squarely within the conclusion in *Friends of the Earth* (even as summarised by the Court in para.102 of *Packham*).

Ground 2: Accounting for irrelevant considerations deciding to exclude municipal waste incinerators from the UK ETS

68. The Response, at para.52 (quoted above), makes clear that the Decision to exclude municipal waste incinerators from the UK ETS was based on the assertion that the "complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them".

69. This was an irrelevant consideration:

    a. The "complex environmental requirements" are undefined but it appears to be the mere existence of regulatory requirements for incinerators. Environmental regulations in one form or another exist for virtually all the industries and installations covered by the UK ETS. They do not give a reason to exclude these industries any more than they provide a reason to exclude municipal waste incinerators. This is because the environmental regulations do not create a financial incentive to reduce CO_2 emissions, nor provide a system to monitor and reduce emissions progressively (the fundamental aim of the UK ETS); they deal with other things.

    b. The asserted diversion of waste from landfill is a flawed and irrelevant consideration as (i) the use of incineration in place of alternative waste disposal (including landfill) leads to <u>increased</u> CO_2 emissions, which is fundamentally inconsistent with stated objective of the UK ETS, and (ii) the diversion of waste from landfill by incinerators is significantly less than the

diversion from recycling and reduction of waste efforts (as explained in the Claimant's witness statement).

c. The asserted "difficulties" are undefined, but are necessarily an irrelevant consideration. There are no substantial (let alone insurmountable) difficulties in calculating CO_2 emissions from municipal waste incinerators; once they can be counted, they can be fully included within the UK ETS. To the extent that there are any difficulties at all in calculating CO_2 emissions from municipal waste incinerators, they are no more difficult than the calculations for other industries or installations that are included within the UK ETS (and the Defendants do not explain any other conclusion). The Defendants has already decided that such difficulties are not a reason to omit these other industries or installations. Accordingly, any difficulties or complexities in the environmental regulations imposed on municipal waste incinerators have no bearing on the extent to which they could be included within the UK ETS. This was an irrelevant consideration and the Decision was unlawful as a result.

Ground 3: Ultra vires the Climate Change Act 2008

70. The power to establish the UK ETS is in s.44 CCA 2008. That section empowers the Secretary of State to establish a trading scheme to limit activities that cause greenhouse gas emissions and to contribute to the reduction in such emissions. However, by designing the UK ETS with the features identified above, the Defendants have failed to act consistently with, let alone as to further, that purpose. In particular, setting the cap above the level of "business as usual" emissions means that the UK ETS will not serve either of the purposes for which the power in s.44 is conferred.

71. In designing the trading scheme under s.44, the Defendants were required to make rational decisions: including industrial emissions and omitting domestic emissions, for example. By deciding to omit municipal waste incinerators from the UK ETS, however, the Defendants acted irrationally. The Decision fails to comply with the purpose for which the s.44 power was conferred (to design a scheme to limit and reduce emissions). The Decision was beyond the scope of the Defendants' powers and was unlawful as a result.

Ground 4: exercise of the s.44 power for improper purposes: to alleviate "pressures that business currently face as a result of our departure from the EU"

72. The purposes for which the power in s.44 CCA 2008 are conferred are clear from the face of the legislation: to establish a system to regulate GHGs and to limit and reduce emissions. Both the establishment of the scheme and the design of its features must be for those purposes.

73. The Defendants, however, have stated that the level of the cap (which, as explained above, is fundamental to the effectiveness of any emissions trading scheme) has been set with the purpose of alleviating "pressures that business currently face as a result of our departure from the EU" (the Response, para.59, quoted above). It is clear from the Response that that purpose is why the cap has been set above the business as usual emissions for 2021. Further, the draft Order indicates that, in fact, the cap will not come below the 2021 projected business as usual emissions until 2029 (subject to any changes following a proposed review by January 2023 or 2024). The result is that the UK ETS will not be able to achieve substantial (and possibly any) reductions in emissions of GHGs during the first few years (and possibly decade) of its operation.

74. It is clear from para.61 of the Response that the Defendants overlooked the advice from the CCC in the letter of 20 March 2020 (quoted above) that the cap 156 $MtCO_2e$ they have chosen is inconsistent with the net zero by 2050 commitment, and that this cap would lead to a large surplus in allowances. It appears that the Defendants rejected this advice from the CCC in favour of a higher cap in order to assist businesses to overcome the financial challenges caused by Brexit.

75. Rather than serving the purposes for which s.44 is conferred (limiting and reducing emissions), the UK ETS will (in the first few years of its operation, at least) instead serve the purpose of helping businesses to cope with the financial pressures caused by Brexit. Alternatively, the dominant purpose for which the power will be exercised in the early years of the UK ETS will be to alleviate Brexit-related pressures on businesses, rather than to limit or reduce emissions. That is not a lawful purpose for which the s.44 power can be exercised; alternatively, the dominant purpose is not a lawful one. Alternatively, by setting this cap, the exercise of the power will frustrate the policy and objects of the legislation conferring the power. Alternatively, the

Defendants have taken into account irrelevant considerations and/or given excessive weight to those considerations (namely, the financial pressures on businesses caused by Brexit) when setting the cap for the UK ETS.

76. Even if a desire to alleviate the pressures caused by Brexit were a desirable aim, it is not a purpose for which the s.44 power is conferred, or a consideration that can lawfully be taken into account (at least, to the extent chosen by the Defendants).[7] Accordingly, the decision to set the level of the cap for 2021 at 156 $mtCO_2e$, being higher than the projected business as usual emissions of 126-131 $mtCO_2e$, is unlawful.

Ground 5: Irrationality

77. The identified features of the Decision were unreasonable in the sense that they were outside the range of reasonable decisions open to the decision-maker and there was a demonstrable flaw in the Defendants' decision-making (*R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), para.98). In circumstances where the UK ETS is intended to be "at least as ambitious environmentally" as the EU ETS (the Response, para.50 and the June 2020 Impact Assessment), it covers the majority of industrial emissions, and it is a crucial means through which the UK will have to discharge its Paris Agreement commitments, it was irrational (i) to exclude municipal waste incinerators, (ii) to allow unsold emission allowances to be rolled forward, and (iii) to set the cap for the UK ETS above the level of existing emissions.

Ground 6: Failure to carry out a lawful consultation exercise

78. In pre-action correspondence **[CB/D/105]** the Defendants stated:

> "72. It is also relevant that the proposals for the UK ETS – including all three elements about which the claimant complains – were published in the consultation document in May 2019, some 15 months ago. It has been clear for all this time that it was not proposed that the UK ETS would cover municipal waste incinerators."

[7] *Stewart v Perth and Kinross Council* [2004] UKHL 16, at para.28 per Lord Hope: "The authority is not at liberty to use [a discretion] for an ulterior object, however desirable that object may seem to it to be in the public interest".

79. This is implies that the decisions on the relevant features of the UK ETS were already formulated before the consultation took place. This is not the impression conveyed to a reasonable reader of the consultation document, which posed questions that appeared to cover each of the issues raised by the Claimant. By way of broad example, the consultation document **[CB/D/252]** said:

> "6. We propose that the scope of a UK ETS, in terms of gases and sectors, should align with the current scope of the EU ETS and cover emissions of CO2, N2O, CH4, SF6, hydrofluorocarbons and perfluorocarbons. It should cover greenhouse gases from electricity generators, aircraft operators and heavy industry above a certain size. For a detailed list of activities currently covered by the EU ETS, which a UK ETS will cover, including activity-specific lower bound thresholds, please see Annex B.
>
> …
>
> Consultation Questions
>
> 3 a) Do you agree with the proposed scope of a UK ETS? (Y/N)
>
> b) Please expand on your answer and give evidence where possible.
>
> 4 a) Do you have any suggestions for which sectors might be included in scope in the future? (Y/N)
>
> b) Please expand on your answer and give evidence where possible."

80. A reasonable reader would have concluded that the contents and substance of these passages were matters which were within the scope of the consultation, and about which the Defendants were interested and had not yet formulated a final policy decision.

81. If, however, as the Defendants now suggest, the policy to exclude municipal waste incinerators from the UK ETS had already been formulated by the time of the consultation, the Defendants have failed to conduct a lawful consultation exercise. The Defendants failed to conduct the consultation at a formative stage and had no intention of changing their minds about the substance of the policy issue in question. In the circumstances they also therefore failed consciously to consider consultation

responses dealing with those matters. This was unlawful including as per the conclusion of Dove J in *R (Stephenson) v Secretary of State for Housing and Communities and Local Government* [2019] EWHC 519 (Admin):

> "57. All of this documentation, in my view, presents a clear and consistent message to the reasonable reader, examining the documents as a member of the public at whom the consultation was directed, that the contents and substance of paragraph 204(a) of the draft revised Framework were matters which were within the scope of the consultation, and about which the Defendant was interested in hearing responses. …
>
> 58. It follows, … [that] the consultation exercise was legally flawed …. By contrast with what the reasonable reader would have discerned from the publicly available material, the Defendant had a closed mind as to the content of the policy and was not undertaking the consultation at a formative stage. The Defendant had no intention of changing his mind about the substance of the revised policy. …"

Remaining Preliminary Issues

82. This is an Aarhus Convention claim, as defined by r. 45.41(2)(a) of the Civil Procedure Rules ("CPR"), because the Claimant is challenging the legality of a decision within the scope of Article 9(3) of the Aarhus Convention, namely one which contravenes provisions of national law relating to the environment (here CCA 2008 and/or common law). As such, the Claimant proceeds with the benefit of the costs protection (as set out in r. 45.43(2)(a) of the CPR) that brings.

Conclusion and Relief Sought

83. The Claimant respectfully seeks the following relief:

    a. A declaration that the Decisions by the Defendants in the Response are unlawful on the grounds set out above.

    b. A declaration that the Defendants failed to conduct a lawful consultation exercise.

    c. An order to reconsider the features of the Decision identified above.

d. Further or other relief as the Court sees fit.

e. Costs.

DAVID WOLFE QC, Matrix
BEN MITCHELL, 11KBW

1 September 2020

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Your ref: **RWS/00255697/1**
Our ref: **Z2008680/ERI/JD3**

9 September 2020

Dear Mr Smith

Proposed claim for judicial review: R (oao Georgia Elliott-Smith) v Secretary of State for Business, Energy & Industrial Strategy & Others - CO/3093/2020

1. This letter is sent in response to the supplemental letter before claim dated 24 August 2020 which raised two new grounds of challenge. It has, as requested by you, been sent as soon as practicable. It should be read with the main letter of response dated 26 August 2020. The two new grounds are dealt with in turn below.

2. This letter of response is sent on behalf of the Secretary of State for Business, Energy and Industrial Strategy. As before it has been reviewed by the Devolved Administrations who agree with and adopt the response.

Additional Ground 1: setting the cap

3. In relation to this additional ground, it is contended that there was a "failure to account for the UK's Paris Agreement commitments" when taking the decision embodied in the Response on the appropriate design of a UK emissions trading system, specifically in relation to the level at which the initial cap was set.

4. As was explained in the letter of response dated 26 August 2020 at paragraphs 42 to 44, there was no failure to consider the "Paris Agreement commitments". Nor did the decision-makers fail to consider taking action in the short to medium term, as was explained at paragraph 24. Moreover, as explained at paragraph 45, a "failure to account for" something is not an error of law; it is a disagreement on the underlying merits.

5. This additional ground is in any event based on a false premise. It is not the case that the initial cap of the UK ETS was "intended to reduce in line with the net zero by 2050 commitment" without further modification. It is also wrong to contend that the intention is to keep the initial cap as set out in the

Greenhouse Gas Emissions Trading Scheme Order 2020 in the short to medium term (ie the next 9 years, to 2030).

6. As was explained in paragraph 13 of the letter of response dated 26 August 2020, the initial design of the UK ETS cap is temporary. As was spelled out in the letter to the Committee on Climate Change (CCC) dated 1 June 2020, a two-stage approach to the UK ETS cap is being adopted. The first stage is intended to be purely temporary in nature. The Response contained a commitment to a second stage in relation to which there would be a consultation on changes to the UK ETS to appropriately align the cap with a net zero consistent trajectory for the whole of Phase I of the UK ETS and a commitment to implement any changes by January 2023 if possible and no later than January 2024.

7. The initial cap in the first stage UK ETS was not "intended to reduce in line with the net zero by 2050 commitment" without further modification and it was never stated that it would be. The decision to set the initial UK ETS cap at 5% less than the UK's notional share of the EU ETS cap was taken to provide an appropriate balance between climate ambition in the context of the UK's net zero commitment and businesses competitiveness, which may be at risk due to early years' market behaviour. The cap, alongside other temporary measures, including the Auction Reserve Price, sought to provide appropriate mitigation of extreme high or low price risks in the initial years of the UK ETS market (para 24 of the Impact Assessment and para 60 of the Response).

8. In addition to the need to consider early years' market behaviour, there was a disparity in timing between the need to have the UK ETS established and the need for further advice from the CCC which will inform changes to the UK ETS to appropriately align the cap with a net zero consistent trajectory and which is due to be provided as part of the CCC's advice on the sixth carbon budget and a cost-effective pathway to net zero emissions in 2050. The UK ETS is intended to ensure that there is a fully functioning UK emissions trading system from January 2021, immediately following the end of the transition period on 31 December 2020, ensuring no carbon pricing gap emerges when the UK ceases to participate in the EU ETS. The CCC's further advice is not, however, due until late 2020. The UK ETS could not have been established in time if it had to wait for the CCC's further advice.

9. This is why the UK ETS was established with a purely temporary initial cap simply for the first stage. Once the market is established and uncertainties associated with early market behaviour subside, it will be replaced by a cap which is appropriately aligned with the 2050 net zero trajectory following publication of the CCC's advice on a cost-effective pathway to net zero emissions in 2050, including advice on the cap and trajectory for the UK ETS in a net zero context, and a subsequent consultation. The Response made it clear that changes to the UK ETS appropriately to align the cap with a net zero trajectory will be implemented by January 2023 if possible and no later than January 2024 (para 62).

10. Further, the contention that "the UK ETS defers the cuts necessary to meet the 2050 deadline until closer to that date" is unsupported by any evidence and is wrong. The May 2019 consultation document, for example, explained that ensuring a smooth transition from the EU ETS to the UK ETS could mean setting a trajectory so that the effects of a tighter cap materialise over the course of a phase of the UK ETS rather than at the beginning. This does not amount to deferring reductions. It is an element of the range of judgements which go into designing a UK ETS to ensure that it is effective in practice.

11. As regards the consideration of climate ambition in the context of the UK's net zero commitment, the analysis in the Impact Assessment published alongside the Government Response indicated that the UK ETS design, combined with early years hedging behaviour assumptions (outlined in paragraph 34) and being a relatively smaller market, could lead to higher carbon values compared to the counterfactual of continued EU ETS participation. This in turn would suggest that installations and operators within scope could be incentivised to deliver greater abatement compared to the counterfactual (paragraph 64). It is therefore not correct to suggest that the UK is deferring action on the cap.

12. The premise that the existence of some headroom in an ETS cap above projected business as usual emissions reduces the short to medium term effectiveness of an ETS is also wrong. Efforts to reduce greenhouse gas emissions within an ETS are driven by the participants' expectations of future tightening of the cap. The cap trajectory creates a clear long-term signal about future increases in the carbon price, which can provide the certainty for participants to make short and long-term decisions on investment that would be necessary to cut their emissions. The EU ETS has a surplus of allowances which is proportionately much larger than the 2021 headroom under the proposals for the start of the UK ETS.

13. Moreover, the initial cap in the UK ETS was set with a reduction of 5% compared to the notional cap the UK would have had if it had remained in the EU ETS for Phase IV. The legislative framework of the EU ETS for its next trading period (Phase IV) was revised in early 2018 to enable it to achieve the EU's 2030 emission reduction targets and as part of the EU's contribution to the Paris Agreement.

14. Please refer also to paragraph 22 of the letter of response dated 26 August 2020, which explains that the UK ETS is only one of a range of actions being planned or taken to tackle climate change and is not the only way in which the 2050 net zero target is to be met.

Additional Ground 2: improper purpose

15. In relation to this additional ground, it is contended that the decision embodied in the Response on the appropriate design of a UK emissions trading system involved an exercise of the power in s44 of the Climate Change Act 2008 for an improper purpose, because the initial cap included in the design of the UK ETS was set above the projected business as usual emissions for 2021.

16. The 2008 Act provides a power to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere. The UK ETS is being established for this purpose. It is within the scope of the statutory power.

17. The claimant's case appears to be based on the proposition that as a matter of law the statutory purpose could only be achieved if in the first year of a UK ETS the cap is set below 'business as usual' emissions for that first year, i.e. the level of expected emissions in the absence of the carbon pricing policy. This is wrong. There is no basis for this in the statute.

18. The claimant's position also misunderstands the nature of an ETS. An ETS is a market and in order to function there needs to be liquidity. The objectives of the UK ETS include to incentivise cost-effective emissions reductions. This provides emitters with a choice: reduce their emissions where it is economic to do so, or pay for them where it is not. Paying for emissions requires a viable market with sufficient liquidity.

19. The allowance prices that result from trading between market participants creates the incentive to reduce emissions: installations and operators whose cost of abatement is lower than the purchase price of allowances are incentivised to abate (and can benefit by selling any surplus allowances to the market) while installations and operators whose cost of abatement is higher than the prevailing allowance price can buy allowances on the market to meet their compliance obligations. In this way, the ETS ensures emissions reductions occur when and where it is most cost-effective.

20. The cap is reduced over time to meet long-term emissions reduction targets. If the initial cap was set at the level of existing emissions this would considerably reduce liquidity on its launch and therefore increase the risk that the new market will not have sufficient liquidity to function. This could in turn lead to disproportionately high carbon prices in the UK ETS, causing carbon leakage as businesses relocate abroad to places where carbon emission costs are lower. This could increase total emissions, contradicting the collective objective of the Paris Agreement. This was reflected in the Response, which said (para 63): "in the interim, particularly given the current uncertainties, we believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the

UK ETS". It was a fundamental objective of the UK ETS that there must be a smooth transition for industry from the EU ETS to the UK ETS.

21. The claimant is in any event wrong to contend that the objective of setting the initial cap was to "serve the purpose of helping businesses to cope with the financial and competitive pressures caused by Brexit". The Response is clear what the objectives of setting the initial cap were. This was also explained in the letter of response of 26 August 2020 at, for example, paragraphs 9 to 12.

22. The Response said that "the key considerations in setting the level of the cap are climate ambition balanced with the costs to business" (para 58) and that "initially tightening the cap by 5% provides the appropriate balance between the UK's climate ambition in the context of the UK's net zero commitment and any risks of disproportionate costs to businesses which could arise in the early years of a UK ETS" (para 60). Paragraph 59 needs to be read as a whole rather than just focussing on the reference to EU exit. It said:

> "The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap."

23. As noted in paragraph 61, regard was also had to "the uncertainties and risks posed by COVID-19". It is clear that the "pressures that businesses currently face as a result of our departure from the EU" was one of a number of considerations taken into account. Paragraph 60 of the Response makes clear that the judgement on the initial cap was formed "to balance these objectives".

24. When designing the elements of a UK ETS – including the initial cap – for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere, it was permissible to take such matters into account. Doing so did not mean that the power was exercised for "improper purposes".

Yours sincerely

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N462

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/3093/2020
Claimant(s) *(including ref.)*	Georgia Elliott-Smith
Defendant(s)	(1)the Secretary of State for Business, Energy and Industrial Strategy, (2) Minister for Agriculture, Environment and Rural Affairs, Northern Ireland Executive. (3) The Scottish Ministers (4) Minister for Environment, Energy and Rural Affairs, Welsh Government
Interested Parties	

Name and address of person to be served

Name:
Georgia Elliott-Smith

Address:
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Farringdon
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EC1M 4LB

SECTION A
Tick the appropriate box

1. I intend to contest all of the claim	✓	} complete sections B, C, D and F
2. I intend to contest part of the claim		
3. I do not intend to contest the claim		complete section F
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.		complete sections B, C and F
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.		complete sections B and F
6. The applicant has indicated that this is a claim to which the Aarhus Convention applies.	✓	complete sections E and F
7. The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C of the Senior Courts Act 1981]		A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B
Insert the name and address of any person you consider should be added as an interested party.

name	**name**
address	**address**
Telephone no. / **Fax no.**	**Telephone no.** / **Fax no.**
E-mail address	**E-mail address**

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

Please see the attached Summary Grounds of Defence on behalf of the First Defendant, the Secretary of State for Business, Energy and Industrial Strategy.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim? ☐ Yes ☑ No

If Yes, please set out your grounds for denial in the box below.

Do you wish to vary the costs limits under CPR 45.43(2)? ☐ Yes ☑ No

If Yes, state the reason why you want to vary the limits on costs recoverable from a party.

SECTION F

**delete as appropriate*

*(I believe)(~~The defendant believes~~) that the facts stated in this form are true.
*I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.
*I am duly authorised by the defendant to sign this statement.

(if signing on behalf of firm or company, court or tribunal)

Position or office held

Deputy Director for Emissions Trading, BEIS

(To be signed by you or by your solicitor or litigation friend)

Signed
CHARLIE LEWIS

Date
24/09/2020

Give an address to which notices about this case can be sent to you

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Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

- Administrative Court in **London**
  Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.
- Administrative Court in **Birmingham**
  Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.
- Administrative Court in **Wales**
  Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.
- Administrative Court in **Leeds**
  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.
- Administrative Court in **Manchester**
  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Claim No CO/3093/2020

B E T W E E N:

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

SECRETARY OF STATE'S SUMMARY
GROUNDS FOR CONTESTING THE CLAIM

Introduction

1. These summary grounds for contesting the claim are filed on behalf of the Secretary of State for Business, Energy and Industrial Strategy. They contain Secretary of State's summary response to the challenge. The Secretary of State contests the claim in its entirety. As well as contesting the merits of the claim, he seeks that permission be refused on the grounds of delay and under s31(3D) of the Senior Courts Act 1981.

2. This challenge is to the decision of the Secretary of State and the devolved administrations on the appropriate design of a UK emissions trading scheme (UK ETS). The decision was published on 1 June 2020 by way of the document entitled 'The future of UK carbon pricing: UK Government and devolved administrations' response' ("the Response").

3. The Response followed a joint consultation in 2019 by the UK Government, the Scottish Government, the Welsh Government and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland. The consultation set out the UK Government's and the devolved administrations' preferred approach to UK carbon pricing once the UK left the European Union and sought views on the design of a UK emissions trading scheme. The consultation proposals are summarised at CB/22/231-233.

4. The Response in June 2020 set out the decision-makers' decision on the initial design of the UK ETS, which is summarised at CB/38/359-360. The main issues are summarised in the letters from the decision-makers to the Committee on Climate Change dated 2 May 2019, 4 March 2020 and 1 June 2020 [CB/21/219, CB/33/339, CB/37/353].

5. In order to be operational immediately following the end of the EU exit transitional period on 1 January 2021, statutory instruments to implement the UK ETS are being progressed, including the Greenhouse Gas Emissions Trading Scheme Order 2020 [CB/45/487].

6. In short, the Claimant is not satisfied with the underlying merits of the initial design of the UK ETS as set out in the Response and in particular the fact that the UK ETS – like the current European Union emissions trading system – does not extend to municipal waste incinerators. It is apparent from the Claimant's witness statement [CB/3/44-54] that this judicial review is directed at the incineration of municipal waste and that the Claimant disagrees with the policy of the UK Government and devolved administrations on a multi-faceted matter of policy which is both technical and political.

7. Permission should not be granted for judicial review claims which are misguided complaints of administrative error.[1] The purpose of the permission stage is to protect public authorities against weak claims such as this one.[2]

[1] *Per* Lord Diplock in *R v Inland Revenue, ex p National Federation of Self-Employed and Small Businesses* [1982] AC 617 at 643A.
[2] *R v Secretary of State for Trade & Industry, ex p Eastaway* [2000] 1 WLR 2222 at 2227H, *per* Lord Bingham; *R (Davies & James) v HMRC* [2010] EWCA Civ 83 at para 11.

8. These summary grounds set out the legal and policy context relating to climate change, including the Paris Agreement and emissions trading schemes, then summarise the features of the UK ETS and the position on municipal waste incinerators, and then address in turn each of the six grounds of challenge, before finally considering delay and s31(3D).

The legal and policy context

The Climate Change Act 2008 and the Paris Agreement

9. The 2008 Act is the legislative centrepiece of the UK's domestic efforts to tackle climate change. It sets a target for the year 2050 for the reduction of targeted greenhouse gas emissions and provides for a system of carbon budgeting. It establishes a framework for the UK to achieve its long-term goals of reducing greenhouse gas emissions through setting emissions reduction targets in statute and carbon budgeting. The UK was the first country to set long-term legally binding targets, introducing limits on the amount of greenhouse gases the UK can emit over successive five-year periods.

10. The explanatory notes to the 2008 Act explained the position as follows:

> "The Act establishes an economically credible emissions reduction pathway to 2050 and beyond by putting into statute medium and long-term targets. In addition, the Act introduces a system of carbon budgeting which constrains the total amount of emissions in a given time period. Carbon budget periods will last five years, beginning with the period 2008-2012, and must be set three periods ahead."

11. The Committee on Climate Change (CCC) was established under the 2008 Act as an independent expert body, to advise the Government and devolved administrations on how to reduce emissions over time and across the economy.

12. When enacted, the 2008 Act placed the Secretary of State under a duty to reduce the net UK carbon account for the year 2050 to at least 80% below the level of net UK

emissions of targeted greenhouse gases in 1990. This was amended to at least 100% below, with effect from 27 June 2019, by the Climate Change Act 2008 (2050 Target Amendment) Order 2019. This is the 2050 'net zero' target.

13. Section 4(1) places a duty on the Secretary of State to set carbon budgets for succeeding periods of five years and also a duty to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget. Under s8(2), the carbon budget for a period must be set with a view to meeting the target for 2050, other levels of carbon budget set out pursuant to s5, and the European and international obligations of the UK.

14. Section 10 sets out matters which must be taken into account by the Secretary of State in coming to any decision relating to carbon budgets. The list of mandatory considerations includes economic, fiscal and social circumstances, including the likely impact on the economy and the competitiveness of particular sectors of the economy.

15. Section 13 places a duty on the Secretary of State to prepare proposals and policies to enable the carbon budgets that have been set under the 2008 Act to be met and with a view to meeting the 2050 net zero target and any target set under the s5(1)(c) power to set targets for later years. Section 13(3) also provides that the proposals and policies, taken as a whole, must be such as to contribute to sustainable development.

16. The Paris Agreement was signed by the UK on 22 April 2016. It was ratified by the UK on 18 November 2016.

17. The Paris Agreement aims to strengthen the global response to the threat of climate change, including by the collective aim of "holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels" (Article 2(1)). The Paris Agreement is to be implemented in light of differing national circumstances (Article 2(2)).

18. Article 4(1) records that "in order to achieve the long-term temperature goal set out in Article 2", the state parties would:

> "aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty".

19. In this way, in order to achieve the long-term temperature goal, parties aim collectively to reach net zero greenhouse gas emissions in the second half of this century.

20. The Paris Agreement sets out global aims to which all state parties subscribe. Each state then draws-up their "nationally determined contributions" (NDC) which are part of the "ambitious efforts" each state is to take "with the view to achieving the purpose of this Agreement as set out in Article 2" (Article 3). Under Article 4(3), each party's successive NDCs will represent a progression and reflect its highest possible ambition, in the light of different national circumstances.

21. The Paris Agreement does not require the UK to meet any specific emission reduction level or to take any particular action to reduce emissions. It imposes no obligation on individual states to implement the Paris Agreement's goals in any particular way. There is no legal obligation on the UK to achieve the aims or goals of the Paris Agreement. The action to be taken pursuant to the Paris Agreement is nationally-determined. Each party determines what action it will take and communicates this to the Secretariat of the UN Framework Convention on Climate Change.[3]

22. As stated in *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin) "Parliament has determined the contribution of the UK towards global goals in the CCA 2008."[4] This includes by means of the 2050 net zero commitment contained in the 2008 Act. The

[3] It is not correct for the Claimant to say at paragraph 13 of the Statement of Facts and Grounds dated 1 September 2020 that the IPCC "provides advice and analysis under the UNFCCC". The IPCC does not sit under the UNFCCC and does not have a formal role in analysing parties' NDCs.
[4] See eg *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin) at para 608.

UK has also committed to producing an enhanced NDC ahead of the 26th conference of the parties to the UN Framework Convention on Climate Change (COP26) to be held in November 2021.

23. The operation of the 2008 Act was recently summarised by the Court of Appeal in *R (Packham) v SSfT* [2020] EWCA Civ 1004 at paragraphs 83 to 87. The Court noted that the carbon budget process ensures progress towards the 2050 target in the period before that year (para 83).

24. The UK's greenhouse gas emissions peaked in the early 1990s. The UK has met the first two carbon budgets (2008-17) and is on track to meet the third (2018-22). Further action is being planned to ensure that the UK can meet the fourth and fifth carbon budgets (2023-32). The fifth carbon budget requires the equivalent of a 57% cut in emissions over 2028-32 from a 1990 baseline. The sixth carbon budget, covering the period 2033-2037, will be set in 2021. This framework of increasingly tighter carbon budgets ensures that the UK takes action to reduce emissions well ahead of 2050, including making significant reductions in the short to medium term.

25. The framework established by the 2008 Act manages the UK's progressive decarbonisation in the years leading up to 2050. This framework, while setting the overall level of ambition, leaves the UK Government (and devolved administrations) to determine how best to balance emissions across the economy, and how the effort is to be distributed amongst sectors, as part of an overall economy-wide transition to net zero by 2050.

26. Part 2 of the Environment (Wales) Act 2016 requires the Welsh Government to meet targets for reducing net Welsh emissions of greenhouse gases. This legislation is to be amended in early 2021 to provide for a 95% reduction by 2050 target. The Climate Change (Scotland) Act 2009 and the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 provide for a similar system of targets for Scotland, but which aim to reach net zero by 2045.

27. The background to the 2050 net zero commitment is explained in the explanatory memorandum to the 2019 Order as follows:

> "7.3 At the 21st Conference of the Parties to the UNFCCC, the Intergovernmental Panel on Climate Change (IPCC) was invited by the Parties to publish a Special Report on the impacts of global warming of 1.5°C and associated greenhouse gas emissions pathways.
>
> 7.4 The IPCC released this Special Report on 8 October 2018. The report contains the most up-to-date assessment of the science on impacts and associated greenhouse gas emissions pathways for 1.5°C, compared to 2°C.
>
> 7.5 In response to the IPCC's Special Report the Government requested advice from the Committee on Climate Change on the implications of the Paris Agreement and the report for the UK's long-term emissions reduction targets, asking whether further action was needed to meet goals of the Paris Agreement.
>
> 7.6 On 2 May 2019 the Committee on Climate Change provided that advice. This recommended that that the UK should legislate as soon as possible to reach net-zero greenhouse gas emissions."

28. In preparing its net zero advice in May 2019 [Acknowledgment of Service Bundle (AB)/3/42], the CCC "reviewed the latest scientific evidence on climate change, including last year's IPCC Special Report on Global Warming of 1.5°C, and considered the appropriate role of the UK in the global challenge to limit future temperature increases" (p8). The CCC advice contained the following (pp 8, 11):

> "We conclude that net-zero is necessary, feasible and cost-effective. Necessary – to respond to the overwhelming evidence of the role of greenhouse gases in driving global climate change, and to meet the UK's commitments as a signatory of the 2015 Paris Agreement".

> "In setting a net-zero target, the UK will be among a small group of countries handling climate change with appropriate urgency. The new target meets fully the requirements of the Paris Agreement, including the stipulation of 'highest possible ambition', and sets the standard for the EU and other developed countries as they consider their own pledges to the global effort".

> "A net-zero GHG target for 2050 will deliver on the commitment that the UK made by signing the Paris Agreement."

> "A net-zero GHG target for 2050 would respond to the latest climate science and fully meet the UK's obligations under the Paris Agreement:

> • It would constitute the UK's 'highest possible ambition', as called for by Article 4 of the Paris Agreement. The Committee do not currently consider it credible to aim to reach net-zero emissions earlier than 2050.
>
> • It goes beyond the reduction needed globally to hold the expected rise in global average temperature to well below 2°C and beyond the Paris Agreement's goal to achieve a balance between global sources and sinks of greenhouse gas emissions in the second half of the century.
>
> • If replicated across the world, and coupled with ambitious near-term reductions in emissions, it would deliver a greater than 50% chance of limiting the temperature increase to 1.5°C."

29. Although they were set under the 80% target, the CCC has not recommend changes to the fourth or fifth carbon budgets or called for them to be re-opened.

30. In its 2019 progress report to Parliament, the CCC said that [CB/24/295]:

> "The net-zero target meets the UK's obligations under the Paris Agreement and responds to the urgent need for action highlighted by the IPCC in last year's landmark Special Report on 1.5°C of global warming."

31. The Government took the Paris Agreement into account when proposing a net zero target, ensuring that this national legislation was consistent with the Paris Agreement's goals. There is no requirement in the Paris Agreement for countries individually or collectively to achieve net zero by 2050. The UK has gone beyond the provisions of the Paris Agreement in setting such a target. The UK was the first major economy to legislate for a 2050 net zero greenhouse gas emissions target.

32. The case law related to the 2008 Act and the Paris Agreement has established the following principles:

(1) the Paris Agreement does not impose a binding legal target on each contracting party to achieve any specified temperature level by 2050 and indeed contains in Article 2(1)(a) two levels of ambition: *R (Plan B Earth) v SoS BEIS* [2018] EWHC 1892 (Admin) at paragraph 30;

(2) the Paris Agreement does not specify any carbon reduction target and does not impose any obligation on the UK Government to meet any carbon reduction

target, or any other target or temperature objective: *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin) at paragraph 631(iii);

(3) there is no legal obligation on the UK Government (or devolved administrations) to act in accordance with the Paris Agreement or to achieve any particular outcome related to it: *R (Plan B Earth) v SSfT* [2020] EWCA Civ 214 at paragraph 238;

(4) the aspirations and essential principles of the Paris Agreement have been translated into domestic legislation in the form of the provisions of the 2008 Act, in particular the 2050 net zero commitment: *Packham* at paragraphs 95 and 97;

(5) even where climate change is a consideration which must be taken into account, there is nothing in the domestic legal and policy framework on climate change, including the 2008 Act, which creates a legal duty which obliges decision-makers to consider the implications of the Paris Agreement beyond recognising the 2050 net zero commitment in the 2008 Act: *Packham* at paragraphs 98-100.

33. Beyond these points of principle, the Claimant's argument that the 2050 net zero commitment in the 2008 Act is inadequate to meet the goals of the Paris Agreement is a disagreement on the merits of the policy of the UK Government and the devolved administrations on a matter which is both technical and political. This Court cannot, in a judicial review, consider and adjudicate upon the Claimant's contentions that the goals of the Paris Agreement require more or different action, and quicker action, than is provided for in the framework of law and policy established pursuant to the 2008 Act.

Emission trading schemes under the Climate Change Act 2008

34. Section 44(1) of the 2008 Act provides that national authorities may make provision by regulations for trading schemes relating to greenhouse gas emissions. Section 44(2)(a) provides that a trading scheme is a scheme that operates by limiting or encouraging the

limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions.

35. Section 45(1) identifies particular activities which are to be regarded as indirectly causing or contributing to greenhouse gas emissions, including the consumption of energy, the use or disposal of materials in whose production energy was used, and the production or supply of things the use of which causes or contributes to greenhouse gas emissions.

36. Schedule 2 to the 2008 Act specifies matters to be covered in regulations under s44. Part 1 of Schedule 2 relates to trading schemes which limit activities. Paragraphs 3 and 4 relate to the activities and the participants to be covered by a trading scheme and allow them to be identified by reference to any criteria.

The UK emissions trading scheme

37. The UK has long been an advocate of the development of carbon pricing internationally. The UK established Europe's first emissions trading scheme in 2002, which served as a pilot for the EU Emissions Trading System (EU ETS). Both the EU ETS and the new UK ETS are cap and trade schemes, where a collective limit – the cap – is set for greenhouse gas emissions produced by activities within the scope of the scheme. The cap is reduced over time, so that emissions fall broadly according to the trajectory in the reduction of the cap.

38. An ETS works to incentivise effective emissions reductions in a number of ways. First, putting a price on carbon incentivises decarbonisation directly if the price of carbon is greater than the cost of abatement. The design of an ETS ensures that decarbonisation takes place where and when it is cheapest to do so. This helps decarbonisation to take place in a more economically efficient way. Secondly, the expectation of rising prices over time also incentivises participants to reduce their emissions as soon as possible, to avoid paying the increased carbon price on those abated emissions. Thirdly, if businesses are successful in reducing emissions, they are also able to sell any excess allowances that they hold at this higher price. The expectation amongst participants of

rising allowance prices incentivises emissions reductions. The cap is, however, only one factor which contributes to rising prices in the future, alongside market behaviour, market intervention, and the market participants' expectation of policy changes and their effects.

39. In October 2017, pursuant to s13 of the 2008 Act, the Secretary of State published the Clean Growth Strategy, setting out the Government's policies and proposals for decarbonising the national economy through the 2020s. The CCC's 2019 net zero report included the advice that the Clean Growth Strategy provided the right framework for the ambitious action needed to deliver the 2050 net zero target.

40. The Clean Growth Strategy provided for a new UK ETS which would be at least as ambitious as the existing EU ETS and provide a smooth transition for the relevant sectors (p44). The Clean Growth Strategy also said (p45):

> "we remain firmly committed to carbon pricing as an emissions reduction tool whilst ensuring energy and trade intensive businesses are appropriately protected from any detrimental impacts on competitiveness".

41. The UK ETS was only one element of the Clean Growth Strategy. Whilst carbon pricing via a UK ETS is an important part of tackling climate change, it is only one of a range of actions being planned or taken to tackle climate change.

42. The UK ETS is being established to ensure that there is a fully functioning UK emissions trading system from January 2021, which gives industry certainty and continues to deliver significant emission reductions in line with current carbon budgets, bearing in mind also the unprecedented covid-19 pandemic and associated economic emergencies (the full and long-term impact of which on traded emissions cannot be assessed). The scheme was designed in order to deliver a UK ETS which can be operational immediately following the end of the transition period on 31 December 2020, ensuring no carbon pricing gap emerges when the UK ceases to participate in the EU ETS and a smooth transition. The UK ETS is a UK replacement for the EU ETS, to stimulate emissions reduction from large UK emitters within the energy-intensive industry, power generation and aviation sectors currently participating in the EU ETS.

43. The objective of the UK ETS, as set out in 'The Future of UK Carbon Pricing Impact Assessment' dated June 2020 ("the Impact Assessment"), is to "incentivise cost-effective emissions reductions for sectors currently in scope of the EU ETS, while balancing this ambition with the competitiveness of UK industry" [CB/39/423].

44. The UK ETS will be both a new system and one which is much smaller than the existing EU ETS market, both in terms of the number of participants and the market size. There is uncertainty about how the new UK ETS market will behave, especially initially. For the UK ETS to be effective in reducing emissions, the UK ETS system, including the market, needs to function effectively. The uncertainties around how the market will respond, particularly in the early years of the scheme, were considered when designing the initial UK ETS, including when setting the cap.

45. The UK ETS was designed taking into account a range of factors, not only the objective of addressing climate change. This included the need to maintain UK business competitiveness and to provide a smooth transition given the pressures that businesses currently face as a result of the UK's departure from the EU and covid-19. The design of an ETS, including the cap and trajectory for the cap, needs to set a credible pathway for emissions reductions across a number of business sectors. The pathway needs to be one which encourages emissions reductions at a rate which is technologically and economically feasible and which does not result in the transfer by businesses of activities to other countries with less stringent emission constraints (known as carbon leakage).

46. In letters to the CCC dated 2 May 2019 and 4 March 2020 seeking its advice, the decision-makers set out the principles which govern the design of the UK ETS [CB/21/220, CB/33/340], including:

    (1) be an operational system which facilitates cost effective decarbonisation through trading of allowances;

    (2) be deliverable for operation from 1 January 2021;

(3) meet the UK Government's commitment in the Clean Growth Strategy that "our future approach is at least as ambitious as the current scheme and provides a smooth transition for the relevant sectors";

(4) maintain industrial competitiveness whilst supporting delivery of the UK's and devolved administrations' domestic and international climate change commitments and targets;

(5) be capable of being linked to the EU ETS.

47. In the May 2019 consultation document, it was stated that, in terms of sectors and activities covered, it was proposed that the scope of the UK ETS should align with the EU ETS [CB/22/252, para 6]. It was said that this would deliver continuity [CB/22/252, para 7]. This is relevant because the issues on the scope of the UK ETS about which the Claimant complains are also features of the EU ETS. If they were changed as the Claimant wishes, the scope of the UK ETS would not align with the EU ETS.

48. There is, however, a separate commitment to consider the option of expanding the future scope of the UK ETS to the most appropriate additional sectors in the first UK ETS review, to be conducted from 2023, to enable implementation of any potential changes to scope by no later than 2026 [CB/38/366, para 51].

The level of the initial cap in the design of the UK ETS

49. The overall reduction in carbon emissions in an ETS is established by means of setting a limit on the level of available emission allowances (the cap) and the rate by which those allowances are reduced over time (the trajectory). The initial cap for the UK ETS has been set 5% lower compared to the notional cap the UK would have had if it had remained in the EU ETS for Phase IV (ie 2021-2030). This starting point cap demonstrates clear climate ambition from the start of the UK ETS, whilst also taking into account the risks associated with transition from the EU ETS, and so provides a balance between a tightening of the cap on emissions and stability and competitiveness for UK business [CB/37/353].

50. Under the UK ETS as it currently stands, the initial cap will be reduced annually so that it will remain 5% below where the UK's notional share of the Phase IV EU ETS cap would have been expected to be, year-on-year. The UK ETS is designed to go further and faster than the EU ETS. The legislative framework of the EU ETS for its next trading period (Phase IV) was revised in early 2018 to enable it to achieve the EU's 2030 emission reduction targets and as part of the EU's contribution to the Paris Agreement.

51. The May 2019 consultation document explained that ensuring a smooth transition from the EU ETS to the UK ETS could mean setting a trajectory so that the effects of a tighter cap materialise over the course of a phase of the UK ETS rather than at the beginning [CB/22/254, para 17]. This does not amount to deferring reductions. It is an element of the range of judgements which go into designing a UK ETS to ensure that it is effective in practice and viable in the long-term.

52. The Claimant's argument that the existence of some 'headroom' in an ETS cap above projected 'business as usual' emissions (ie the level of expected emissions in the absence of the carbon pricing policy) reduces the short to medium term effectiveness of an ETS is wrong. Efforts to reduce greenhouse gas emissions within an ETS are driven by the participants' expectations of future tightening of the cap. The design of the UK ETS initial cap already demonstrates ambition to reduce emissions from the start of the new scheme. The cap is only one factor which drives abatement in an ETS, with other factors, such as participants' expectations of the direction of changes in allowance prices, also driving abatement.

53. The cap is reduced over time to meet long-term emissions reduction targets and this shapes UK ETS participants' expectations. The cap trajectory creates a clear long-term signal about future increases in the carbon price, which can provide the certainty for participants to make short and long-term decisions on investment that would be necessary to cut their emissions.[5] The EU ETS has a surplus of allowances which is

[5] In fact, merely publicly stating plans to change he trajectory can provide a similar signal.

proportionately much larger than the 2021 headroom under the proposals for the start of the UK ETS.

54. An ETS is a market and in order to function properly there needs to be liquidity in the market. The UK ETS aims to incentivise cost-effective emissions reductions by pricing carbon. This provides emitters with a choice: reduce their emissions where it is economic to do so, or pay for them where it is not. Paying for emissions requires a viable market with sufficient liquidity.

55. The allowance prices that result from trading between market participants creates the incentive to reduce emissions: installations and aircraft operators whose cost of abatement is lower than the purchase price of allowances are incentivised to abate (and can benefit by selling any surplus allowances to the market), while those whose cost of abatement is higher than the prevailing allowance price can buy allowances on the market to meet their compliance obligations. In this way, the ETS ensures emissions reductions occur when and where it is most cost-effective.[6]

56. A liquid and stable market is required for an effective ETS in order to incentivise businesses to reduce emissions. It enables participants to predict future rises in allowance prices so that they can set long-term investment plans to abate emissions, being able to judge when it would be cost-effective to do so. A new ETS is especially susceptible to spikes and volatility in allowance prices at the start, which would risk undermining the effectiveness of the UK ETS. Some headroom is crucial to avoid this, as the CCC recognises [CB/36/352].

57. The cap is reduced over time to meet long-term emissions reduction targets. If the initial cap was set at the level of existing or 'business as usual' emissions this would considerably reduce liquidity on its launch and therefore increase the risk that the new market will not have sufficient liquidity to function effectively. This could in turn lead to disproportionately high carbon prices in the UK ETS, especially at the commencement of the new market under the UK ETS, causing carbon leakage as

[6] This is explained in paragraph 5 of Annex A to the May 2019 consultation document [AB/4/85].

businesses relocate abroad to places where carbon emission costs are lower. This could increase total emissions, contradicting the collective objective of the Paris Agreement.

58. This was reflected in the Response, which said (para 63): "in the interim, particularly given the current uncertainties, we believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the UK ETS" [CB/38/368]. It was a fundamental objective of the UK ETS that there must be a smooth transition for industry from the EU ETS to the UK ETS.

59. The initial design of the UK ETS is, however, intended to be purely temporary in nature [CB/37/353]. The UK ETS has been designed to provide the necessary flexibility to raise the requirements of the UK ETS in the near future. It was in particular designed bearing in mind that the CCC is due to produce its advice on the sixth carbon budget, for the period 2033-2037, in late 2020. The Response and the 1 June 2020 letter to the CCC make it clear that there is a commitment to review the approach adopted in the initial design of the UK ETS in light of this advice from the CCC.

60. There will be a consultation on the level of and appropriate trajectory for the cap for the remainder of Phase 1 of the UK ETS within nine months of the CCC's advice on the sixth carbon budget being published. This advice is due in late 2020. This advice will inform the evolution of the UK ETS after its initial launch. Any resultant changes will be implemented by January 2023 if possible, and certainly no later than January 2024.

61. The position with the cap is summarised in the explanatory memorandum to the Greenhouse Gas Emissions Trading Scheme Order 2020 as follows (p5) [AB/5/105]:

> "The cap on allowances that are created under the UK ETS each year will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to roughly 156 million allowances in 2021. The initial cap will be reduced annually by a little over 4.2 million allowances, meaning that the UK ETS cap will remain 5% below where we would have expected the UK's notional share of the Phase IV EU ETS cap to be year on year. These cap figures include the aviation scope. As set out in the Government Response, it is the Government's intention that this is a temporary cap. The Government will consult on an appropriate trajectory for the UK ETS

> cap for the remainder of the first phase within nine months of the Committee on Climate Change publishing its advice on the Sixth Carbon Budget. We aim to appropriately align the cap with a Net Zero trajectory by January 2023, and no later than January 2024, while aiming to give the industry at least one year's notice to provide the market with appropriate forewarning."

62. For the reasons given above, it is factually wrong, and misunderstands the UK ETS, for the Claimant to contend that setting the cap above 'business as usual' emissions: defers cuts necessary to meet the 2050 net zero target until closer to 2050; allows greenhouse gas emissions to increase post-2020; means the UK ETS will not be able to achieve substantial or any reductions in emissions until after 2029.

Rolling forward unsold carbon allowances

63. The UK ETS includes the ability for unsold allowances at auctions to be 'rolled forward' to the following four auctions, with each auction offering for sale allowances up to a maximum of 125% of those originally intended for sale at that auction. So, unsold allowances are not redistributed more than the next four auctions out and no one auction will have more than 125% of its originally intended allowance volume as a result of the rolling forward of allowances. This rolling forward would only happen if an auction does not fully clear (eg because the reserve price was not reached)[7] or because an auction was cancelled. The rolling forward of unsold allowances only applies to unsold allowances from a specific auction and not to 'unused' allowances within the overall UK ETS.

64. Allowing unsold allowances from an auction to roll forward to an auction in the immediate future is important for maintaining the supply of allowances from auctions into the market, helping to support liquidity in the market. This in turn helps to support an effective and efficient ETS market that allows participants to trade in allowances and to deliver efficient industrial decarbonisation. However, limiting the extent to

[7] The use of a reserve price ensures a minimum price for allowances and so ensures a strong enough signal towards emissions reductions is given. It ensures allowances are only sold for a sufficiently ambitious price.

which allowances can be rolled forward helps to avoid any long-term build-up in the number of allowances being offered at each auction.

65. This rolling forward would only keep allowances available for purchase in the immediate few auctions, for a matter of weeks. If successive auctions with unsold allowances result in a redistribution which would cause an auction to be inflated beyond 125% of its originally planned volume, the excess for that auction would be entered into a reserve. The unsold allowances are therefore moved into an allowance reserve if multiple auctions do not fully clear, removing them from auctions. By entering the reserve, allowances do not enter circulation in the market.

66. By limiting the extent to which allowances can be rolled forward, and providing a route to reserve where the limits are reached, the design of the UK ETS goes beyond the equivalent provisions of the EU ETS. This element of the design of the UK ETS is more restrictive of the ability to redistribute allowances than Phases III and IV of the EU ETS, which do not limit the number of allowances that can be 'pushed forward' into future auctions, nor how far into the future auctions can be inflated. The measures to roll forward unsold allowances in the UK ETS are based on the design of the EU ETS but are more stringent in applying limits to the number of allowances that can be rolled forward and how far they can be rolled forward. The UK ETS enables greater ambition environmentally than the EU ETS.

67. Providing this route to reserve for surplus allowances might lead to a build-up of allowances in that reserve. The Response therefore also contained a particular commitment to consult on how appropriately to address any long-term surplus of allowances which may build-up in the UK ETS allowance reserve in the long-term (para 235) [CB/38/399]. However, this is only necessary as a result of the UK ETS including a route to reserve that enables greater ambition environmentally.

68. For these reasons, it is factually wrong, and misunderstands the UK ETS, for the Claimant to contend that the rolling forward provisions of the UK ETS: will allow more emissions in a subsequent period than would otherwise be the case under the EU ETS; will allow allowances to be sold and used at a later date; means emissions reductions in one period can justify higher emissions in subsequent period; and, reduces the ability

of the UK ETS to limit and reduce GHG emissions, especially in the short to medium-term.

Municipal waste incinerators

69. The Claimant contends that, unless municipal waste incinerators are included in the UK ETS, there is no mechanism to incentivise the reduction of emissions from such incinerators. This is wrong. Waste management policy interventions to reduce the amount of municipal waste going for incineration are a means of encouraging the limitation of the incineration of municipal waste and thereby reducing emissions from municipal waste incinerators.

70. It is notable that, in its June 2020 progress report, the CCC recommends increased re-use and recycling to address emissions from waste incineration [CB/40/468, 470]. The CCC says that increased recycling will be "key" to "limiting fossil emissions from energy from waste plants" and:

> "Achieving significant emission reductions in the waste sector requires a step-change towards a circular economy, moving away from landfill and incineration (and the associated methane and fossil CO_2 emissions), and towards a reduction in waste arisings and collection of separated valuable resources for re-use and recycling".

71. In England, the December 2018 'Resources and Waste Strategy for England' seeks to maximise the amount of waste sent to recycling instead of incineration (or landfill) and reduce the amount of waste (including municipal waste) that is produced in the first place. Legislation is coming forward in the Environment Bill to provide the legislative framework needed to deliver on many of the commitments in this strategy (eg separate collection of certain waste streams, including plastic, in England). As another example, from October 2020, Regulation 21(5) of the Waste (Circular Economy) (Amendment) Regulations 2020 amends the Environmental Permitting (England and Wales) Regulations 2016 to impose a condition on all environmental permits for waste incineration plants which prevents separately-collected plastic waste from being incinerated.

72. There are other similar strategies in the devolved administrations, eg the Welsh Government's 'Towards Zero Waste' and 'Beyond Recycling' strategies and the Scottish Government's circular economy strategy 'Making Things Last'. The Waste (Wales) Measure 2010 sets increasingly challenging statutory recycling targets for local authorities with the aim of at least 70% of municipal waste being recycled or composted/anaerobically digested by 2025, thus reducing the quantity of material being incinerated or landfilled. In Northern Ireland, the Department of Agriculture, Environment & Rural Affairs is currently developing the 'Environment Strategy for Northern Ireland'. Scotland already restricts the incineration of materials for recycling and the 'Circular Economy Package policy statement' published by the four administrations in July 2020 seeks to increase recycling of municipal waste and restrict the waste materials which can be incinerated.

73. The environmental requirements placed on municipal waste incinerators under the environmental permitting regime in England and Wales do seek the reduction of greenhouse gas emissions from municipal waste incinerators. Under this regime, the Environment Agency in England and Natural Resources Wales in Wales ensures that the global warming potential of the incinerator is minimised by the use of best available techniques to maximise the energy efficiency of the incinerator and minimise nitrous oxide emissions from de-NOx systems.

74. There are also other mechanisms available to reduce greenhouse gas emissions from municipal waste incinerators, such as a potential incineration tax. The potential for an incineration tax was set out in the October 2018 Budget, which said at paragraph 3.58:

> "The government recognises the important role incineration currently plays in waste management in the UK, and expects this to continue. However, in the long term the government wants to maximise the amount of waste sent to recycling instead of incineration and landfill. Should wider policies not deliver the government's waste ambitions in the future, it will consider the introduction of a tax on the incineration of waste, in conjunction with landfill tax, taking account of the possible impacts on local authorities."

75. The claim is also predicated on the assumption that incineration of municipal waste leads to the highest level of carbon emissions of all means of dealing with such waste, including landfill. That contention is wrong. Obtaining energy from the waste via municipal waste incinerators is better than landfill in terms of environmental impacts, including greenhouse gas emissions. For example, landfilling biodegradable waste leads to the release of methane, which is a far more potent greenhouse gas than the CO_2 released by incineration.

76. It is factually wrong for the Claimant to contend that: municipal waste incinerators lead to the release of greater greenhouse gas emissions than all other forms of waste disposal; there is no mechanism to incentivise the reduction of greenhouse gas emissions from municipal waste incinerators; and that nothing is being done to address greenhouse gas emissions from municipal waste incinerators.

Ground 1: failure to consider the UK's Paris Agreement commitments

77. The Claimant contends that, in designing the UK ETS, the only aspect of climate action to which regard was had was meeting the 2050 net zero target set out in the 2008 Act. That is not the case. The Response refers to action on climate change generally and not only in the context of the 2050 net zero target (see eg paras 12, 14, 25, 26 and 58) [CB/38/361-362, 368]. The 1 June 2020 letter to the CCC also makes it clear that regard was had to tackling climate change generally and not only in relation to the 2050 net zero target [CB/37/353-354]. The explanatory memorandum to the Greenhouse Gas Emissions Trading Scheme Order 2020 says that the UK ETS "is an important part of the UK's efforts to achieve its net zero target and tackle climate change" (p4) [AB/5/104].

78. Linked to this, the Claimant contends that no consideration was given to the Paris Agreement. That is also not the case. It is apparent that the Paris Agreement itself was taken into account in designing the UK ETS. The Paris Agreement is repeatedly referenced in the consultation document [CB/22/234, 236, 254, 266-267, 270, 273, 288], the Response [CB/38/360, 367, 382, 391-392, 400, 406] and the 1 June 2020 letter to the CCC [CB/37/354].

79. The extent to which the Paris Agreement was taken into account in the design of the UK ETS is reflected by the fact that the reviews under the UK ETS were designed to align with the Paris Agreement Global Stocktakes. As was stated in the Response, aligning the review points with the Paris Agreement Global Stocktake dates ensures that a UK ETS remains aligned with the UK's global ambitions on carbon [CB/38/382, para 151].

80. As in the case of *Packham*, it is impossible to infer from the Response and the associated documents any failure to have regard to the UK's relevant statutory and policy commitments on climate change. The decision-makers for the UK ETS were plainly well-aware of the UK's determination to contribute to the global goals of the Paris Agreement, which were factored in when legislating for net zero, and were familiar with what this means in practice. They can be taken to have been fully aware of the Paris Agreement and the 2008 Act and to have taken their provisions into account.

81. The Claimant also contends that the decision-makers failed to consider reducing, or further reducing, emissions in the short to medium term. This again is not correct. Indeed, the design of the UK ETS for the initial period of 2021-2025 was primarily about the reduction of emissions in this timeframe.

82. Moreover, consideration was given to setting the cap and the trajectory in the UK ETS to seek further reductions in the short to medium term. This was specifically and expressly considered in the Response at paragraphs 58-63 [CB/38/368-369]. The 1 June 2020 letter to the CCC also makes it clear that there was consideration of tightening the cap on emissions further [CB/37/353-354]. Consideration was given to how far the initial design of the UK ETS should go in the short to medium term.

83. There was no legal duty on the decision-makers to refer in the Response to all the particular provisions of the Paris Agreement, such as Article 2(1)(a) or Article 4(1). It cannot be inferred that those provisions were left out of account because they were not expressly referred to in the Response. It is not credible to suggest that these provisions were excluded from consideration by decision-makers. At all events, the substantive

issue – whether the cap in the initial UK ETS design should be tighter for the short to medium term, including the initial period of 2021-2025 – was expressly considered in the Response and the 1 June 2020 letter to the CCC.

84. The Claimant's contention that there has been a "failure to account for" these particular provisions of the Paris Agreement goes beyond a contention that matters were left out of consideration and into a disagreement with judgements on the underlying merits of the considerations, especially the policy decision on the level of the cap in the initial UK ETS design. Such a contention would not amount to an error of law.

85. In any event, as set out above at paragraph 32, the courts have established that:

(1) the Paris Agreement does not impose any obligation on the UK Government (or devolved administrations) to act in accordance with its provisions or to achieve any particular target, objective or outcome related to it; and

(2) the "aspirations" and "essential principles" of the Paris Agreement have been "translated" into domestic legislation in the form of the provisions of the 2008 Act, in particular the 2050 net zero commitment, and there would be no duty on decision-makers to consider the implications of the Paris Agreement beyond recognising the 2050 net zero commitment.

86. It is not the case that, for the design of the UK ETS, especially as it is to run for the initial period from 2021 to 2025, there is anything in the Paris Agreement which is different from and goes beyond the 2050 net zero target. The Claimant is wrong to contend that the Paris Agreement, as it relates to the initial design of the UK ETS, is more demanding in relation to either timing or extent than the provision in the 2008 Act to meet the net zero target by 2050.

87. In relation to the specific contentions made in paragraphs 60(a)-(c) of the claim, it has been explained above at paragraphs 49 to 75 that these are misconceived, as well as being merits points. In summary:

(1) It is not the case that incineration gives rise to greater greenhouse gas emissions than all other forms of waste disposal. It is also wrong to contend that incineration of municipal waste is inconsistent with the goals of the Paris Agreement. The goals of the Paris Agreement must be met at an economy-wide level and, given the scale and complexity of matters involved, no one single decision could be said to be inconsistent with the Paris Agreement. In any event, emissions from municipal waste incinerators are capable of being controlled as a consequence of waste policy.

(2) The rolling forward does not allow additional emissions than would otherwise be the case under the UK ETS and will not have a material effect on the ability of the UK ETS to reduce greenhouse gas emissions. It is more restrictive than the EU ETS mechanism. It is in any event a component of ensuring an effectively functioning market under the UK ETS, which in turn is necessary to ensure that the UK ETS is effective in reducing emissions.

(3) The level of the initial cap in the UK ETS does not involve deferring reductions. It was set to ensure that the UK ETS would be workable and would incentivise cost-effective emissions reductions. Again, if the UK ETS does not function effectively it will not be effective in reducing emissions. The initial cap was set having regard to the factors which bear upon achieving this overall objective.

88. None of the ways in which the Claimant articulates its complaints under Ground 1 gives rise to an arguable error of law.

Ground 2: irrelevant considerations in excluding municipal waste incinerators

89. The Claimant contends that three matters mentioned in paragraph 52 of the Response [CB/38/366], in relation to the conclusion that municipal waste incineration should remain outside the scope of the UK's initial ETS, were legally irrelevant considerations.

90. As a preliminary point, the Claimant is wrong to suggest that the decision not to bring municipal waste incinerators within the scope of the UK ETS was based only on the

conclusion that "the complex environmental requirements placed on municipal waste incinerators, as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS". It is clear from reading paragraph 52 of the Response as a whole that the conclusion was also based on the view that "there may be more appropriate measures than the UK ETS" for reducing emissions from municipal waste incinerators. As noted above at paragraphs 68 to 73, such measures could include, for example, waste management policy interventions to reduce the generation of municipal waste in the first place, to reduce the amount of municipal waste going for incineration, as well as taxation, regulation and innovation.

91. This ground is, in any event, misconceived in suggesting that the matters complained about by the Claimant were legally irrelevant considerations such that it was an error of law to take them into account. The Court of Appeal made clear in *R (Khatun) v Newham LBC* [2005] QB 37 at paragraph 35 that, where a statute conferring discretionary power provides no lexicon of the matters to be treated as relevant by the decision-maker, it is for the decision-maker to judge what is relevant subject only to *Wednesbury* review. It was clearly not irrational for the decision-makers in this case to judge they should have regard to the matters set out at paragraph 52 of the Response.

92. Matters which relate to the difficulties arising in relation to including an activity in an emissions trading scheme are plainly relevant considerations when deciding whether or not to bring that activity within the scope of the scheme. The suggestion that this is a legally irrelevant consideration is hopeless. It is absurd to suggest that, when deciding what activities to include within the scope of an emissions trading scheme under the 2008 Act, it is legally impermissible to consider the difficulties arising in relation to including such activities within the scheme.

93. As to the first matter, the "complex environmental requirements placed on municipal waste incinerators" are obvious. It is well-known that waste incineration has been subject to particular and complex requirements for many years, including in particular those arising under European Directives such as 89/429/EEC, 89/369/EEC, 2000/76/EC and 2010/75/EU. The "complex environmental requirements placed on municipal waste incinerators" can perhaps best be described by reference to two categories.

94. First, there are those requirements which apply to the incineration of waste. These are currently found in, for example, Chapter IV of the Industrial Emissions Directive (and the Waste Incineration Directive before it) and the Waste Framework Directive. For England and Wales, for example, municipal waste incinerators would also normally be subject to Schedules 7 (Industrial Emissions Directive) and 13 (waste incineration) to the Environmental Permitting (England and Wales) Regulations 2016. These include a detailed and prescriptive set of requirements which address both processes and emissions.

95. Secondly, there are those requirements which apply to the broader subject of the management of municipal waste, in both law and policy, some of which have been described at paragraphs 70-71.

96. The complexities are increased by the fact that there are different instruments applying in the different administrations of the UK. This includes, for example, the Pollution Prevention and Control (Scotland) Regulations 2012, the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013, the Waste (England and Wales) Regulations 2011, the National Waste Management Plan for Scotland Regulations 2007 and the Waste Regulations (Northern Ireland) 2011.

97. Contrary to what is said at paragraph 69(a) of the claim, the Response did not refer to the "mere existence of regulatory requirements for incinerators". It clearly refers to the difficulties such matters would cause in relation to including municipal waste incinerators in a UK ETS. Nor is there any basis for suggesting that the Response proceeded on the basis that there was already a system for incentivising emissions reductions equivalent to the UK ETS or that the UK ETS would duplicate pre-existing regulations which contained financial incentives to reduce CO_2 emissions. Further, it is clear that the environmental regulations applicable to the incineration of municipal waste do not apply to other industries and installations covered by the UK ETS. They are different.

98. As to the second matter, it is again obvious that the incineration of municipal waste plays a role in diverting waste from landfill. Some waste is incinerated that would

otherwise have been sent to landfill. That is undeniable. Including municipal waste incinerators in the UK ETS would be difficult without creating incentives which run counter to environmental requirements such as reducing the amount of waste sent to landfill. It is obvious that requiring municipal waste incinerators to purchase credits under an ETS would risk incentivising less waste to be incinerated and more waste to be landfilled. Adding in a new hurdle to the incineration of municipal waste would create a situation which was less effective than otherwise might be the case in diverting waste from landfill. It has been judged better to manage the waste system in its entirety and holistically through waste policy and regulation.

99. The Claimant's contentions about incineration leading to higher CO_2 emissions than landfill, and the relative scale of waste diverted from landfill, are unsupported by evidence and are not accepted.[8] Even if correct, however, they would not make the role played by municipal waste incinerators in diverting waste from landfill a legally irrelevant consideration when deciding whether municipal waste incineration should remain outside the scope of the UK's initial ETS.

100. As to the third matter, the difficulties referred to in paragraph 52 of the Response are not "difficulties in calculating CO_2 emissions from municipal waste incinerators". They are policy and practical difficulties that would arise in relation to grappling with a situation where further environmental regulation was added on top of existing complex environmental requirements and where a different set of requirements was added which would, at least to an extent, be in tension with existing waste-related requirements. The issue of whether such matters would make it difficult to include municipal waste incinerators in a UK ETS was a matter of judgement for the decision-makers.

101. The reasoning for not bringing municipal waste incinerators within the scope of the UK ETS was sound. The decision-makers were entitled to conclude that municipal waste incinerators should not be brought within the scope of the UK ETS. This reflects the conclusion reached by the EU.

[8] They are in any event disagreements on the underlying merits of subject matter which cannot be raised in a claim for judicial review, save as contentions of *Wednesbury* irrationality, which are not made and which would in any event be hopeless.

Ground 3: UK ETS *ultra vires* the Climate Change Act 2008

102. The Claimant contends that the UK ETS is *ultra vires* s44 of the 2008 Act because the initial design of the UK ETS is inconsistent with the purpose of s44 in that it does not cover municipal waste incinerators and includes an initial cap which is above the level of 'business as usual' emissions (ie the level of expected emissions in the absence of the carbon pricing policy).

103. This ground is premised on the assertions that, in these two respects, the UK ETS will not limit or encourage the limitation of activities that cause or contribute to greenhouse gas emissions. That premise is wrong, in relation to both aspects, for the reasons given above at paragraphs 49-62 and 68-75. This ground is unarguable for this reason alone.

104. In terms of the s44 power, the Claimant's contention appears to be that an ETS could only lawfully be made under s44 if it encompassed all activities which cause or contribute to greenhouse gas emissions and included a cap set below 'business as usual' emissions in year one of the scheme. There is no foundation in the 2008 Act for this.

105. A trading scheme under s44 needs to do no more than encourage the limitation of activities that consist of the emission of greenhouse gases or that cause or contribute to such emissions. The UK ETS does this. It is clear from s44 that an ETS does not need to encompass all activities that cause or contribute to greenhouse gas emissions. It is absurd to suggest that an ETS must be so wide. The EU ETS covers around one-third of UK emissions currently.

106. It is also clear from s44 that an ETS can encourage the limitation of activities that cause or contribute to greenhouse gas emissions; it does not have to limit the activities directly. Moreover, it is also apparent that s44 says nothing about the extent to which an ETS should limit or encourage the limitation of activities. Activities do not have to be limited so as to achieve any particular level of greenhouse gas emissions under s44.

107. The 2008 Act provides the power to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere. The UK ETS is being established for this purpose. It is within the scope of the statutory power.

108. The contention that it was irrational to design the UK ETS without including municipal waste incinerators within the scheme is addressed below under Ground 5.

Ground 4: s44 power exercised for improper purposes

109. The Claimant contends that the power in s44 has been exercised for an improper purpose because, it is alleged, the decision to set the cap on the emissions allowable under the UK ETS above the projected 'business as usual' emissions for 2021 was in order to alleviate "pressures that business currently face as a result of our departure from the EU".

110. This ground is based on a misunderstanding of the operation of emissions trading systems. It has been explained above at paragraphs 52-58 that setting the initial cap above the level of 'business as usual' emissions (ie the level of expected emissions in the absence of the carbon pricing policy) was an aspect of ensuring a UK ETS which functioned effectively. This was wholly in accordance with the purpose of s44, namely to establish an ETS which operates effectively to limit or encourage the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions. The initial level of the cap was set not above the level of 'business as usual' emissions to assist businesses, but rather to ensure that the UK ETS functioned effectively as an emissions trading system. Setting the cap at this level will facilitate, and not frustrate, the UK ETS in effectively limiting or encouraging the limitation of relevant activities.

111. In any event, this ground is based on a misreading of the Response. It does not say that the initial level of the cap was set above 'business as usual' emissions with the purpose of alleviating pressures on businesses arising from Brexit.

112. The Response said that "the key considerations in setting the level of the cap are climate ambition balanced with the costs to business" (para 58) and that "initially tightening the cap by 5% provides the appropriate balance between the UK's climate ambition in the context of the UK's net zero commitment and any risks of disproportionate costs to businesses which could arise in the early years of a UK ETS" (para 60) [CB/38/368].

113. Paragraph 59 needs to be read as a whole rather than just focussing on the reference to EU exit. It said [CB/38/368]:

> "The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap."

114. As noted in paragraph 61, regard was also had to "the uncertainties and risks posed by COVID-19" [CB/38/368]. It is clear that the "pressures that businesses currently face as a result of our departure from the EU" was one of a number of considerations taken into account. Paragraph 60 of the Response makes clear that the judgement on the initial cap was formed "to balance these objectives".

115. When designing the elements of a UK ETS – including the initial cap – for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere, it was permissible to take such matters into account. Doing so did not mean that the power was exercised for "improper purposes".

116. It is apparent from this part of the Response, read as a whole, that it was neither the purpose nor the dominant purpose of the design of the UK ETS to alleviate Brexit-related pressures on businesses. That is unarguable.

117. It cannot seriously be suggested that the context in which the UK ETS would be imposed upon businesses was legally irrelevant when deciding upon the appropriate

design of the UK ETS. An ETS is intended to incentivise businesses to take action to reduce greenhouse gas emissions, which can only be achieved if businesses can afford to take such action. The focus of an ETS cannot be on driving down emissions regardless of the impacts on businesses.

118. Moreover, in order for the UK ETS to be effective and avoid increasing global emissions, it is important to avoid 'carbon leakage', ie the transfer by businesses of activities to other countries with less stringent emission constraints.[9] Consideration of the circumstances in which businesses operate is part of considering whether the UK ETS would undermine business competitiveness, which is in turn relevant to whether the UK ETS would be effective in reducing emissions – rather than just displacing them to another country. Considering business competitiveness has climate aims, to mitigate carbon leakage.

119. The weight to be given to different factors when judging where precisely to strike the balance in terms of the level of the initial cap of the UK ETS was a matter for the decision-makers to judge. There is no basis whatsoever for suggesting that the weight given to considerations relating to maintaining business competitiveness was *Wednesbury* irrational.

120. The contention that the decision-makers overlooked the advice from the CCC in its 20 March 2020 letter is obviously wrong. The Response expressly refers to that letter [CB/38/365, 368, 399, at paras 40, 61, 235]. The decision-makers replied to that letter at the same time the Response was published, explaining the consideration which had been given to it [CB/37/353-354]. The approach of setting a temporary cap and then adjusting it following receipt of the CCC's advice on the sixth carbon budget was recommended by the CCC [CB/25/297, CB/36/351].

Ground 5: irrationality

[9] Carbon leakage was raised in the letters to the CCC at CB/21/219-220 and CB/37/353.

121. The Claimant contends that it was irrational to design the UK ETS so that it (i) excluded municipal waste incinerators, (ii) allowed unsold emission allowances to be rolled forward, and (iii) had a cap which was above the level of existing emissions.

122. As to (i), designing the UK ETS so that it did not include municipal waste incinerators was plainly not irrational. It cannot be said that it was a view that no reasonable person in the position of the decision-makers, properly directing themselves on the relevant material, could have reached. The EU ETS does not include municipal waste incinerators either.

123. Designing the UK ETS so that it did not include municipal waste incinerators meets the objective that the UK ETS be at least as ambitious as the current EU ETS. It matches the EU ETS in this respect. Moreover, as explained above, there are means of encouraging the limitation of the incineration of municipal waste, and thereby reducing emissions from municipal waste incinerators, other than through inclusion in the UK ETS. Further, the Response specifically explained why municipal waste incinerators were not included [CB/38/366, para 52].

124. As to (ii) and (iii), it has been explained above that the Claimant's contentions on these points are based on false premises, arising apparently from a failure to understand the operation of the UK ETS. These features of the UK ETS simply do not have the effects asserted by the Claimant. In respect of both provisions, the UK ETS is more ambitious than the EU ETS. There are in any event sound reasons for including these features in the design of the UK ETS. These are articulated in for example:

    (1) the letter to the CCC of 1 June 2020 [CB/37/353-354];

    (2) the Response at paragraphs 58-63 and 235 [CB/38/368-369, 399].[10]

125. Overall, in considering the appropriate design of the UK ETS, questions of judgement arise, particularly in relation to consideration of the extent of inquiry that should be

[10] See also the Impact Assessment at paragraphs 3-15, 20-26, 32-40, 122-129, and 146-150 [CB/39/426-429, 432-434,450-451, 455] and the consultation document at paragraphs 9-17 and 153-155 [CB/22/253-254, 284], and paragraphs 46-53 and 56-104 of Annex A [AB/4/92 and 93-99].

undertaken, the factors that should be taken into account, and as to the weight to be afforded to those factors. The legal test is one of rationality in relation to all of those matters (see eg the *Khatun*, *Plantagenet Alliance*, and *DSD v Parole Board* line of cases).[11] The rationality hurdle is extremely difficult to overcome precisely because it reflects, on important constitutional grounds, the primacy of decision-making by the Government and devolved administrations. That is all the more so in a context such as this concerning a multi-faceted decision involving a range of technical, policy and political judgements.

Ground 6: failure to carry out a lawful consultation exercise

126. The Claimant contends that the consultation leading to the Response was unlawful because the features of the UK ETS, including that municipal waste incineration would not be within the scope of the UK ETS, had been determined before the consultation took place. That is wrong.

127. The only foundation for this allegation is the statement in paragraph 72 of the pre-action letter of response [CB/9/103]. That said that it had been clear since the publication of "the proposals for the UK ETS" in the May 2019 consultation document that "it was not proposed that the UK ETS would cover municipal waste incinerators". This provides no basis for alleging predetermination. It simply refers to the *proposals* for the UK ETS. It is well-established that consulting on proposals does not amount to predetermination.

128. The proposals on the scope of the UK ETS were set out in the consultation document. The proposal was that the scope of the UK ETS, in terms of sectors, should align with the current scope of the EU ETS [CB/22/252, para 6]. This would not include municipal waste incinerators. The consultation asked whether respondents agreed with the proposed scope of a UK ETS [CB/22/253].

[11] *R (Khatun) v Newham LBC* [2005] QB 37; *R (Plantagenet Alliance) v Secretary of State for Justice* [2015] 3 All ER 261; *R (DSD) v Parole Board* [2019] QB 285.

129. It was recorded in the Response that "in the light of responses received, we have decided to keep the scope of a UK ETS as proposed in the consultation" [CB/38/366, para 50]. The Response gave express consideration to expanding the scope of the system [CB/38/366, para 51]. It also gave express consideration to whether or not municipal waste incinerators should be brought within the scope of the UK ETS and decided that they should not be for the reasons given in the Response [CB/38/366, para 52]. There was no predetermination.

Delay

130. Under CPR r 54.5, a judicial review claim form must be filed (a) promptly and (b) in any event not later than three months after the grounds to make the claim first arose. Promptness and the three month long-stop are separate requirements. Promptness means that applications for judicial review have to be made as speedily as possible. The pre-action protocol for judicial review records that compliance with the protocol does not affect the time limit for bringing a claim.[12]

131. There has been a lack of promptness in this case. The challenge to the Response of 1 June 2020 was filed with the Court on the last possible day of the three month long-stop period, 1 September 2020. Moreover, the pre-action protocol letter was not even sent until 5 August 2020, more than two months after the Response was published. No action was apparently taken for two months after the decision was published. This is in the context of all the elements of the UK ETS about which the Claimant complains being features of the proposals which were consulted on in May 2019.

132. Despite the point being raised in pre-action correspondence, the Claimant has not provided any explanation for her delay. There could be no justification or good reason

[12] The Claimant says that she considers the Secretary of State's response – sent on 26 rather than 24 August 2020 – as being in breach of the pre-action protocol. This is not accepted. The protocol allows a reasonable extension where it is not possible to respond within the normal timescale. The Secretary of State explained why 26 August 2020 was a reasonable timescale, as required under the protocol [CB/5/79, CB/8/88-90]. There was no breach. The Secretary of State also responded to the Claimant's supplemental letter before claim in a response dated 9 September 2020 [AB/6/108].

for delay on this scale. The claim was not brought promptly and permission to bring it should be refused.

Whether the outcome for the Claimant would have been substantially different

133. Section 31(3C) of the Senior Courts Act 1981 provides that the Court should consider "whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred". Section 31(3D) provides that, if, on considering that question, it appears to the Court to be "highly likely that the outcome for the applicant would not have been substantially different", the Court must refuse to grant permission.

134. Although misguided, it is clear from the Claimant's witness statement that the outcome at which this challenge is aimed is municipal waste incinerators being within the scope of the UK ETS. This is the common theme of the grounds of challenge. It is highly likely that the outcome in this respect would not have been substantially different if the conduct complained of had not occurred. Under s31 of the Senior Courts Act 1981, therefore, the Court would be obliged to refuse to grant permission for this claim to be brought.

135. It would have been incompatible with a fundamental objective of the UK ETS – that there must be a smooth transition for industry from the EU ETS to the UK ETS – to have included municipal waste incinerators within the scope of the UK ETS from the start of Phase 1. The proposals consulted upon were that the scope of the UK ETS in terms of sectors should align with the scope of the existing EU ETS, ie not including municipal waste incinerators [CB/22/252, para 6]. The consultation only referenced "the potential to expand scope in later years of UK ETS operation" [CB/22/231].

136. Even if it had been concluded that a higher level of climate change ambition should be reflected in the design of the UK ETS, this would not have led to municipal waste incinerators being included within the full UK ETS. Municipal waste incinerators were not excluded from the UK ETS as a result of the level of climate ambition which was adopted in the Response for the UK ETS.

137. Moreover, there is a commitment to consider the option of expanding the scope of the UK ETS to the most appropriate additional sectors in the first UK ETS review, with a report setting out the review's conclusions to be published before 31 December 2023, to enable implementation of any potential changes to scope by no later than 2026 [CB/38/366, para 51]. There is therefore an alternative route for the Claimant to pursue the ultimate remedy she seeks, namely the inclusion of municipal waste incinerators within the UK ETS.

Conclusion

138. Permission should be refused because this claim is unarguable. The Claimant simply disagrees with the technical, policy and political judgements made by the decision-makers – the UK Government and the devolved administrations – on the initial design of the UK ETS. Permission should also be refused on the grounds of delay and pursuant to s31(3D) of the Senior Courts Act 1981.

139. The Secretary of State seeks his costs for filing an acknowledgement of service, including these summary grounds of defence. A successful defendant who has filed an acknowledgment of service should generally recover the costs of so doing.[13]

RICHARD HONEY

24 September 2020

[13] *R (Mount Cook) v Westminster CC* [2004] 2 P&CR 22 at p434 (para 76(1); *R (Ewing) v Office of the Deputy Prime Minister* [2006] 1 WLR 1260 at 1267A-B.

N462

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/3093/2020
Claimant(s) *(including ref.)*	Georgia Elliot-Smith
Defendant(s)	(1) SSBEIS (2) DAERA (NI) (3) The Scottish Ministers (4) Minister for Environment, Energy and Rural Affairs, (Welsh Govt)
Interested Parties	

Name and address of person to be served

name
Georgia Elliot-Smith

address
c/o Leigh Day,
25 St John's Lane,
Farringdon
London,
EC1M 4LB

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim	☑	complete sections B, C, D and F
2. I intend to contest part of the claim	☐	
3. I do not intend to contest the claim	☐	complete section F
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and F
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and F
6. The applicant has indicated that this is a claim to which the Aarhus Convention applies.	☐	complete sections E and F
7. The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C) of the Senior Courts Act 1981]	☐	A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name

address

Telephone no. **Fax no.**

E-mail address

name

address

Telephone no. **Fax no.**

E-mail address

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

(1) I am instructed to act on behalf of the Department of Agriculture, Environment and Rural Affairs, Northern Ireland.

(2) As a preliminary point, my client wishes to bring to the attention of the court the correct identity of the Second Defendant. In accordance with Article 5 of The Departments (Northern Ireland) Order 1999, government departments in Northern Ireland are bodies corporate and as such are legal entities in their own right. In light of this the correct reference to the relevant defendant in respect of the Northern Ireland devolved administration is the Department of Agriculture, Environment and Rural Affairs, Northern Ireland as opposed to a reference to a specific minister. The Court is respectfully requested to update the court record in this matter to reflect the correct identity of the Second Defendant in this matter.

(3) The Second Defendant contests the challenge as put in the claim form and accompanying grounds in its entirety.

(4) The Second Defendant has had the benefit of being sighted on the Summary Grounds of Resistance preppared on behalf of the First Defendant, the Secretary of State for Business, Energy and Industrial Strategy. Having considered the contents of that document, the Second Defendant is in agreement with and supports the arguments as put on behalf of the Secretary of State. As such, with the Court's valuable time, the public purse and avoiding unnecessary duplication in mind the Second Defendant does not propose to file its own Summary Grounds of Resistance but rather adopt and support what is said in the Summary Grounds of Resistance filed on behalf of the Secretary of State.

(5) The Second Defendant as the relevant department of a devolved administration which is clearly affected by the proposed challenge naturally wishes to be involved in the proceedings. However, as explained above in relation to the Summary Grounds of Resistance the Second Defendant will actively engage when this will provide benefit to the consideration of proceedings and will aim to avoid duplication wherever this is possible. Of course should the Court wish to be provided with any assistance specifically from the Second Defendant then the Second Defendant will ensure that the Court is so provided with that assistance.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

The Department of Agriculture, Environment and Ruaral Affairs, as the Second Defendant, invites the Court to refuse permission for this claim to proceed.

The Second Defendant also seeks the normal order in these circumstances (in accordance with the principles in R (oao Moiunt Cook Land Ltd) v Westminster City Council under Part 54) that the Claimant pay the Second Defendant's costs in filing this Acknowledgment of Service summarily assessed in the sum set out in the cost schedule to within 7 days.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim? ☐ Yes ☑ No

If Yes, please set out your grounds for denial in the box below.

Do you wish to vary the costs limits under CPR 45.43(2)? ☐ Yes ☐ No

If Yes, state the reason why you want to vary the limits on costs recoverable from a party.

SECTION F

*delete as appropriate

~~*I believe~~ *(The defendant believes) that the facts stated in this form are true.

*I am duly authorised by the defendant to sign this statement.

(if signing on behalf of firm or company, court or tribunal)

Position or office held

Grade 6 Lawyer

(To be signed by you or by your solicitor or litigation friend)

Signed

Date

25th September 2020

Give an address to which notices about this case can be sent to you

name

FAO Chris Burge, Government Legal Department

address

Government Legal Department,
Planning, Infrastructure and Environment Team,
102 Petty France,
Westminster, London, SW1H 9GL

Telephone no.

Fax no.

0207 210 3001

E-mail address

chris.burge@governmentlegal.gov.uk

If you have instructed counsel, please give their name address and contact details below.

name

address

Telephone no.

Fax no.

E-mail address

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

Administrative Court addresses

- Administrative Court in **London**

  Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

- Administrative Court in **Birmingham**

  Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

- Administrative Court in **Wales**

  Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

- Administrative Court in **Leeds**

  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- Administrative Court in **Manchester**

  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

N462

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/3093/2020
Claimant(s) *(including ref.)*	Georgia Elliott-Smith RWS/00255697/1
Defendant(s)	See continuation sheet
Interested Parties	none identified

Name and address of person to be served

name
Georgia Elliott-Smith

address
c/o Leigh Day
25 St. John's Lane
Farringdon
London
EC1M 4LB

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim	☑	complete sections B, C, D and F
2. I intend to contest part of the claim	☐	
3. I do not intend to contest the claim	☐	complete section F
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and F
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and F
6. The applicant has indicated that this is a claim to which the Aarhus Convention applies.	☑	complete sections E and F
7. The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C) of the Senior Courts Act 1981]	☐	A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name
none identified

address

Telephone no.

Fax no.

E-mail address

name

address

Telephone no.

Fax no.

E-mail address

Continuation Sheet

Defendants:

(1) SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

This Ackowledgment of Service is filed on behalf of the Scottish Ministers, who are named as Third Defendant. The Scottish Ministers endorse the Summary Grounds for Contesting the Claim filed by the First Defendant, the Secretary of State for Business, Energy and Industrial Strategy.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

None sought.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim? ☐ Yes ☑ No

If Yes, please set out your grounds for denial in the box below.

Do you wish to vary the costs limits under CPR 45.43(2)? ☐ Yes ☑ No

If Yes, state the reason why you want to vary the limits on costs recoverable from a party.

SECTION F

*delete as appropriate

*~~(I believe)~~(The defendant believes) that the facts stated in this form are true.
*I am duly authorised by the defendant to sign this statement.

(if signing on behalf of firm or company, court or tribunal)

Position or office held
Lawyer

(To be signed by you or by your solicitor or litigation friend)

Signed

Date
25 September 2020

Give an address to which notices about this case can be sent to you

name
Joe Vester

address
Government Legal Department
102 Petty France
London
SW1H 9AJ

Telephone no.
020 7210 3592

Fax no.

E-mail address
joe.vester@governmentlegal.gov.uk

If you have instructed counsel, please give their name address and contact details below.

name
none

address

Telephone no.

Fax no.

E-mail address

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

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- Administrative Court in **Leeds**

  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- Administrative Court in **Manchester**

  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

N462

Judicial Review
Acknowledgment of Service

In the High Court of Justice Administrative Court	
Claim No.	CO/3093/2020
Claimant(s) *(including ref.)*	Georgia Elliott-Smith RWS/00255697/1
Defendant(s)	The Secretary of State for Business, Energy and Industrial Strategy (UK Government); The Minister for
Interested Parties	None identified.

Name and address of person to be served

name

Georgia Elliott-Smith

address

c/o Leigh Day
25 St. John's Lane
Farringdon
London
EC1M 4LB

SECTION A

Tick the appropriate box

1. I intend to contest all of the claim	☑	complete sections B, C, D and F
2. I intend to contest part of the claim	☐	
3. I do not intend to contest the claim	☐	complete section F
4. The defendant (interested party) is a court or tribunal and **intends** to make a submission.	☐	complete sections B, C and F
5. The defendant (interested party) is a court or tribunal and **does not intend** to make a submission.	☐	complete sections B and F
6. The applicant has indicated that this is a claim to which the Aarhus Convention applies.	☑	complete sections E and F
7. The **Defendant** asks the Court to consider whether the outcome for the claimant would have been **substantially different** if the conduct complained of had not occurred [see s.31(3C) of the Senior Courts Act 1981]	☐	A summary of the grounds for that request must be set out in/accompany this Acknowledgment of Service

Note: If the application seeks to judicially review the decision of a court or tribunal, the court or tribunal need only provide the Administrative Court with as much evidence as it can about the decision to help the Administrative Court perform its judicial function.

SECTION B

Insert the name and address of any person you consider should be added as an interested party.

name

address

Telephone no. **Fax no.**

E-mail address

name

address

Telephone no. **Fax no.**

E-mail address

SECTION C

Summary of grounds for contesting the claim. If you are contesting only part of the claim, set out which part before you give your grounds for contesting it. If you are a court or tribunal filing a submission, please indicate that this is the case.

This Acknowledgment of Service is filed on behalf of the Welsh Ministers, who are named as Fourth Defendant. The Welsh Ministers endorse the Summary Grounds for Contesting the Claim filed by the First Defendant, the Secretary of State for Business, Energy and Industrial Strategy. They also endorse the attached Summary Grounds.

SECTION D

Give details of any directions you will be asking the court to make, or tick the box to indicate that a separate application notice is attached.

None sought.

If you are seeking a direction that this matter be heard at an Administrative Court venue other than that at which this claim was issued, you should complete, lodge and serve on all other parties Form N464 with this acknowledgment of service.

SECTION E

Response to the claimant's contention that the claim is an Aarhus claim

Do you deny that the claim is an Aarhus Convention claim? ☐ Yes ☑ No

If Yes, please set out your grounds for denial in the box below.

Do you wish to vary the costs limits under CPR 45.43(2)? ☐ Yes ☑ No

If Yes, state the reason why you want to vary the limits on costs recoverable from a party.

SECTION F

*delete as appropriate

*(~~I believe~~)(The defendant believes) that the facts stated in this form are true.
*I am duly authorised by the defendant to sign this statement.

(if signing on behalf of firm or company, court or tribunal)

Position or office held
Solicitor

(To be signed by you or by your solicitor or litigation friend)

Signed

Date
25 September 2020

Give an address to which notices about this case can be sent to you

name
Catriona Hawthorne

address
Welsh Government Legal Services
Welsh Government
Cathays Park
Cardiff
CF10 3NQ

Telephone no.
03000 250662

Fax no.

E-mail address
catriona.hawthorne@gov.wales

If you have instructed counsel, please give their name address and contact details below.

name
Mona Bayoumi

address
Civitas Law - Civil and Public Law Barristers
The Mews
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Cardiff
CF11 9LL

Telephone no.
0845 0713 007

Fax no.

E-mail address
mona.bayoumi@civitaslaw.com

Completed forms, together with a copy, should be lodged with the Administrative Court Office (court address, listed below), at which this claim was issued within 21 days of service of the claim upon you, and further copies should be served on the Claimant(s), any other Defendant(s) and any interested parties within 7 days of lodgement with the Court.

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  Administrative Court Office, Room C315, Royal Courts of Justice, Strand, London, WC2A 2LL.

- Administrative Court in **Birmingham**

  Administrative Court Office, Birmingham Civil Justice Centre, Priory Courts, 33 Bull Street, Birmingham B4 6DS.

- Administrative Court in **Wales**

  Administrative Court Office, Cardiff Civil Justice Centre, 2 Park Street, Cardiff, CF10 1ET.

- Administrative Court in **Leeds**

  Administrative Court Office, Leeds Combined Court Centre, 1 Oxford Row, Leeds, LS1 3BG.

- Administrative Court in **Manchester**

  Administrative Court Office, Manchester Civil Justice Centre, 1 Bridge Street West, Manchester, M3 3FX.

IN THE HIGH COURT OF JUSTICE **CO/3093/2020**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

THE QUEEN

(On the application of GEORGIA ELLIOTT-SMITH)

CLAIMANT

-and-

(1) SECRETARY OF STATE FOR BUSINESS ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

DEFENDANTS

SUMMARY GROUNDS OF DEFENCE ON BEHALF OF THE WELSH GOVERNMENT

Introduction:

1. By claim form dated 1st September 2020, the Claimant applies for permission to apply for judicial review to challenge the legality of the Defendants' decision in relation to the new UK Emissions Trading Scheme (hereafter "UK ETS") which is

intended to replace the existing EU Emissions Trading Scheme at the end of the transitional period for the UK's departure from the EU dated 1st June 2020.

2. This was a decision of the Secretary of State and the devolved administrations. The decision was published in a document named "The Future of UK Carbon Pricing" on 1st June 2020 (see pages 355-422 of the Claimant's bundle). This followed a joint consultation in May 2019 by the UK Government, Scottish Government, Welsh Government and the Department of Agriculture Environment and Rural Affairs in Northern Ireland. The consultation document is set out at pages 221-292 of the Claimant's bundle.

3. For the avoidance of any doubt, the Minister for Environment, Energy and Rural Affairs of the Welsh Government (hereafter for the purpose of these Summary Grounds "The Minister") unequivocally adopts in its entirety the Summary Grounds of Defence of the Secretary of State. However, as per the Consultation document and indeed the response published on 1st June 2020, it is clear that there are additional statutory duties pursuant to the Environment (Wales) Act 2016 and the Wellbeing of Future Generations (Wales) Act 2015 that apply only in Wales.

4. These separate duties (explained further below) must be taken into account by the Minister when making any decision. These duties are in addition to the duties imposed upon the Welsh Government pursuant to the Climate Change Act 2008.

5. In order to assist the Court and the parties, the Minister provides these brief Summary Grounds of Defence to set out the legislative framework insofar as it applies to Wales.

Relevant Law and Policy:

6. For the purpose of these Summary Grounds of Defence the Minister does not repeat the background to the Climate Change Act 2008 and the operation of the Paris

Agreement and simply refers the Court to the section entitled "The Legal and Policy Context" in the Summary Grounds of Defence of the Secretary of State.

7. The Environment (Wales) Act, which integrates the management of natural resources into the Well-being of Future Generations Act's sustainable development architecture, introduced a further set of principles to guide and support the development and implementation of policies on managing natural resources. As per the Consultation Document of May 2019, the Environment (Wales) Act 2016 set the long-term target to reduce emissions by at least 80% as compared to 1990 levels by 2050 and subsequent secondary legislation establishes interim targets for 2020 (27%), 2040 (45%) and 2040 (76%).

8. On 21st March 2019, the Welsh Government published "Prosperity for All: a Low Carbon Wales", which is a robust and detailed cross-government plan to cut emissions and contribute to the global fight against climate change. It sets out how Wales will meet its first carbon budget and lays the foundations for achieving its target of reducing greenhouse gas emissions from Wales.

9. The Well-Being of Future Generations (Wales) Act 2015 has guided Wales' decarbonisation action, and guided its responses and decision making in respect of its response to the Future of Carbon Pricing.

The Well-Being of Future Generations (Wales) Act 2015

10. The Act is described in the statutory guidance as an act that gives a legally-binding common purpose – the seven well-being goals – for national government, local government, local health boards and other specified public bodies. It details the ways in which specified public bodies must work, and work together to improve the well-being of Wales.

11. The Act sets out the following:

Section 2 Sustainable development

In this Act, "sustainable development" means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the wellbeing goals (see section 4).

Section 3 Well-being duty on public bodies

(1) Each public body must carry out sustainable development.

(2) The action a public body takes in carrying out sustainable development must include—

> *(a) setting and publishing objectives ("well-being objectives") that are designed to maximise its contribution to achieving each of the well-being goals, and*
>
> *(b) taking all reasonable steps (in exercising its functions) to meet those objectives.*

(3) A public body that exercises functions in relation to the whole of Wales may set objectives relating to Wales or any part of Wales.

(4) A public body that exercises functions in relation only to a part of Wales may set objectives relating to that part or any part of it.

Section 4 The well-being goals

The well-being goals are listed and described in Table 1—

TABLE 1

Goal	***Description of the goal***
A prosperous Wales.	*An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides*

	employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.
A resilient Wales.	*A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).*
A healthier Wales.	*A society in which people's physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.*
A more equal Wales.	*A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances).*
A Wales of cohesive communities.	*Attractive, viable, safe and well-connected communities.*
A Wales of vibrant culture and thriving Welsh language.	*A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.*
A globally responsible Wales.	*A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account*

of whether doing such a thing may make a positive contribution to global well-being.

12. The Act provides for better decision-making by ensuring that those public bodies take account of the long-term, help to prevent problems occurring or getting worse, take an integrated and collaborative approach, and considers and involves people of all ages. This supports existing commitments such as the Welsh language, equalities and the UN Convention on the Rights of the Child.

13. Together, the seven well-being goals and five ways of working provided by the Act are designed to support and deliver a public service that meets the needs of the present without compromising the ability of future generations to meet their own needs.

14. Under the Act the sustainable development framework applies to all policy areas. The Act places Welsh public bodies (including the Welsh Ministers) under a duty to act "in accordance with the sustainable development principle", which means that these bodies must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

Application of the Wellbeing of Future Generations (Wales) Act 2015 to the Minister's Decision regarding the UK ETS:

15. As per the Secretary of State's Summary Grounds of Defence, the Climate Change Act 2008 sets targets for the year 2050 and establishes a framework for the UK to achieve its long term goals of reducing greenhouse gas emissions. The Paris Agreement, which was signed by the UK on 22nd April 2016 and ratified on 18th November 2016 sought to strengthen the global response to the threat of climate change.

16. Part 2 of the Environment (Wales) Act 2016 requires the Welsh Government to meet targets for reducing net Welsh emissions of greenhouse gases from Wales.

17. In support of/or in addition to the above, the Minister, in exercising her wellbeing duty under section 3 of the 2015 Act, was compelled to further consider whether the proposals under the UK ETS contributed to the well-being goals set out in section 4 of the same.

18. On the basis that the UK ETS will play a significant part in meeting Wales' emissions targets, the Minister concluded that it will contribute to the seven well-being goals in the following ways:

    - A prosperous Wales – ensuring a low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change). This includes developing frameworks which both incentivise decarbonisation, but do so in a way which strengthens industry in Wales and protects employment.

    - A resilient Wales – Limiting additional impacts upon biodiversity and the natural environment associated with long-term emissions.

    - A healthier Wales – Avoiding the impacts of climate change upon health and wellbeing.

    - A more equal Wales – Avoiding wider, secondary, impacts of climate change upon society.
      Climate change has been shown to impact disproportionately on disadvantaged sections of society. The contributions this scheme makes to decarbonising Wales will ensure these impacts are not exacerbated further. The scheme will also complement work done elsewhere to create equality in Wales by protecting jobs.

- A Wales of cohesive communities – Supporting local economies and communities by providing a sustainable approach towards decarbonisation of industry and supply chains.

- A globally responsible Wales – Contributing to global emissions reduction, policy designed to protect against offshoring of emissions.

- A Wales of vibrant culture and thriving Welsh language – all stakeholder engagement to follow Welsh Language policy guidelines by ensuring the sustainability of natural resources within our communities and living environments this proposal indirectly also support the sustainability of Welsh speaking communities.

19. In compliance with her duties under the Act, the Minister considered that agreeing the proposals under the UK ETS with the Secretary of State and the other devolved administrations were clearly reasonable steps to meet the wellbeing objectives set out above thereby furthering the sustainable development principle.

Conclusion:

20. On the basis of the above, the Minister considers that for all the reasons set out in the Secretary of State's Summary Grounds of Defence, and her compliance with the duties under the 2015 Act mean her decision on the design of the UK ETS is simply unassailable.

21. The Minister accordingly invites the Court to refuse permission as the claim is plainly unarguable and amounts to no more than mere disagreement with policy judgments made by all Defendants on the design of the UK ETS.

22. The Minister also joins issue with the Secretary of State insofar as there has been delay in the bringing of this claim for which there has been no explanation, as well as whether permission ought to be refused pursuant to section 31 of the Senior Courts Act 1981 for the same reasons as set out in the Secretary of State's Summary Grounds of Defence at paragraphs 133-137.

23. Further, the Minister seeks costs for filing the acknowledgment of service along with these summary grounds of defence.

Mona Bayoumi

Civitas Law Chambers

25th September 2020

CO/3093/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

CLAIMANT'S REPLY TO SUMMARY GROUNDS OF RESISTANCE

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1. There is nothing in the Defendants' Summary Grounds of Resistance ("SGR") that should persuade the Court to refuse permission in respect of grounds 1(a), 1(c) and 4. The Defendants have no 'knockout blow'[1] on any of the preliminary issues, or on the merits of the grounds. The Claimant no longer advances the other grounds in the Statement of Facts and Grounds ("SFG").

2. In this Reply, abbreviations and terms used are as defined in the SFG.

3. The Defendants' position is based (as summarised at para.32 SGR) on a strained reading of the judgments in *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin), *R (Plan B Earth)*[2] *v SSfT* [2020] EWCA Civ 214 and *R (Packham) v SSfT* [2020] EWCA Civ 1004:

[1] *R (Mencap) v PHSO* [2010] EWCA Civ 875, at para 15.
[2] Identified as *R (Friends of the Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 in the Statement of Facts and Grounds.

a. Contrary to para.32(2), the Paris Agreement does impose a temperature objective on the UK (along with all other signatories), namely, to ensure any increase is "well below 2°C" and to pursue efforts "to limit the temperature increase to 1.5°C".

b. The reference to para. 631(iii) of the Divisional Court's judgment in *Spurrier* does not detract from this. That was merely an observation on the dualist nature of the UK's legal system (see, para.606 of the judgment), which is not in question in this claim, and the Divisional Court explaining – as part of seeking to ascertain the extent of the reference in the ANPS in issue's reference to "carbon targets" – that the Paris Agreement does not set carbon targets such that Paris was not part of the ANPS policy text in question. None of that bears on the undisputable point that Paris does set temperature objectives, and that is what matters here.

c. Paragraph 32(3) incompletely paraphrases para.238 of *Plan B Earth*. It is correct that there is no domestic obligation imposed directly by the Paris Agreement on the Defendants; there is, however, an international law obligation on the UK Government to act in accordance with the Paris Agreement, from which it follows that there is a domestic obligation to take it into account when making decisions relating to climate change. The Court of Appeal explained this in *Plan B Earth* said:

> "238. Again we would emphasize that it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision."

The same applies here.

d. Contrary to paras.32(4) and (5), the Court of Appeal in *Packham* did not conclude that the Paris Agreement has been entirely translated into the Climate Change Act 2008, such that there could be no obligation to consider the Paris Agreement separately. This is clear from a reading the full reasoning

at paras.95-103 (see also the Claimant's submissions on *Packham* at paras.65-67 of the SFG):

i. The net zero by 2050 commitment is the "main aspiration of the Paris Agreement" (para.95); it is not the only aspect of it;

ii. In recognition of the fact that consideration of the 2050 commitment is not a substitute for the other aspects of the Paris Agreement, the Court made findings of fact as to the level of consideration given to pre-2050 aspects of the Paris Agreement (para.96-97);

iii. The Court found that the aspects of the Paris Agreement that were separate to and went beyond the 2050 target were not relevant considerations in the circumstances of that decision, as it was a non-statutory matter which reduced the constraints on the government:

> "103. … In this case the decision under challenge was not taken under a statutory scheme in which the decision-making process is shaped as it is under the provisions of the Planning Act governing the designation of a national policy statement, with specific duties such as those in sections 5(8) and 10(3) – or under any statutory scheme. To make the decision at all was itself a matter of free choice for the Government, as were the decision-making parameters themselves. The Government was at liberty to select the issues on which it wished to be advised …"

Ground 1: failure to consider the Paris Agreement

4. The Defendants have identified no 'knockout blow' in response to ground 1(a) (exclusion of incinerators from the UK ETS) and 1(c) (the level of the cap). On the contrary, the matters raised in the SFG underline that the Claimant's central contention is correct: the Defendants indeed unlawfully failed to account for the commitments made by the UK in the Paris Agreement to the extent that they are qualitatively different, and measurable against different timescales, to the net-zero emissions by 2050 commitment.

5. First, (as to paras.77-79) it is correct that the Defendants made broad references to tackling climate change alongside the references to the net zero commitment in s.1 CCA 2008, and made some references to the Paris Agreement. But none of these address the substance of the short and medium term aspects of the Paris Agreement, however. They concerned only the need to address climate change in general (thus, if anything, underlining the relevance of the Paris Agreement as a consideration) and the administrative step of aligning reviews of the UK ETS with periodic reviews under the Paris Agreement. The only timeline for climate action considered by the Defendants was that of 2050.

6. Secondly, as to para.80, the Defendants have misread *Packham*, as explained above and in paras.65-67 of the SFG. *Packham* is not an authority for the proposition that the Defendants can simply be assumed to have fully accounted for the relevant aspects of the Paris Agreement.

7. Thirdly, as to para.81, the assertion that "the design of the UK ETS for the initial period of 2021-2025 was primarily about the reduction of emissions in this timeframe" is simply wrong to the extent that this is an answer to the Claimant's claim. As the Defendants themselves make clear, the design of the ETS during that initial period is not even aligned with the 2050 target; axiomatically, it is not aligned with short and medium term aspects of the Paris Agreement (see, in particular, paras. 59 and 62 of the Response).

8. Fourthly, as to para.82, it is demonstrably incorrect to assert that "consideration was given to setting the cap and the trajectory in the UK ETS to seek further reductions in the short to medium term." The Defendants refer here to paras.58-62 of the Response. These paragraphs show that the Defendants weighed environmental considerations (namely and exclusively, "reducing emissions to net zero by 2050") against competitive and international pressures on the UK economy. Nowhere in these paragraphs was any consideration given to the need under the Paris Agreement for emission reductions *on a short to medium timeline*. In particular, para.62 of the Response makes clear that the UK ETS will not even be aligned with the 2050 target. These passages of the Response are themselves sufficient to make good the Claimant's

ground 1. The Defendant's cannot credibly rely on these paragraphs to substantiate their defence.

9. Fifthly, as to paras.83 and 84, the Claimant does not rely on the mere absence of reference to Articles 2 and 4 of the Paris Agreement. It is the failure to consider the substance of those articles (i.e. the importance arising from them of cuts in the short to medium term) that is tellingly absent from the decision-making documents. There is, contrary to the final sentence of para.83 no evidence of consideration anywhere by the Defendants of the need for emission reductions on a faster timeline than the 2050 target. Instead, they considered only whether or not to align with a 2050 target (and then decided not to).

10. Sixthly, at paras.85-86 the Defendants rely on strained interpretations of the case law (addressed above). These authorities do not allow the Defendants to ask the Court simply to assume that they have accounted for the Paris Agreement or to elide the contents of the Paris Agreement with the CCA 2008. As the Claimant set out in paras.11-19 and 54-55 SFG, there are substantial and important differences between them. The Defendants failed to consider these.

11. Seventhly, the factual assertions made by the Defendants at para.87 are matters for trial, not permission. They are wrong for the reasons given in the SFG.

Ground 4: exercise of the s.44 power for improper purposes

12. The Defendants' response to ground 4 ignores the contents of the Response it purports to defend and instead – entirely impermissibly – sets out a new rationale for the Defendants' decision to set the cap on the UK ETS above 'business as usual' emissions.

13. According to the SGR, "setting the initial cap above the level of 'business as usual' emissions … was an aspect of ensuring a UK ETS which functioned effectively" (para.110). That is not how the Defendants described it when making the decision.

14. The Response makes clear that the cap was set at 156 $MtCO_2e$ as a compromise of environmental protection against competitive pressures placed on businesses as a result of Brexit, with the emphasis placed significantly on the latter. See, in particular, paras.59-60 of the Response:

> "59. The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs [energy intensive industries] and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap.
>
> 60. To balance these objectives, the cap for a UK ETS will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to around 156 million allowances in 2021. …"

15. That it was pressures on businesses as a result of Brexit, and not environmental protection, that motivated the decision on the level of the cap is further demonstrated by the fact that the Defendants rejected the CCC's advice of 20 March 2020. This warned that the Defendant's proposed cap is incompatible with the 2050 net zero target:

> "However, the interim proposals for the scheme set out in your letter are inconsistent with the UK's Net Zero ambitions in some respects, primarily relating to the relatively high level of allowed emissions under the proposed cap. … The cap as currently proposed would begin the scheme in 2021 with considerably higher allowed emissions from stationary sources of 150 $MtCO_2$ (around 17% above the actual emissions in 2018). That implies a large surplus continuing until the point when a revised cap in line with the sixth carbon budget advice comes into force (e.g. 2023)."

16. The Defendants cannot credibly contend that the cap chosen was necessary for the functioning of the UK ETS market, still less that it will be effective at reducing emissions in light of the CCC's advice. The CCC made clear that the cap chosen risks damaging the market by creating a significant surplus. The Defendants' vague reliance on the need for liquidity in the market is simply irrelevant when the level of the cap chosen so far in excess of what would be necessary to provide sufficient liquidity.

17. In any event, even if the cap could have been set at 150 $MtCO_2e$ as a *bona fide* way of ensuring liquidity in the market, that was not the actual purpose for which the Defendants acted. It is simply not permissible for the Defendants to seek to give an entirely new and inconsistent explanation to the one given in the contemporaneous documents.

18. The arguments in response to ground 4 are misconceived as a result.

Delay

19. The Claimant has set out the timeline upon which she brought her claim in para.51 and 52 SFG, including the extent to which the Defendants failed to comply with the pre-action protocol.

20. However, if the Court considers there to have been any lack of promptness in this case, the Claimant submits that it would be consistent with the overriding objective to extend time as the Defendants intend to remake an identical decision when bringing the draft Order into effect. That will constitute a fresh public law decision, with a fresh time limit for judicial review, such that any delay is of no consequence.

Section 31 of the Senior Courts Act 1981

21. The Court of Appeal in *Plan B Earth* considered whether an argument based on s.31(3A), as advanced by the Defendants in this case, could be sustained. It rejected such an argument as misconceived:

> "233. We would add this observation. It was not submitted to us that in designating the [Airports National Policy Statement] ANPS the Secretary of State committed no error of law – or that, if he did, the error itself was immaterial – because the relevant consequences of meeting the targets already in place under the Climate Change Act would have been, or at least might have been, the same as those of implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under section 5(8) of the Planning Act, the implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate

Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation."

22. As there, so here.

Conclusion

23. For the reasons given above and in the SFG, the Claimant submits that her claim is clearly arguable. The absence of a knock blow in response to grounds 1(a), 1(c) and 4, despite the detailed SGR provided by the Defendants, shows that this is precisely the kind of claim which ought to be resolved at a full hearing. The Claimant respectfully submits that permission should be granted in respect of grounds 1(a), 1(c) and 4 as a result.

DAVID WOLFE QC, Matrix
BEN MITCHELL, 11KBW

5 October 2020

In the High Court of Justice
Queen's Bench Division
Administrative Court

CO/3093/2020

In the matter of an application for judicial review

THE QUEEN

on the application of

GEORGIA ELLIOTT-SMITH

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS NORTHERN IRELAND EXECUTIVE
THE SCOTTISH MINISTERS
MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

Notification of the Judge's decision on the application for permission to apply for judicial review (CPR 54.11, 54.12)

Following consideration of the documents lodged by the claimant, the acknowledgement of service filed by the defendant and the claimant's reply

ORDER by the Honourable Mr Justice Lane

1. The application for permission to apply for judicial review is refused.

2. The costs of preparing the acknowledgement of service are to be paid by the claimant to the defendant, summarily assessed in the sum of £8,680 in respect of the first defendant and £2,096 in respect of the second defendant.

3. Paragraph 2 above is a final costs order unless within 14 days of the date of this Order the claimant files with the Court and serves on the defendant a notice of objection setting out the reasons why she should not be required to pay costs (either as required by the costs order, or at all). If the claimant files and serves notice of objection, the relevant defendant may, within 14 days of the date it is served, file and serve submissions in response. The claimant may, within 7 days of the date on which the defendant's response is served, file and serve submissions in reply.

4. The directions at paragraph 3 apply whether or not the claimant seeks reconsideration of the decision to refuse permission to apply for judicial review.

(a) If an application for reconsideration is made, the Judge who

hears that application will consider the written representations (if any) filed pursuant to paragraph 3 above together with such further oral submissions as may be permitted, and decide what costs order if any, should be made.

(b) If no application for reconsideration is made or if an application is made but withdrawn, the written representations filed pursuant to paragraph 3 above will be referred to a Judge and what order for costs if any, should be made will be decided without further hearing.

Reasons

The core of this challenge is about Article 2(1)(a) of the Paris Agreement. This Agreement contains the objective of holding the increase in the global average temperature to well below 2 degrees centigrade above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change. The claimant believes this objective of the Paris Agreement to be of crucial importance. She contends that Article 2(1)(a) has not been taken into account by the defendants, in issuing on 1 June 2020 their consultation response entitled "*The future of UK carbon pricing: UK government and devolved administrations' response"*. That response has been followed by the publication on 14 July 2020 of the draft "Greenhouse Gas Emissions Trading Scheme Order 2020".

I do not find this ground of challenge to be arguable. The response makes multiple references to the Paris Agreement. The fact that Article 2(1)(a) is not specifically mentioned does not arguably mean that proper regard was not had to it.

The exclusion of municipal incinerators from the scheme of controls was unarguably valid. I note that one of the reasons for exclusion was the part played by such incinerators in reducing the need for landfill. A balancing exercise was plainly at work. It cannot be right to contend that difficulties in bringing such incinerators within scope are indicative of irrationality on the part of the defendants.

For the reasons given in paragraphs 102 to 108 of the summary grounds of the first defendant, the ETS is unarguably not *ultra vires* section 44 of the Climate Change Act 2008; nor is it arguable that the power in that section has been exercised for improper purposes. The defendants had regard to the effect on business in order to ensure that the scheme would operate effectively, in the light of the UK's leaving the EU. The purpose of the ETS was unarguably not to alleviate Brexit-related pressures on business.

There is no arguable legal flaw in the consultation exercise. There is no evidence to indicate a closed mind on the part of the defendants.

There is unarguable merit in the secondary position of the defendants, with regard to section 31(2C) of the Senior Courts Act 1981. The impugned decision would inevitably have been the same if express reference had been made to Article 2(1)(a). The exclusion of municipal incinerators, the rolling-forward of allowances and setting the cap higher than projected business as usual omissions would all be features of any scheme, given the policy considerations concerned.

The claimant's complaint is that a more stringent regime should be introduced, notwithstanding those policy factors. Upon analysis, her complaint is political, not legal in nature.

I am not persuaded there has been delay in this case. I agree with what the claimant says on this issue.

Signed *Mr Justice Lane*

The date of service of this order is calculated from the date in the section below

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For completion by the Administrative Court Office

Sent / Handed to

either the Claimant, and the Defendant [and the Interested Party]
or the Claimant's, and the Defendant's [and the Interested Party's] solicitors

Date: 16/10/2020

Solicitors: LEIGH DAY SOLS
Ref No. RWS/JEK/00255697/1

Notes for the Claimant

If you request the decision to be reconsidered at a hearing in open court under CPR 54.12, you must complete and serve the enclosed Form 86B within 7 days of the service of this order.

A fee is payable on submission of Form 86B. ***For details of the current fee please refer to the Administrative Court fees table at*** https://www.gov.uk/court-fees-what-they-are.

Failure to pay the fee or submit a certified application for fee remission may result in the claim being struck out.

The form to make an application for remission of a court fee can be obtained from the gov.uk website at https://www.gov.uk/get-help-with-court-fees

BY THE COURT

CO/3093/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

CLAIMANT'S GROUNDS OF RENEWAL

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1. These are the Claimant's Grounds of Renewal following the order of 16 October 2020 ("the order") refusing permission on the papers made by The Honourable Mr Justice Lane ("the Judge").

Grounds of renewal

2. It appears from the reasons given in the order that the Judge did not have the benefit of reading the Claimant's Reply when considering the application for permission. In the Reply, the Claimant withdrew some of her grounds and explained that the Defendants had no 'knockout blows' on the remaining grounds and why. However, the Judge appears to have not to have been aware of that, as the reasons comment on grounds that had already been withdrawn and do not engage with the arguments made in the Reply.

3. For the reasons given in the Reply and Statement of Facts and Grounds in relation to grounds 1(a), 1(c) and 4, the claim is arguable and The Honourable Mr Justice Lane was wrong to decide otherwise. In summary, the Judge was wrong:[1]

    a. To treat the mere references to the Paris Agreement in the decision documents as meeting the claim. It was the substantive consideration of the short and medium term aspects of the UK's commitments under the Paris Agreement, which was required. Such consideration is entirely absent from the decision.

    b. To accept that the Defendants had merely "had regards to the effect on business", rather than to have acted for an improper purpose. Under s.44 of the Climate Change Act 2008, the Defendant could only lawfully act in order to "limiting or encouraging the limitation of" emissions. Given the level of the cap chosen, the rejection of the warnings about this cap by the Committee on Climate Change, and the express importance placed by the Defendants on protecting businesses and alleviating Brexit-related pressures, the Defendants did not act to advance this purpose.

4. The Judge was also wrong to conclude, under s. 31(2C) of the Senior Courts Act 1981, that the outcome was highly likely to have been the same. The Defendants have not overcome the evidential burden (that burden being on the Defendants not the Claimant) to demonstrate that, and the Judge impermissibly found that the scheme would have excluded waste incineration, and set the cap at the same levels, in any event, because that was the Defendants' policy position. That wrongly strays into the territory of predetermining an outcome when important environmental matters are at stake.

Costs

5. As the claim is arguable and permission should be granted, the costs award at para.2 of the order should be set aside.

6. However, even if permission is refused, a costs cap applies such that there is no power for the Court to make a costs award against the Claimant in the terms of para.2 of the order. The claim is an Aarhus Convention claim under the Civil Procedure Rules ("CPR") 45.41(2)(a), which is accepted by the Defendants (see Section E of the Defendants' Acknowledgment of Service). The Claimant is claiming as an individual within the meaning of CPR 45.43(2)(a). Accordingly,

[1] The references to the rationality of the exclusion of municipal waste incinerators, whether the UK ETS is ultra vires s.44 of the Climate Change Act 2008 and the lawfulness of the consultation exercise all relate to grounds that have been withdrawn and should not have weighed on the question of whether permission should have been granted for grounds 1(a), 1(c) and 4.

a cost cap of £5,000 applies to the amount the Claimant may be ordered to pay. The Defendants have not applied for that default cap to be varied.

7. In making the costs order, the Court breached CPR 45.44(2), because the default cap can only be increased above £5,000 (which is the consequence of the costs order) on application of the Defendants. No such application has been made. Therefore, the costs order is ultra vires and should be replaced with the default costs caps, namely that the Claimant's costs liability is limited to £5,000 inclusive of VAT and the Defendants' costs liability is limited to £35,000 plus VAT.

David Wolfe QC

Matrix

Ben Mitchell

11 KBW

22 October 2020

CO/3093/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

SKELETON ARGUMENT ON BEHALF OF THE CLAIMANT
For permission hearing on 1 December 2020

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*References to pages of the Supplementary Hearing Bundle are in the form [**HB/page**]. References to pages of the Claim Bundle are in the form **[CB/page].***

Essential Reading

- *Claimant's Statement of Facts and Grounds ("SFG") **[CB/11-43]**, Reply **[HB/65-72]** and Grounds of Renewal **[HB/78-80]***
- *Defendants' Summary Grounds of Resistance ("SGR") **[HB/7-42]***
- *Fourth Defendant's Summary Grounds of Defence **[HB/56-64]***
- *Decision of the Honourable Mr Justice Lane **[HB/73-75]***
- *The Claimant's witness statement **[CB/44-57]***

Introduction

1. This case concerns one aspect of the UK's action to tackle climate change. The Claimant is concerned here with two aspects of the Defendants' decision to establish an "emissions trading scheme" (as explained below): (1) the exclusion from it of

emissions from municipal waste incinerators and (2) the level of the "cap" under the scheme (i.e. the volume of permitted emissions).

2. The Claimant seeks permission to bring a claim for judicial review on two grounds:

    a. The Defendants were required to have regard for the UK's short and medium term obligations under the Paris Agreement on Climate Change as they are "so obviously material that [*they*] had to be taken into account", per the Court of Appeal's conclusion in *(Plan B Earth) v SSfT* [2020] EWCA Civ 214, paragraph 237. The Defendants unlawfully failed to do this.

    b. The admitted purpose for which the Defendants acted when setting the cap was in order to alleviate pressures on businesses. This was not a lawful purpose, as the relevant statutory power could only lawfully be exercised for the purposes of limiting or encouraging the limitation of emissions.

3. Permission was refused on the papers by Lane J **[HB/73-75]**. However, this decision appears to have been made without the benefit of considering the Claimant's Reply **[HB/65-72]** to the First Defendants' SGR **[HB/7-42]**. The Claimant originally advanced some additional grounds, which she withdrew having considered the SGR. However, as there are no "knockout blows"[1] in relation to the above two grounds, they are at least arguable and permission should be granted in respect of them.

The decision – background

4. An emissions trading scheme is a means to tackle greenhouse gas ("GHG") emissions by using a market mechanism to determine where emissions reductions take place across multiple sectors of the economy. Under such a scheme, participation is made mandatory for companies and installations within these sectors, subject to limited exceptions. The crucial issue for such a scheme is whether it is cheaper for emitters to reduce their emissions than to purchase allowances or pay penalties: if it is, emitters will be incentivised to reduce their emissions; if it is not, they will not be. Relatedly, the preferential exclusion of certain categories of emitters (here, municipal waste incinerators) obviates the potential to reduce their emissions.

[1] *R (Mencap) v PHSO* [2010] EWCA Civ 875, at para 15

5. There is no dispute between the parties as to mechanism by which an emissions trading scheme operates. It is as follows. In order to release emissions, emitters covered by the scheme need to purchase or receive allowances. Each allowance permits the holder to emit 1 tonne of CO_2 equivalent ("tCO_2e") of GHGs. Emitters can also sell their surplus allowances to be used by other emitters. This ability to trade allowance gives an economic value to the allowances and creates a market. Which of these outcomes (an incentive to reduce or not) occurs is determined by the state's control of the market. In particular, the state can either flood or ration the market of allowances (i.e. control the "liquidity" of the market). It does this by setting the number of allowances that exist, referred to as the "cap" on the total number of allowances. As each allowance equates to 1 tCO_2e emissions, the number of allowances directly controls the volume of emissions.

6. The UK currently participates in the EU Emissions Trading Scheme ("EU ETS").[2] Brexit has given the UK the option of either continuing to implement the EU ETS, or to establish a different scheme. The Defendants opted to develop a new scheme. Rather than plan to mimic the EU ETS, the Defendants consulted and considered the design of an emissions trading scheme from top to bottom. The outcome is the UK Emissions Trading Scheme ("UK ETS"), which is outlined in *The future of UK carbon pricing: UK government and devolved administrations' response* ("the Response") **[CB/355-422]** and accompanying Impact Assessment **[CB/423-462]**.

7. There are two aspects of the decision that are relevant to this claim.

    a. First, as stated in paragraph 52 of the Response **[CB/366],** the UK ETS will not apply to municipal waste incinerators. The implications of this omission are substantial: on the Defendants' own statistics, incinerators released 6.3 million tCO_2e ("$mtCO_2e$") in 2018 (see the statement from Lord Duncan, then Parliamentary Under Secretary of State for the Department of Business, Energy and Industrial Strategy dated 5 February 2020 **[CB/312]**) while the Committee on Climate Change ("the CCC") estimates the volume at 6.8

[2] Principally, Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC, implemented domestically by secondary legislation (principally, Greenhouse Gas Emissions Trading Scheme Regulations 2012/3038).

$mtCO_2e$ for 2018 (see page 79 of the CCC's June 2020 report, *Reducing UK Emissions* **[CB/467]**). The scope of the UK ETS for 2021 will be 126-131 $mtCO_2e$ (see, the June 2020 Impact Assessment **[CB/429]**). The emissions from incinerators are, thus, equivalent to approximately 5.4% of the entire volume of GHG emissions within the scope of the UK ETS (see, the SGF paragraph 47 **[CB/29-30]**). This exclusion removes (or at the very least, dramatically reduces) any incentive for municipal waste incinerators to reduce their GHG emissions. This is a particular problem for tackling climate change (to which the short to medium term emissions are of crucial importance) because incinerators create huge quantities of emissions instantaneously when waste is combusted (see Johnke, et al, *IPCC Good Practice Guidance, 'Emissions from Waste Incineration'* **[HB/81-94]** and pages 1 and 7 of the UKWIN report, *Evaluation of the climate change impacts of waste incineration in the United Kingdom* October 2018 **[CB/155; CB/161]**), whereas other forms of waste disposal such as recycling can avoid these (see pages 183-184 of the CCC June 2020 report, *Reducing UK Emissions* **[CB/470-471]**) and even landfill can act as carbon sinks or cause emissions (at a lower total level) to be released slowly over many years (see pages 1, 16-19 of the UKWIN report, *Evaluation of the climate change impacts of waste incineration in the United Kingdom* October 2018 **[CB/155; CB/170-173]**). Compared to other forms of energy production (which are covered by the UK ETS), municipal waste incinerators are also particularly inefficient as they produce proportionately more emissions per unit of energy than the alternatives (see pages 10-14 of the UKWIN report, *Evaluation of the climate change impacts of waste incineration in the United Kingdom* October 2018 **[CB/164-168]**).

b. Second, the cap on the UK ETS for its first year will be around 156 $mtCO_2e$ (see paragraph 60 of the Response **[CB/368]**), and subsequent annual caps will be set by reference to this starting point (see clause 22 of the *Draft Greenhouse Gas Emissions Trading Scheme Order 2020* **[CB/500-501]**). This is substantially higher than the projected "business as usual" emissions of 126-131 $mtCO_2e$ for 2021 (see the June 2020 Impact Assessment, para 23 **[CB/429]**). The effect of

this is to stop the UK ETS from requiring emission reductions in the short and medium term (or at least reduce its capacity to ensure emission reductions).

The decision – what did the Defendants do unlawfully?

8. As explained below, in setting up the UK ETS the Defendants entirely failed to: (1) have regard for the UK's short and medium term obligations under the Paris Agreement; and/or (2) act with the purpose of limiting (or encouraging the limitation of) emissions, which is the only lawful purpose for which the UK ETS could be designed, instead acting for a purpose not provided for by the statute.

Ground 1 – Failure to have regard for the Paris Agreement

Did the Defendants have regard to relevant aspects of the Paris Agreement?

9. The Defendants did consider some aspects of the Paris Agreement: specifically, the procedural deadlines for filing returns for the Global Stocktake, and the long-term target of achieving net-zero emissions. They did not, however, give any consideration to the short and medium-term aspects of the UK's obligations under the Paris Agreement. These are provided for by Articles 2(1) and 4(1) (as mentioned in SFG, paragraph 11 **[CB/16]**) respectively, namely:

> "Article 2
>
> 1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:
>
> > (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> …

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty." (emphasis added) **[CB/485-486]**

10. Those obligations seek to limit global temperature increases to 1.5°C above pre-industrial levels and to reach peak global emissions and start to reduce them as soon as possible. Accordingly, the focus is not simply on what happens at 2050 and beyond. These also require substantial emission reductions in the short and medium-term.

11. As explained at SFG paragraphs 20-24 **[CB/20-22]**, the Paris Agreement obligations are not co-extensive with the UK's obligation in section 1 of the Climate Change Act 2008 to achieve net-zero GHG emissions by 2050 or meet the interim carbon budgets. The Paris Agreement requires a specific climate outcome (a 1.5°C temperate increase, and a global peak of emissions as soon as possible). The net-zero commitment and the climate budgets require gradual reductions in emissions on a trajectory to 2050. But they are not co-extensive because the net-zero commitment is in practice insufficient to meet the Paris Agreement obligations. The IPCC made this clear in its Special Report, *Global Warming of 1.5°C* **[CB/140-149]**:

> "Under emissions in line with current pledges under the Paris Agreement (known as Nationally Determined Contributions, or NDCs), global warming is expected to surpass 1.5°C above pre-industrial levels, even if these pledges are supplemented with very challenging increases in the scale and ambition of mitigation after 2030 (*high confidence*). This increased action would need to achieve net zero CO_2 emissions in less than 15 years. … **[CB/142]**

> The later emissions peak and decline, the more CO_2 will have accumulated in the atmosphere. Peak cumulated CO_2 emissions – and consequently peak temperatures – increase with higher 2030 emissions levels … Based on the implied emissions until 2030, the high challenges of the assumed post-2030 transition, and the assessment of carbon budgets in Section 2.2.2, global warming is assessed to exceed 1.5°C if emissions stay at the levels implied by the NDCs until 2030" (emphasis added) **[CB/145]**

12. The May 2019 advice from the CCC **[HB/96-128]** (quoted by the Defendants at paragraph 28 of the SGR **[HB/13]**) also makes clear that, whilst the net-zero commitment is consistent with the Paris Agreement, it is not a complete replacement as the net-zero commitment has to be "coupled with ambitious near-term reductions in emissions" for there to be even a 50% changes to meeting the 1.5°C commitment (a key aspect of the Paris Agreement):

> "A net-zero GHG target for 2050 would respond to the latest climate science and fully meet the UK's obligations under the Paris Agreement:
>
> …
>
> - If replicated across the world, and coupled with ambitious near-term reductions in emissions, it would deliver a greater than 50% chance of limiting the temperature increase to 1.5°C." (emphasis added) **[HB-102]**

13. Despite the stance taken by the Defendants in this litigation, the First Defendant has also publicly recognised this when he said at the United Nations on 8 March 2020 **[CB/342-347]**:

> "We all know that the current commitments made under the Paris Agreement fall far short of what is required. … And let me be clear, this is not about the UK pointing the finger, we know we also need to do more ourselves." **[CB/344]**

14. The Claimant does not argue that the Defendants were obliged by domestic law to act compatibly with the Paris Agreement – that would be a bad point. They were, however, required to consider its obligations when deciding to introduce, and when

designing, the UK ETS. This does not amount to a merits challenge, despite what the First Defendant says at paragraph 33 of its SGR **[HB/15]**. The Defendants were legally required to consider both the net-zero commitment and the Paris Agreement, as they impose different obligations. Whilst considering the former, they failed to consider the Paris Agreement obligations, despite them being obviously material to the discharge of a statutory purpose to limit precisely the same thing (i.e. GHG emissions) that the Paris Agreement obliges the UK to do.

15. This is made clear from the terms of the Response **[CB/355-422]**, June 2020 Impact Assessment **[CB/423-462]** and the Defendants' letters to CCC **[CB/219-220; CB/339-341]**. At no point in any of these documents did the Defendants consider the obligation under the Paris Agreement to make significant emission reductions in the short and medium term. Instead, the only aspects of environmental protection mentioned or considered in them was the net-zero by 2050 commitment and a more general concern about climate change. The passages of the Response relating to the aspects of the UK ETS under challenge make clear that the Defendants only considered the 2050 commitment **[CB/366-368]**:

> "52. We acknowledge respondents' comments regarding expanding the scope of the scheme to include municipal waste incinerators. … While we agree that emissions from these sectors will need to be abated to meet our net zero target, there may be more appropriate measures than the UK ETS for doing so.
>
> …
>
> 59.The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs [*energy intensive industries*] and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap.

60.To balance these objectives, the cap for a UK ETS will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to around 156 million allowances in 2021. …" (emphasis added)

16. If there were any doubt about this, it is also made clear from the First Defendant's SGR, which make clear that the Defendants (erroneously) consider the Paris Agreement to be co-extensive with the Climate Change Act (paragraphs 32 and 85 **[HB/14-15; HB/29]**).

17. Simultaneously, yet inconsistently, the Defendants assert that the decision-makers "can be taken to have been fully aware of the Paris Agreement and the 2008 Act and to have taken their provisions into account" (paragraph 80 **[HB/28]**).

18. While it is perfectly acceptable to present alternative legal arguments, the Defendants' approach in the SGR is actually to present alternative factual arguments, which is self-evidently flawed; and, in any event, in relation to the alternative suggestion that they did consider matters not mentioned in any of the contemporaneous materials, entirely unsupported by any evidence. On the one hand, the Defendants argue that the Paris Agreement is factually co-extensive with the Climate Change Act 2008, such that there was nothing separate for them to consider. That is wrong for the reasons given above. On the other hand, however, the Defendants assert that the Court should simply assume (without any evidential basis) that they did in fact consider all relevant aspects of the Paris Agreement. The existence of the former argument completely obviates any factual basis on which this second argument could be made (even if it were acceptable in principle).

Why was the failure to have regard for the short and medium-term aspects of the Paris Agreement unlawful?

19. The Claimant submits that the short and medium-term obligations under the Paris Agreement were mandatory relevant considerations such that this failure renders the decision unlawful.

20. The present case is within the four corners of *Plan B*, namely, the exercise of a statutory power to which the objective of tackling climate change is relevant. In the

exercise of that power, the Paris Agreement is so obviously a relevant consideration that a failure to have regard to it is unlawful, as the Court of Appeal explained:

> "203. … The narrower question that is raised in this case is whether the Secretary of State was under a legal obligation to take into account the Paris Agreement – or indeed an obligation not to take it into account at all – in the particular context of the decision to designate the ANPS [*Airports National Policy Statement, under s.5 of the Planning Act 2008, which per s.10 required consideration of the 'desirability of mitigating, and adapting to, climate change'*]. That question was not necessarily answered, as a matter of law, by what the legal targets in the Climate Change Act were.
>
> …
>
> 234. The grounds advanced on behalf of Friends of the Earth by Mr Wolfe focused in particular on the requirements of section 10 of the Planning Act [*2008*]. Mr Wolfe submitted:
>
> > (1) There was an error of law in the approach taken by the Secretary of State because he never asked himself the question whether he could take into account the Paris Agreement pursuant to his obligations under section 10.
> >
> > (2) If he had asked himself that question, and insofar as he did, the only answer that would reasonably have been open to him is that the Paris Agreement was so obviously material to the decision he had to make in deciding whether to designate the ANPS that it was irrational not to take it into account.
>
> 235. We accept those submissions in essence.
>
> 236. First, … [*the Secretary of State*] did not ever consider whether to take the Paris Agreement into account as a matter of discretion.
>
> 237. Secondly, and in any event, if he had appreciated he had any discretion in the matter, we agree that the only reasonable view open to him was that the Paris Agreement was so obviously material that it had to be taken into account.

It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in [*R. (on the application of Hurst) v HM Coroner for Northern District London [2007] UKHL 13; [2007] A.C. 189*], at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category.

238. Again we would emphasize that it does not follow from this that the Secretary of State was obliged to act in accordance with the Paris Agreement or to reach any particular outcome. The only legal obligation, in our view, was to take the Paris Agreement into account when arriving at his decision."

21. In designing the UK ETS, the Defendants were exercising the power in section 44 of the Climate Change Act 2008 to establish an trading scheme in order to limit GHG emissions. So far as it relevant here, it provides **[CB/484]**:

"**44 Trading schemes**

(1) The relevant national authority may make provision by regulations for trading schemes relating to greenhouse gas emissions.

(2) A "trading scheme" is a scheme that operates by—

(a) limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions, or

(b) encouraging activities that consist of, or that cause or contribute, directly or indirectly, to reductions in greenhouse gas emissions or the removal of greenhouse gas from the atmosphere."

22. The Paris Agreement was so obviously material to that decision that the Defendants were required to take it into account. This is, at the very least, arguable and permission should be granted as a result.

23. The Defendants' principal response to this is to argue that *Packham* is an authority for the proposition that, despite the absence of reference to the short and medium-term aspects of the Paris Agreement, it can be assumed that they were considered. That is wrong. The conclusion in *Packham* has to be read as a whole: (i) a low intensity review of the decision at issue was applied, as it related to the exercise of a non-statutory power for which the Defendant was accountable to Parliament (paragraphs 47-48), and (ii) the exercise at issue was the provision of advice to government, which had set the terms of reference and had not sought advice in relation to the Paris Agreement (paragraph 94). *Packham* is not an authority for the proposition that the Paris Agreement can simply be assumed to have been taken into account by the Defendants in the exercise of a statutory power to which it is "obviously material". This is a case within the four corners of *Plan B*, not *Packham*.

24. The Defendants also suggest that the Paris Agreement has been "translated" into the Climate Change Act 2008 (see paragraphs 32(4) and 85(2) of the First Defendant's SGR **[HB/15; HB/29]**). That is based on a misreading of paragraph 95 of *Packham*. In that paragraph, the Court explained that it was concerned with "the main aspiration of the Paris Agreement". There are several aspirations and aspects to the Paris Agreement: one of them (achieving net-zero emissions by the latter half of the 21st Century) is broadly analogous with the commitment to achieving net-zero emissions by 2050. To the extent that any of the Paris Agreement is translated into domestic law, it is this aspect. This says nothing about the other aspects of the Paris Agreement.

25. Even if it were correct that the long-term aspects of the Paris Agreement had been translated into the Climate Change Act 2008, that is clearly not the case in respect of the short and medium-term aspects. The Climate Change Act 2008 addresses the short and medium-term though carbon budgets set under its section 4. The next (fourth) budget (for 2023-2027)[3] and the following (fifth) budget (for 2028-2032)[4] were set

[3] The Carbon Budget Order 2011/ 1603 (29 June 2011)
[4] The Carbon Budget Order 2016/785 (20 July 2016)

before the UK had ratified the Paris Agreement (on 18 November 2016). These budgets were set prior to the existence of (and so necessarily without reference to) the obligations under Articles 2(1) and 4(1) of the Paris Agreement. They also substantially pre-date the amendment of section 1 of the Climate Change Act 2008 committing the UK to net-zero by 2050 on 27 June 2019, and so to the extent that amendment "translated" the Paris Agreement into domestic law it had no impact on the content of these budgets.[5] There is no plausible basis on which these budgets can be said to "translate" or implement the Paris Agreement as a result. These are the budgets that cover the short and medium term, which is exactly the period to which this claim relates.

26. The Defendants' response to ground 1(a) and (c) is internally inconsistent. On the one hand, they assert that the Paris Agreement and the net-zero commitment are co-extensive, when they demonstrably are not; and on the other hand, they ask the Court simply to assume that they lawfully accounted for all relevant aspects of the Paris Agreement. The Defendants' own submission makes clear that this latter request has no foundation. That is particularly so where the statutory power in section 44 of the Climate Change Act 2008 makes it manifestly clear that the Paris Agreement is an "obviously material" relevant consideration. In the circumstances, the Claimant's ground 1 is at least arguable and permission should be granted.

Ground 2 – improper statutory purpose

The statutory purpose

27. The statutory purpose for which an emissions trading scheme can be established is to limit or encourage the limitation of GHG emissions. This is clear from the terms of section 44 of the Climate Change Act 2008, which grants the relevant power:, namely limiting or encouraging the limitation of activities that cause GHG emissions or encouraging activities that reduce GHG emissions or remove GHGs from the atmosphere. If there were any doubt that these are the statutory purposes for section

[5] As the CCC made clear to the Defendants on page 30 of its May 2019 report, *Net Zero – The UK's Contribution to Stopping Global Climate Change* [**HB/121]**

44, it is confirmed by Part 3: Trading Schemes of the Explanatory Memorandum to the Climate Change Act 2008 **[HB/95]**:

> "13. Part 3 and Schedules 2, 3 and 4 provide the Secretary of State and the devolved administrations with powers to set up trading schemes relating to greenhouse gas emissions though secondary legislation. Trading schemes may limit activities that lead, directly or indirectly, to emissions of greenhouse gases (for example, by capping emissions from a particular set of activities and allow trading of emissions within the cap), or they may encourage activities that directly or indirectly lead to a reduction in greenhouse gas emissions or the removal of greenhouse gases from the atmosphere."

What was the Defendants' purpose?

28. The cap for the UK ETS decided upon by the Defendants, 150 mtCO_2, was not chosen for the purpose of ensuring that emissions would be limited in the early years of the scheme (as is clear from paragraphs 23-24 of the June 2020 Impact Assessment **[CB/429]**, the CCC's letter to the Defendants dated 20 March 2020 **[CB/351-352]** and the Defendants' response of 1 June 2020 **[CB/353-354]**). The Defendants themselves acknowledge that the cap is inconsistent with a trajectory to net-zero emissions by 2050 (see paragraphs 61 and 62 of the Response **[CB/368]**, the CCC's letter of 20 March 2020 **[CB/351-352]** and the Defendants' response of 1 June 2020 **[CB/353-354]**).

29. The Defendants assert that, rather than environmental protection, the cap was chosen for the purpose of ensuring that the UK ETS "functioned effectively". That is not borne out by the evidence, however, as the CCC had expressly warned in its letter of 20 March 2020 **[CB/351]** that this cap would lead to <u>excessive</u> liquidity and damage the effective functioning of the market:

> "However, the interim proposals for the scheme set out in your letter are inconsistent with the UK's Net Zero ambitions in some respects, primarily relating to the relatively high level of allowed emissions under the proposed cap. In a year when the UK needs to be seen as a climate leader, adopting the proposed trading scheme risks sending a damaging signal internationally

ahead of the UN climate talks in Glasgow in November. It also risks undermining the scheme as a trading system, since if the cap is set too high the floor price in the scheme will set the price and become a de-facto tax." (emphasis added)

30. It is clear that the Defendants' real purpose in setting this cap was neither environmental protection nor ensuring the effective functioning of the UK ETS. Instead, it was to alleviate competitive pressures businesses face, particularly in light of Brexit, as the Defendants spelled out in the Response **[CB/368]**:

> "59. The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs [energy intensive industries] and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap." (emphasis added)

31. The Claimant submits that this is, at least arguably, not a lawful purpose for which the s.44 power may be exercised.

Section 31 of the Senior Courts Act 1981 – did the above issues make any difference?

32. The applicability of section 31 of the Senior Courts Act 1981 in this context was considered and rejected as misconceived by the Court of Appeal in *Plan B*:

> "233. We would add this observation. It was not submitted to us that in designating the [Airports National Policy Statement] ANPS the Secretary of State committed no error of law – or that, if he did, the error itself was immaterial – because the relevant consequences of meeting the targets already in place under the Climate Change Act would have been, or at least might have been, the same as those of implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under section 5(8) of the Planning Act, the

implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation."

33. Nonetheless, the Defendants assert that the outcome (i.e. the exclusion of municipal waste incinerators and the high level of the cap) would have been substantially the same, even if the above errors of law had not occurred (SGR, paragraph 134 **[HB/41]**).

34. In relation to ground 1 (Paris Agreement), there is no basis for this assertion, let alone to the high level of certainty required for a finding that it is "highly likely". The outcome is a UK ETS that has been designed without urgency: it permits substantial emissions over the short and medium-term and ignores the additional emissions generated by incineration relative to other forms of waste disposal and energy production. It *may* have been possible for the Defendants lawfully to design such a scheme, but the fact that they did so having failed to consider the short and medium-term aspects of the Paris Agreement (from which where urgency as a relevant consideration is derived) means the Court can have no confidence that that would be the case.

35. In relation to ground 4 (statutory purpose), section 31 is of no effect as the lawfulness of the Defendants' purpose is determined independently of the outcome.

36. Alternatively, there is an exceptional public interest that warrants granting of permission (and, in due course, relief). There is a fundamental failing in the Defendants' decision-making for the UK ETS. There will likely be many more decisions responding to climate change in the near future, to which the Paris Agreement will similarly be a mandatory relevant consideration. Clarification from the Court of the need to consider the short and medium-term aspects of the Paris Agreement would lead to improved decision-making and be in the public interest.

37. In particular, contrary to paragraph 137 of the First Defendant's SGR **[HB/42]**, the fact that the Defendants have the option to review the scheme in 2023 to consider whether to include other sectors by 2026, and implement any changes to the emissions cap by no later than January 2024 (see paragraphs 48 and 60 of the First Defendant's SGR **[HB/19; HB/22]**) is a clear example of this public interest and undermines the Defendants' arguments on relief. That is because, if the Court finds that the decision was unlawful, the outcome of that future review may well be different, given that the Court would have clarified for the Defendants what they were lawfully required to account for and identified the lawful purposes of the scheme. As such, it is not highly likely that the outcome (i.e. the scheme) would be the same if the Claimant is granted relief.

Costs

38. The claim is an Aarhus Convention claim under the Civil Procedure Rules ("CPR") 45.41(2)(a), which is accepted by the Defendants (see Section E of the Defendants' Acknowledgment of Service **[HB/5; HB/45; HB/50; HB/54]**). The Claimant is claiming as an individual within the meaning of CPR 45.43(2)(a). Accordingly, a cost cap of £5,000 applies to the amount the Claimant may be ordered to pay. That default cap can only be increased above £5,000 on application of the Defendants (CPR 45.44(2)). No such application has been made. As such, paragraph 2 of Lane J's order **[HB/73]** should be set aside and replaced by the default cost caps, namely that the Claimant's costs liability is limited to £5,000 inclusive of VAT and the Defendants' costs liability is limited to £35,000 plus VAT.

Conclusion

39. For the reasons given above and the Grounds of Renewal, the Claimant submits that permission to bring the claim for judicial review in respect of grounds 1(a) and (c) and ground 4 should be granted.

David Wolfe QC, Matrix

Ben Mitchell, 11KBW

17 November 2020

Permission Hearing: 1 December 2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Claim No CO/3093/2020

B E T W E E N:

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

SECRETARY OF STATE'S SKELETON ARGUMENT FOR PERMISSION HEARING

Preliminary

Time estimate: 1 hour (including judgment)

Time estimate for pre-reading: 1½ hours

List of essential pre-reading (in addition to skeleton arguments):

- Order of Mr Justice Lane dated 16.10.20: HB/8/73-75
- Secretary of State's Summary Grounds of Defence dated 24.9.20 (part): HB/2/9-22, 25-30, 35-37, 40-42
- Defendants' letter to the Committee on Climate Change dated 1.6.20: CB/37/353-354
- 'The future of UK carbon pricing' response of 1.6.20 (part): CB/38/359-363, 366-368
- Paris Agreement: Articles 2.1, 4.1 and 14.1

References to documents in the Claim Bundle are in the form CB/x/y, and references to documents in the Supplemental Hearing Bundle are in the form HB/x/y, where 'x' is the tab number and 'y' is the page number.

References in the form 'SGD xx' are to paragraphs of the Secretary of State's Summary Grounds of Defence.

Introduction

1. This judicial review is a challenge to the decision of the Secretary of State and the devolved administrations on the appropriate design of a new UK emissions trading scheme (UK ETS). The decision was published on 1 June 2020 by way of the document entitled 'The future of UK carbon pricing: UK Government and devolved administrations' response' ("the Response").

2. This skeleton argument sets out in summary form the main points in answer to the Claimant's case as now presented in her skeleton argument dated 17 November 2020 ("CSk"). It should be read with the Secretary of State's Summary Grounds of Defence (SGD) which set out the background and response to this challenge in more detail.

3. To seek to justify renewal, the Claimant contends that Lane J did not consider her Reply.[1] This is wrong. The Judge expressly stated in his order refusing permission that he had considered "the claimant's reply" [HB/8/73].

Background

4. The Claimant identifies two concerns about the UK ETS. Both are baseless:

   (1) The fact that municipal waste incinerators (MWIs) are not included within the UK ETS (as is the case currently with the EU ETS) does not obviate the potential to reduce their emissions.[2] Nor does it remove or dramatically reduce any incentive for MWIs to reduce greenhouse gas (GHG) emissions.[3] Reduction of GHG emissions from MWIs is addressed through waste management policy and regulation [SGD 69-73].

[1] CSk para 3.
[2] CSk para 4.
[3] CSk para 7(a).

(2) The effect of the initial cap in the UK ETS is not to stop, or reduce the capacity of, the UK ETS to reduce emissions in the short and medium-term.[4] The initial cap has been set to ensure that the UK ETS – as a new ETS and a much smaller one than the EU ETS – functions effectively. The UK ETS market needs to function effectively if it is to achieve any emissions reductions in the short to medium-term.

5. It is apparent that the Claimant does not understand how an ETS works. She takes far too simplistic a view of market behaviour in an ETS.[5] The Court is asked to read SGD 37-62 which explains how the market operates and how the initial cap in the new UK ETS was designed. The UK ETS is more ambitious in terms of tackling climate change than the EU ETS it will replace [SGD 49, 66-67, 124].

Ground 1: failure to take the Paris Agreement into account

6. The error of law alleged in Ground 1 is a failure to have regard to the so-called "short and medium-term aspects of the Paris Agreement".[6] This is unarguable for any one of four reasons.

7. First, this contention is untenable where the Claimant accepts that the Defendants had regard to the Paris Agreement and did consider "the longer-term target of achieving net zero emissions" in the Paris Agreement.[7] The Claimant's position involves submitting that the Defendants left out of account part of one sentence[8] in Article 4.1 of the Paris Agreement, whilst accepting they took into account a later part of the same sentence.[9]

[4] CSk para 7(b).
[5] See eg CSk para 5.
[6] CSk paras 9, 14.
[7] CSk para 9.
[8] "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible".
[9] "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century".

8. Further, the Claimant accepts that the Defendants did consider the 'global stocktake' aspect of the Paris Agreement.[10] This is defined in Article 14.1 as a process to:

> "periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the 'global stocktake')".

9. The global stocktake is about progress towards the long-term goals of the Paris Agreement. This necessarily relates to the period before the long-term, ie progress in the short to medium-term.

10. The Claimant's approach of carving-up the Paris Agreement – even individual sentences – to seek to argue that parts of it were left out of account is wholly untenable.

11. Secondly, the Claimant's contention involves artificially dividing the longer and shorter-term elements of the Paris Agreement. Article 4.1 of the Paris Agreement is clear that one is an aspect of the other:

> "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible … and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (emphasis added).

12. In the Paris Agreement, reaching "global peaking of greenhouse gas emissions as soon as possible" is inextricably linked to achieving net zero emissions in the second half of this century and the long-term temperature goals in Article 2. Similarly, in the domestic legislation, the 2050 net zero target does not stand on its own: there is a framework to ensure progress towards it by reductions in the short to medium-term [SGD 23].

13. The Claimant can only argue that "short and medium-term aspects of the Paris Agreement" were not taken into account by treating them as entirely separate,

[10] CSk para 9.

freestanding elements of the Paris Agreement. Seeking to divorce the two elements from each other is wholly artificial. The short to medium-term aspects are part and parcel of the longer-term aspects.

14. Thirdly, the Claimant's case is untenable as it is founded on the absence of express references in the Response. The fact that the Response did not expressly refer to specific provisions of the Paris Agreement – such as Article 2.1 or a part of Article 4.1 – does not mean that it should be inferred that they were left out of account.[11] It is not credible to suggest that these specific provisions were excluded from consideration by the Defendants when regard was clearly had to the Paris Agreement more generally [SGD 78-80].[12] It cannot be inferred that parts of the Paris Agreement were left out of account simply because they were not expressly mentioned in the Response.

15. Fourthly, the underlying issue of substance – seeking "substantial emissions reductions in the short and medium-term"[13] – was considered by the Defendants [SGD 81-83]. The Defendants did what the Claimant says was required, that is considering whether the emissions reductions under the UK ETS could go further, faster.

16. Moreover, the fact that the accumulated national commitments of state parties are currently insufficient to meet the global goals of the Paris Agreement,[14] does not mean that the UK Government has to go beyond its net zero commitment and seek to cut UK GHG emissions via the UK ETS so much that it undermines the competitiveness of UK business. This would not, in any event, tackle global GHG emissions as it would encourage 'carbon leakage', ie the transfer by businesses of activities to other countries with less stringent emission constraints [SGD 45, 57, 118].

[11] CSk para 15.
[12] And where the 2050 net zero target and the Paris Agreement are so inextricably linked: SGD 27-28, 30, 80.
[13] CSk para 10.
[14] CSk para 11. Any suggestion that the UK is obliged by the Paris Agreement to go further than it is going would be an argument on the merits which cannot be entertained on this judicial review [SGD 33]. It also seeks impermissibly to give the Paris Agreement force domestically, which is not possible under the UK's dualist system. Any obligation imposed on the UK Government by the Paris Agreement has no effect in domestic law.

Ground 2 (ex 4): s44 power exercised for an improper purpose

17. The Claimant contends that the "purpose for which the Defendants acted when setting the cap was in order to alleviate pressures on businesses".[15] The Claimant's argument depends impermissibly on taking one part of one sentence of the Response and reading it in isolation.

18. It is necessary to read the relevant part of the Response – paragraphs 58 to 63 – as a whole [CB/38/368]. When that is done, it is plain that "other pressures that businesses currently face as a result of our departure from the EU" was simply a consideration taken into account and not a, let alone the, purpose for which the initial cap was set. That is a complete answer to this ground.

19. The true position is explained at SGD 37-62 and 110-120. In short:

    (1) an ETS is intended to incentivise businesses to take action to reduce greenhouse gas emissions, which can only be achieved if businesses can afford to take such action and do not transfer activities to other countries with less stringent emission constraints (carbon leakage);

    (2) it is therefore appropriate, when setting the initial cap, to take into account the costs to businesses which could arise in the early years of the new UK ETS, and the other pressures that businesses face, to ensure the UK ETS would be effective in reducing emissions;

    (3) the initial cap was set at the level it was to ensure that the UK ETS functioned effectively as an emissions trading system and would therefore facilitate limiting or encouraging the limitation of relevant activities;

[15] CSk paras 2(b) and 30.

(4) the initial cap was set in line with the purpose of s44, namely to establish an ETS which operates effectively to limit or encourage the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions.

20. The effective functioning of the UK ETS is absolutely necessary to ensure the scheme's climate change objectives are achieved. Setting the UK ETS cap simply to drive down UK emissions, regardless of the impacts of business, would be counter-productive. It would prevent the UK ETS market from functioning effectively, and encourage carbon leakage, and not make a contribution to reducing global GHG emissions.

Delay

21. The Response was published on 1 June 2020. No steps towards a judicial review were taken until the pre-action letter on 5 August 2020, more than two months later. Despite this point being raised in the pre-action response, the Claimant has provided no explanation at all for this delay. The claim was commenced on the last possible day of the three month long-stop period. The claim was not brought promptly and permission should also be refused for this reason [SGD 130-132].

Whether the outcome for the Claimant would have been substantially different

22. Lane J decided that [HB/8/74]:

> "The impugned decision would inevitably have been the same if express reference had been made to Article 2(1)(a). The exclusion of municipal incinerators, the rolling forward of allowances and setting the cap higher than projected business as usual emissions would all be features of any scheme, given the policy considerations concerned."

23. The Senior Courts Act 1981 requires only that this outcome be "highly likely" before permission must be refused under s31(3D).

24. This is not a case like *Plan B*[16] where the Paris Agreement was consciously not taken into account. Moreover, consideration was given in this case to going further, faster [SGD 82]. The Defendants went as far as they thought they could for the initial design of the new UK ETS. There is no reason to think that they would have gone further when setting the initial cap. The letter of 1 June 2020 to the CCC makes that clear [CB/37/353-354].

25. There is nothing in this judicial review which creates "reasons of exceptional public interest" under s31(3E) to justify hearing it when it would make no difference to the decision in this case.

Conclusion

26. For the reasons given above, and set out in more detail in the Secretary of State's Summary Grounds of Defence, permission to bring this claim on both remaining grounds should be refused. The claim is unarguable.

RICHARD HONEY

Chambers of Andrew Tait QC
Francis Taylor Building
Temple, London EC4Y 7BY
Tel: 0207 353 8415
Email: richard.honey@ftbchambers.co.uk

23 November 2020

[16] *R (Plan B Earth) v SSfT* [2020] EWCA Civ 214.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT
BEFORE MR JUSTICE MORRIS

Claim No CO/3093/2020

B E T W E E N:

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

ORDER

BEFORE the Honourable Mr Justice Morris in the Royal Courts of Justice by video hearing on 1 December 2020

UPON hearing leading counsel and counsel for the Claimant and counsel for the First Defendant (the Second to Fourth Defendants not attending)

AND UPON the Claimant's application of 22 October 2020 for renewal of her claim for permission to apply for judicial review following the decision of the Honourable Mr Justice Lane refusing permission on the papers dated 16 October 2020

IT IS ORDERED THAT

1. Permission is granted on Grounds 1a, 1c and 4.

2. The hearing shall be listed for 2 days on the first available dates after 8 March 2021.

3. The case is not suitable for hearing by a Deputy High Court Judge.

4. The defendants and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve detailed grounds for contesting the claim or supporting it on additional grounds and any written evidence, within 35 days of service of this order.

5. Any reply and any application by the claimant to lodge further evidence must be lodged within 21 days of the service of detailed grounds for contesting the claim.

6. The parties must agree the index to the trial bundle not less than 5 weeks before the date of the hearing.

7. The claimant must file and serve a trial bundle not less than 4 weeks before the date of the hearing.

8. The claimant must file and serve a skeleton argument not less than 21 days before the date of the hearing.

9. The defendants and any interested party must file and serve a skeleton argument not less than 14 days before the date of the hearing.

10. The claimant must file an agreed bundle of authorities not less than 5 days before the date of the hearing.

BY THE COURT

Dated: 1st December 2020

Direct Dial: 020 7650 1248
Email:rowans@leighday.co.uk; jeriksen@leighday.co.uk
Your Ref:
Our Ref: RWS/JEK/00255697/1
Date: 9 December 2020

FAO: Secretary of State for BEIS; Department for Agriculture, Environment and Rural Affairs Northern Ireland; The Scottish Ministers; and, Minister for Environment, Energy and Rural Affairs Welsh Government
Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

By email: Ellen.Richardson@governmentlegal.gov.uk; Erica.Devine@governmentlegal.gov.uk; Chris.Burge@governmentlegal.gov.uk; Emel.Djevdet@governmentlegal.gov.uk; Joe.Vester@governmentlegal.gov.uk; Sarah.Wise@governmentlegal.gov.uk; Catriona.Hawthorne@gov.wales; Luke.Walsh001@gov.wales

Dear all,

Re: CO/3093/2020 - R (Georgia Elliott-Smith) v Secretary of State for Business, Energy & Industrial Strategy & Others

1. We write with respect to our client's judicial review challenge to two aspects of the Defendants' decision to establish the new UK Emissions Trading Scheme ('UK ETS'), for which our client was granted permission on 1 December 2020 by Mr Justice Morris.

The Greenhouse Gas Emissions Trading Scheme Order 2020

2. The aspects of the decision under challenge in this claim, (namely, the exclusion of emissions from municipal waste incinerators and the level of the 'cap' set under the scheme) informed the contents of the draft Order establishing the UK Emission Trading Scheme ('*The Greenhouse Gas Emissions Trading Scheme Order 2020*' ("the Order")), as published on 14 July 2020.

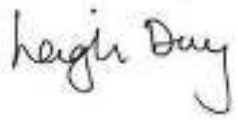
3. As such, in paragraph 7 of our statement of facts and grounds, we indicated that, if implemented as drafted, the Order would remake the same decision as that currently under challenge. Nonetheless, we note that the Greenhouse Gas Emissions Trading Scheme Order 2020 ("the Order") was made on 11 November 2020 (coming into force on 12 November 2020) and, in doing so, took effect as a fresh public law decision that repeated the same legal errors in respect of the same matters.

4. We therefore seek confirmation that, in the event that our claim is successful, any findings from the Court and/or relief granted will be treated by the Defendants as biting on the Order as made on 11 November 2020 (on the basis that it is substantively identical to the decision under challenge), such that, if ordered or required in order to rectify any illegality identified by the Court, it would be reviewed and amended in light of any findings from the Court on the design of the scheme.

5. If the Defendants do not agree to this, we will be forced to issue a parallel, second challenge to the decision to make the Order and to seek to stay that challenge pending the result of the current judicial review. We consider that this would be wasteful, given the substantively identical nature of the decisions and, if it is required by your refusal to agree to the above, we put you on notice that we would seek our costs of having to take these steps from you on an indemnity basis.

6. Given the urgency of the judicial review timeframe, we request your response by 5pm on **10 December 2020**. Please send your response to both Rowan Smith and Julia Eriksen, using the contact details in our letterhead.

Yours faithfully,



Leigh Day

Leigh Day

Direct Dial: 020 7650 1248
Email:rowans@leighday.co.uk; jeriksen@leighday.co.uk
Your Ref:
Our Ref: RWS/JEK/00255697/1
Date: 9 December 2020

FAO: Secretary of State for BEIS; Department for Agriculture, Environment and Rural Affairs Northern Ireland; The Scottish Ministers; and, Minister for Environment, Energy and Rural Affairs Welsh Government
Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

By email: Ellen.Richardson@governmentlegal.gov.uk; Erica.Devine@governmentlegal.gov.uk; Chris.Burge@governmentlegal.gov.uk; Emel.Djevdet@governmentlegal.gov.uk; Joe.Vester@governmentlegal.gov.uk; Sarah.Wise@governmentlegal.gov.uk; Catriona.Hawthorne@gov.wales; Luke.Walsh001@gov.wales

Dear all,

Re: CO/3093/2020 - R (Georgia Elliott-Smith) v Secretary of State for Business, Energy & Industrial Strategy & Others

1. We write with respect to our client's judicial review challenge to two aspects of the Defendants' decision to establish the new UK Emissions Trading Scheme ('UK ETS'), for which our client was granted permission on 1 December 2020 by Mr Justice Morris.
2. The Court has confirmed that this is an Arhus Convention claim (that fact having already been agreed by the parties). In the exchanges following his decision on permission, Mr Justice Morris explained he did not need to make an order on cost caps, because the ordinary £5,000 limit would apply.
3. With this in mind, we write to confirm our understanding that in the event that our client is unsuccessful, the cost cap of £5,000 inclusive of VAT covers our client's costs liability to all of the Defendants combined.
4. We would be grateful if you could confirm that our understanding is correct within the next 7 days. Please send your response to both Rowan Smith and Julia Eriksen, using the contact details in our letterhead.

Yours faithfully,

Leigh Day

Leigh Day

Government
Legal Department

Litigation Group **T 020 7210 3000**
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DX 123243, Westminster 12 **www.gov.uk/gld**

Rowan Smith
Leigh Day
Leigh Day Solicitors
Priory House
25 St John's Lane
LONDON
EC1M 4LB

By email only

Your ref: RWS/00255697/1
Our ref: Z2008680/ERI/JD3

17 December 2020

Dear Mr Smith

R (oao Georgia Elliott-Smith) v Secretary of State for Business, Energy & Industrial Strategy & Others - CO/3093/2020

We act for the First Defendant in this matter, the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State"), and write further to your three letters of 9 December 2020 regarding, variously, the Greenhouse Gas Emissions Trading Scheme Order 2020 ("the 2020 Order"), costs, and the duty of candour. We set out the Secretary of State's response to these points below.

The 2020 Order

You have asked for confirmation that, in the event that the claim is successful, any findings from the Court and/or relief granted will be treated by the Defendants as biting on the Order as made on 11 November 2020.

In response we would accept that if the current judicial review is successful and the Court makes a declaration that any aspect of the decision set out in the Government's Response to the consultation ("the Response") was unlawful for a particular reason, the Court's reasoning would also apply to any relevant aspects of the 2020 Order which follow from the Response. We would also accept that, if the Court makes an order requiring reconsideration of any features of the decision set out in the Response, and that reconsideration leads to a decision to change the UK ETS, that change would have to be implemented through an amendment to or replacement of the 2020 Order.

In light of the above we do not see that there is any practical utility in a judicial review of the 2020 Order in addition to the current judicial review.

Costs

We agree that in the event that your client's claim is unsuccessful, the cost cap of £5,000 inclusive of VAT would cover her costs liability to all of the Defendants combined. For the avoidance of doubt, we consider that the reciprocal cap would also be inclusive of VAT.

Duty of candour/disclosure

You have asked for disclosure within 14 days of documents evidencing: (i) consideration of the Paris Agreement in the decision-making process; and (ii) the purpose for which business considerations were relied upon when setting the cap.

In response we would note that the Secretary of State is in the process of preparing detailed grounds and evidence in accordance with the timetable which you have agreed and which has now been approved by the Judge (i.e. 35 days from service of the order, namely 8 January 2021). We will provide any necessary disclosure together with our evidence and as part of that process will consider whether there are documents relating to the two issues you have raised, including any exchanges with the Devolved Administrations, which fall to be disclosed. We do not consider that there is any justification for the additional step your letter now appears to contemplate of providing disclosure in advance of our detailed grounds and evidence.

Yours sincerely

Ellen Richardson
For the Treasury Solicitor

D +44 (0)20 7210 3038
F +44 (0)20 7210 3001
E ellen.richardson@governmentlegal.gov.uk

CC: For Northern Ireland Executive: Chris.Burge@governmentlegal.gov.uk & Emel.Djevdet@governmentlegal.gov.uk;
For the Scottish Ministers: Joe.Vester@governmentlegal.gov.uk & Sarah.Wise@governmentlegal.gov.uk
For the Welsh Government: Luke.Walsh001@gov.wales & Catriona.Hawthorne@gov.wales

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Rowan Smith
Leigh Day Solicitors
Priory House
25 St John's Land
LONDON
EC1m 4LB

Your ref: RWS/JEK/00255697/1
Our ref: Z2010640/CBG/JD3

17 December 2020

Dear Mr Smith

R(oao Georgia Elliott-Smith) v (1) Secretary of State for Business, Energy & Industrial Strategy & (2) DAERA

As you are aware I act on behalf of the Department of Agriculture, Environment and Rural Affairs, Northern Ireland, the Second Defendant in these proceedings. This letter responds to the three letters sent on behalf of your client on 9 December 2020, which addressed the following: (1) the Greenhouse Gas Emission Trading Scheme Order 2020 ("the 2020 Order"); (2) costs in the context of Aarhus; and (3) the duty of candour. I address each in turn below.

The 2020 Order

In respect of the 2020 Order my Client has considered your request that the Defendants treat any findings, and/or relief granted, by the Court as biting on the 2020 Order as it was made in November this year. My Client has had sight of the letter by the Secretary of State for Business, Energy and Industrial Strategy of 17 December 2020 and echoes what is said there – namely that if the judicial review is successful and the Court makes a declaration that any aspect of the Government's Response to the consultation is unlawful then the Court's reasoning would apply to relevant aspects of the 2020 Order which follow from the Response to the consultation. My Client concurs with the Secretary of State that should the Court require reconsideration of any of the features of the decision as set out in the consultation response, and such reconsideration results in a decision to change the UK Emissions Trading Scheme then those changes would have to be implemented by way of amendment to the 2020 Order or replacement of it.

As such there would appear to be no benefit from separate judicial review proceedings in relation to the 2020 Order running alongside the current judicial review.

Aarhus Costs

Your second letter raises a query in respect of whether the cost cap of £5,000 inclusive of VAT covers your Client's liability to all of the Defendants combined.

My client takes the view that the cost caps (both your Client's £5,000 cap and the reciprocal cap) are inclusive of VAT. Further my Client agrees that that your Client's cost cap of £5,000 covers her liability to all of the Defendants combined.

Duty of candour and disclosure requests

Your third letter seeks disclosure, within 14 days, of documents evidencing (i) consideration of the Paris Agreement in the decision making process and (ii) the purpose for which business considerations were relied upon in respect of the setting of the cap.

My Client would draw your attention to the fact that provision of evidence is already covered by the directions which you have agreed to and which have been approved by the Court – specifically evidence is to be filed and served alongside detailed grounds by 8 January 2021. My Client does not see there is any justification for the provision of evidence earlier than as is provided for in the agreed and approved directions.

Further my Client is entirely aware of its duty of candour obligations and will provide any documents necessary to comply with that duty. For the avoidance of doubt my Client will consider whether it holds any documents relating to your specific requests as part of its duty of candour review.

Yours sincerely

Chris Burge
For the Treasury Solicitor

D +44 (0)7542 226 148
F +44 (0)20 7210 3001
E chris.burge@governmentlegal.gov.uk

Julia Eriksen

From: Sarah Wise <Sarah.Wise@governmentlegal.gov.uk>
Sent: 17 December 2020 20:57
To: 'Luke.Walsh001@gov.wales'; Ellen Richardson; Julia Eriksen; Rowan Smith
Cc: Erica Devine; Chris Burge; Emel Djevdet; Joe Vester; Catriona.Hawthorne@gov.wales
Subject: [EXTERNAL] RE: RCO/3093/2020 - Georgia Elliott-Smith v BEIS and others

[illegible]

Dear Rowan,

I confirm on behalf of my client that we similarly agree with the points made by the First Defendant.

Sarah

Sarah Wise
Senior Lawyer
Planning, Infrastructure, and Environment Team
Justice and Development Division
Litigation Group, Government Legal Department

102 Petty France, London, SW1H 9AJ
Telephone: +44 (0)20 7210 3158
sarah.wise@governmentlegal.gov.uk

Please note that I do not work Fridays

[illegible]

Dear Ms Eriksen and Mr Smith

The Welsh Government is in agreement with all of the points made in the First Defendant's letter of today's date (which was attached to the email below).

Kind regards
Luke

Luke Walsh
Cyfreithiwr | Lawyer
Tim Amgylchedd ac Ynni | Environment and Energy Team
Gwasanaethau Cyfreithiol | Legal Services
Swyddfa'r Prif Weinidog | Office of the First Minister
Llywodraeth Cymru | Welsh Government
(0300 025 3577

PRISM
Rwy'n cefnogi pobl LHDTRh+ | I support LGBTI+ people

Rhagenwau: ef/iddo ayyb Ω Pronouns: he/him

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[illegible]
[illegible]
[illegible]
[illegible]

Dear Ms Eriksen and Mr Smith,

Please see the attached letter.

Kind regards,

Ellen Richardson
Senior Lawyer
Planning, Infrastructure and Environment Team
Justice and Development Division
Litigation Group, Government Legal Department

102 Petty France, Westminster, London, SW1H 9GL
DX 123243, Westminster 12
Tel: +44 (0)20 7210 3038
ellen.richardson@governmentlegal.gov.uk

GLD accepts service by email. See https://www.gov.uk/government/organisations/government-legal-department Due to COVID-19 and the current circumstances I would appreciate any documentation being sent by e-mail rather than by post to limit the handling of materials

gld.digital [illegible]

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preifatrwydd yn esbonio sut rydym yn defnyddio eich gwybodaeth a sut rydym yn diogelu eich preifatrwydd. Rydym yn croesawu gohebiaeth yn Gymraeg. Byddwn yn anfon ateb yn Gymraeg i ohebiaeth a dderbynnir yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi. On leaving the Welsh Government this email was scanned for all known viruses. The Welsh Government takes the protection of your data seriously. If you contact the Welsh Government then our Privacy Notice explains how we use your information and the ways in which we protect your privacy. We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

Julia Eriksen

From:	Luke.Walsh001@gov.wales
Sent:	17 December 2020 16:19
To:	Ellen.Richardson@governmentlegal.gov.uk; Julia Eriksen; Rowan Smith
Cc:	Erica.Devine@governmentlegal.gov.uk; Chris.Burge@governmentlegal.gov.uk; Emel.Djevdet@governmentlegal.gov.uk; Joe.Vester@governmentlegal.gov.uk; Sarah.Wise@governmentlegal.gov.uk; Catriona.Hawthorne@gov.wales
Subject:	[EXTERNAL] RE: RCO/3093/2020 - Georgia Elliott-Smith v BEIS and others

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Dear Ms Eriksen and Mr Smith

The Welsh Government is in agreement with all of the points made in the First Defendant's letter of today's date (which was attached to the email below).

Kind regards
Luke

Luke Walsh
Cyfreithiwr | Lawyer
Tim Amgylchedd ac Ynni | Environment and Energy Team
Gwasanaethau Cyfreithiol | Legal Services
Swyddfa'r Prif Weinidog | Office of the First Minister
Llywodraeth Cymru | Welsh Government
(0300 025 3577

PRISM
Rwy'n cefnogi pobl LHDTRh+ | I support LGBTI+ people

Rhagenwau: ef/iddo ayyb Ω Pronouns: he/him

[illegible]

Dear Ms Eriksen and Mr Smith,

Please see the attached letter.

Kind regards,

Ellen Richardson
Senior Lawyer

Planning, Infrastructure and Environment Team
Justice and Development Division
Litigation Group, Government Legal Department

102 Petty France, Westminster, London, SW1H 9GL
DX 123243, Westminster 12
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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Claim No CO/3093/2020

B E T W E E N:

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

SECRETARY OF STATE'S DETAILED GROUNDS FOR CONTESTING THE CLAIM

Introduction

1. These detailed grounds for contesting the claim are filed on behalf of the Secretary of State for Business, Energy and Industrial Strategy. Permission was granted to bring the claim on Grounds 1(a), 1(c) and 4 by Mr Justice Morris at a renewed permission hearing on 1 December 2020. The Secretary of State contests the claim in its entirety.

2. This challenge is to the decision of the Secretary of State and the devolved administrations on the appropriate design of a standalone UK emissions trading scheme (UK ETS). The decision was published on 1 June 2020 by way of the document entitled 'The future of UK carbon pricing: UK Government and devolved administrations' response' ("the Response").

3. The Response followed a joint consultation in 2019 by the UK Government, the Scottish Government, the Welsh Government and the Department of Agriculture,

Environment and Rural Affairs in Northern Ireland. The consultation set out the UK Government's and the devolved administrations' preferred approach to UK carbon pricing once the UK left the European Union and sought views on the design of a UK emissions trading scheme. The consultation proposals are summarised at CB/22/231-233.

4. The Response in June 2020 set out the decision-makers' decision on the initial design of the UK ETS, which is summarised at CB/38/359-360. The main issues are summarised in the letters from the decision-makers to the Committee on Climate Change dated 2 May 2019, 4 March 2020 and 1 June 2020 [CB/21/219, CB/33/339, CB/37/353].

5. In order to be operational immediately following the end of the EU exit transitional period on 1 January 2021, statutory instruments to implement the UK ETS have been progressed, including the Greenhouse Gas Emissions Trading Scheme Order 2020.[1]

6. In short, the Claimant is not satisfied with the underlying merits of the initial design of the UK ETS as set out in the Response and in particular the fact that the UK ETS – like the European Union emissions trading system – does not extend to municipal waste incinerators. It is apparent from the Claimant's witness statement [CB/3/44-54] that this judicial review is directed at the incineration of municipal waste and that the Claimant disagrees with the position of the UK Government and devolved administrations on a multi-faceted matter of policy which is both technical and political. However, neither of the two grounds on which permission was granted directly relate to the judgement not to bring municipal waste incinerators within the scope of the UK ETS.

7. These detailed grounds set out the legal and policy context relating to climate change, including the Paris Agreement and emissions trading schemes, then summarise the features of the UK ETS and the position on municipal waste incinerators, and then

[1] The Greenhouse Gas Emissions Trading Scheme Order 2020 (2020/1265) was made on 11 November 2020. The explanatory memorandum for the Order states at 2.1 that: "The purpose of this Order is to establish a UK-wide greenhouse gas emissions trading scheme (ETS), to encourage cost-effective emissions reductions which will contribute to the UK's emissions reduction targets and net zero goal".

address in turn the two grounds of challenge for which permission has been granted, before finally considering s31(2A) of the Senior Courts Act 1981.

The legal and policy context

The Climate Change Act 2008 and the Paris Agreement

8. The 2008 Act is the legislative centrepiece of the UK's domestic efforts to tackle climate change. It sets a target for the year 2050 for the reduction of targeted greenhouse gas emissions and provides for a system of carbon budgeting. It establishes a framework for the UK to achieve its long-term goals of reducing greenhouse gas emissions through setting emissions reduction targets in statute and carbon budgeting. The UK was the first country to set long-term legally binding targets, introducing limits on the amount of greenhouse gases the UK can emit over successive five-year periods.

9. The explanatory notes to the 2008 Act explained the position as follows:

> "The Act establishes an economically credible emissions reduction pathway to 2050 and beyond by putting into statute medium and long-term targets. In addition, the Act introduces a system of carbon budgeting which constrains the total amount of emissions in a given time period. Carbon budget periods will last five years, beginning with the period 2008-2012, and must be set three periods ahead."

10. The Committee on Climate Change (CCC) was established under the 2008 Act as an independent expert body, to advise the Government and devolved administrations on how to reduce emissions over time and across the economy.

11. When enacted, the 2008 Act placed the Secretary of State under a duty to reduce the net UK carbon account for the year 2050 to at least 80% below the level of net UK emissions of targeted greenhouse gases in 1990. This was amended to at least 100% below, with effect from 27 June 2019, by the Climate Change Act 2008 (2050 Target Amendment) Order 2019. This is the UK's 2050 'net zero' target.

12. Section 4(1) places a duty on the Secretary of State to set carbon budgets for succeeding periods of five years and also a duty to ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget. Under s8(2), the carbon budget for a period must be set with a view to meeting the target for 2050, other levels of carbon budget set out pursuant to s5, and the European and international obligations of the UK.

13. Section 10 sets out matters which must be taken into account by the Secretary of State in coming to any decision relating to carbon budgets. The list of mandatory considerations includes economic, fiscal and social circumstances, including the likely impact on the economy and the competitiveness of particular sectors of the economy.

14. Section 13 places a duty on the Secretary of State to prepare proposals and policies to enable the carbon budgets that have been set under the 2008 Act to be met and with a view to meeting the 2050 net zero target and any target set under the s5(1)(c) power to set targets for later years. Section 13(3) also provides that the proposals and policies, taken as a whole, must be such as to contribute to sustainable development.

15. The Paris Agreement was signed by the UK on 22 April 2016. It was ratified by the UK on 18 November 2016.

16. The Paris Agreement aims to strengthen the global response to the threat of climate change, including by the collective aim of "holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels" (Article 2(1)). This is a long-term temperature goal. The Paris Agreement is to be implemented in light of differing national circumstances (Article 2(2)).

17. Article 4(1) provides:

> "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between

> anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty."

18. In this way, in order to achieve the long-term temperature goal, parties aim collectively to reach net zero greenhouse gas emissions in the second half of this century.

19. The Paris Agreement sets out global aims to which all state parties subscribe. Each state then draws-up their "nationally determined contributions" (NDC) which are part of the "ambitious efforts" each state is to take "with the view to achieving the purpose of this Agreement as set out in Article 2" (Article 3). Under Article 4(3), each party's successive NDCs will represent a progression and reflect its highest possible ambition, in the light of different national circumstances.

20. The Paris Agreement does not require the UK to meet any specific emission reduction level or to take any particular action to reduce emissions. It imposes no obligation on individual states to implement the Paris Agreement's goals in any particular way. There is no legal obligation on the UK to achieve the aims or goals of the Paris Agreement. The action to be taken pursuant to the Paris Agreement is nationally-determined. Each party determines what action it will take and communicates this in its NDC to the Secretariat of the UN Framework Convention on Climate Change.[2]

21. As stated in *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin), "Parliament has determined the contribution of the UK towards global goals in the CCA 2008."[3] This includes by means of the 2050 net zero commitment contained in the 2008 Act.

22. The UK's greenhouse gas emissions peaked in the early 1990s. The UK has met the first two carbon budgets (2008-17) and is on track to meet the third (2018-22). Further action is being planned to ensure that the UK can meet the fourth and fifth carbon budgets (2023-32). The fifth carbon budget requires the equivalent of a 57% cut in emissions over 2028-32 from a 1990 baseline. The sixth carbon budget, covering the

[2] It is not correct for the Claimant to say at paragraph 13 of the Statement of Facts and Grounds dated 1 September 2020 that the IPCC "provides advice and analysis under the UNFCCC". The IPCC does not sit under the UNFCCC and does not have a formal role in analysing parties' NDCs.
[3] See *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin) at para 608.

period 2033-2037, will be set in 2021. This framework of increasingly tighter carbon budgets ensures that the UK takes action to reduce emissions well ahead of 2050, including making significant reductions in the short to medium term.

23. At the relevant time,[4] the NDC for the UK was that adopted and communicated on behalf of the EU and its Member States, which set a binding target of achieving an at least 40% reduction of 1990 emissions by 2030. The UK's projected contribution to that target was less stringent than the targets set in the UK's fourth and fifth carbon budgets issued pursuant to s4 of the 2008 Act, which were respectively a 50% reduction for the period 2023-2027 and a 57% reduction for the period 2028-2032.[5]

24. The framework established by the 2008 Act manages the UK's progressive decarbonisation in the years leading up to 2050. This framework, while setting the overall level of ambition, leaves the UK Government (and devolved administrations) to determine how best to balance emissions across the economy, and how the effort is to be distributed amongst sectors, as part of an overall economy-wide transition to net zero by 2050.

25. Part 2 of the Environment (Wales) Act 2016 requires the Welsh Government to meet targets for reducing net Welsh emissions of greenhouse gases. This legislation is to be amended in early 2021 to respond to the December 2020 CCC advice, which recommended a target for net zero greenhouse gas emissions in 2050. The Climate Change (Scotland) Act 2009 and the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 provide for a similar system of targets for Scotland, but which aim to reach net zero by 2045.

26. The background to the 2050 net zero commitment is explained in the explanatory memorandum to the 2019 Order as follows:

[4] The UK Government communicated a new NDC on 12 December 2020, in line with advice from the CCC. This new NDC commits the UK to reducing economy-wide GHG emissions by at least 68% by 2030, compared to 1990 levels.

[5] Carbon Budgets 3 to 5, covering the period 2018 to 2032, had been set on the assumption that the UK would continue to participate in the EU ETS. Setting the cap for the UK ETS below the level which would have applied under the EU ETS would be more ambitious than had been assumed in Carbon Budgets 3 to 5.

> "7.3 At the 21st Conference of the Parties to the UNFCCC, the Intergovernmental Panel on Climate Change (IPCC) was invited by the Parties to publish a Special Report on the impacts of global warming of 1.5°C and associated greenhouse gas emissions pathways.
>
> 7.4 The IPCC released this Special Report on 8 October 2018. The report contains the most up-to-date assessment of the science on impacts and associated greenhouse gas emissions pathways for 1.5°C, compared to 2°C.
>
> 7.5 In response to the IPCC's Special Report the Government requested advice from the Committee on Climate Change on the implications of the Paris Agreement and the report for the UK's long-term emissions reduction targets, asking whether further action was needed to meet goals of the Paris Agreement.
>
> 7.6 On 2 May 2019 the Committee on Climate Change provided that advice. This recommended that that the UK should legislate as soon as possible to reach net-zero greenhouse gas emissions."

27. In preparing its net zero advice in May 2019 [AB/3/42],[6] the CCC "reviewed the latest scientific evidence on climate change, including last year's IPCC Special Report on Global Warming of 1.5°C, and considered the appropriate role of the UK in the global challenge to limit future temperature increases" [AB/3/50]. The CCC advice contained the following [AB/3/50, 53]:

> "We conclude that net-zero is necessary, feasible and cost-effective. Necessary – to respond to the overwhelming evidence of the role of greenhouse gases in driving global climate change, and to meet the UK's commitments as a signatory of the 2015 Paris Agreement".
>
> "In setting a net-zero target, the UK will be among a small group of countries handling climate change with appropriate urgency. The new target meets fully the requirements of the Paris Agreement, including the stipulation of 'highest possible ambition', and sets the standard for the EU and other developed countries as they consider their own pledges to the global effort".
>
> "A net-zero GHG target for 2050 will deliver on the commitment that the UK made by signing the Paris Agreement."
>
> "A net-zero GHG target for 2050 would respond to the latest climate science and fully meet the UK's obligations under the Paris Agreement:

[6] Acknowledgement of Service Bundle.

> • It would constitute the UK's 'highest possible ambition', as called for by Article 4 of the Paris Agreement. The Committee do not currently consider it credible to aim to reach net-zero emissions earlier than 2050.
>
> • It goes beyond the reduction needed globally to hold the expected rise in global average temperature to well below 2°C and beyond the Paris Agreement's goal to achieve a balance between global sources and sinks of greenhouse gas emissions in the second half of the century.
>
> • If replicated across the world, and coupled with ambitious near-term reductions in emissions, it would deliver a greater than 50% chance of limiting the temperature increase to 1.5°C."

28. Although they were set under the 80% target, the CCC has not recommended changes to the fourth or fifth carbon budgets or called for them to be re-opened.[7]

29. In its 2019 progress report to Parliament, the CCC said that [CB/24/295]:

> "The net-zero target meets the UK's obligations under the Paris Agreement and responds to the urgent need for action highlighted by the IPCC in last year's landmark Special Report on 1.5°C of global warming."

30. The Government took the Paris Agreement into account when proposing a net zero target, ensuring that this national legislation was consistent with the Paris Agreement's goals. There is no requirement in the Paris Agreement for countries individually or collectively to achieve net zero by 2050. The UK has gone beyond the provisions of the Paris Agreement in setting such a target. The UK was the first major economy to legislate for a 2050 net zero greenhouse gas emissions target.

31. The case law related to the 2008 Act and the Paris Agreement has established the following principles:

    (1) the Paris Agreement does not impose a binding legal target on each contracting party to achieve any specified temperature level by 2050 and indeed contains in Article 2(1)(a) two levels of ambition: *R (Plan B Earth) v SoS BEIS* [2018] EWHC 1892 (Admin) at paragraph 30;

[7] The CCC's advice on the sixth carbon budget, published on 9 December 2020, was that emissions must fall more quickly to 2030 than required by the fifth carbon budget, but also that it was not necessary to change the fifth budget level in law.

(2) the Paris Agreement does not impose any obligation on the UK Government to meet any carbon reduction target, or any other target or temperature objective: *R (Spurrier) v SSfT* [2019] EWHC 1070 (Admin) at paragraph 631(iii);

(3) there is no domestic legal obligation on the UK Government (or devolved administrations) to act in accordance with the Paris Agreement or to achieve any particular outcome related to it: *R (Plan B Earth) v SSfT* [2020] EWCA Civ 214 at paragraph 238;

(4) the relevant aspirations and essential principles of the Paris Agreement have been "translated into" domestic legislation in the form of the provisions of the 2008 Act, in particular the 2050 net zero commitment: *R (Packham) v Secretary of State for Transport* [2020] EWCA Civ 1004 at paragraphs 95 and 97;

(5) even where climate change is a consideration which must be taken into account, there is nothing in the domestic legal and policy framework on climate change, including the 2008 Act, which creates a legal duty which obliges decision-makers to consider the implications of the Paris Agreement beyond recognising the 2050 net zero commitment in the 2008 Act: *Packham* at paragraphs 98-100;

(6) the Paris Agreement itself is not Government policy, there is no commitment for the purposes of domestic law to perform the obligations in the Paris Agreement, the obligations are not part of UK law, and they give rise to no legal rights or obligations in domestic law: *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52 at para 108;

(7) the Paris Agreement goals are reflected in domestic law through the 2008 Act: *Heathrow Airport* at paras 122-123;

(8) it is rational to conclude that the international obligations of the UK under the Paris Agreement are sufficiently taken into account by having regard to the obligations under the 2008 Act: *Heathrow Airport* at paras 132 and 149.

32. It is not the function of the Court to enter into scientific debate.[8] An analysis of scientific opinion is not a proper subject for judicial review proceedings.[9] The Court should also accord an enhanced margin/area of respect to decisions involving or based upon scientific, technical and predictive assessments.[10] Where a decision is highly dependent upon the assessment of a wide variety of complex technical matters, the margin of appreciation will be substantial.

33. Beyond these points of principle, the Claimant's argument that the 2050 net zero commitment in the 2008 Act is inadequate to meet the goals of the Paris Agreement is a disagreement on the merits of the policy of the UK Government and the devolved administrations on a matter which is both technical and political. This Court cannot, in a judicial review, consider and adjudicate upon the Claimant's contentions that the goals of the Paris Agreement require more or different action, and quicker action, than is provided for in the framework of law and policy established pursuant to the 2008 Act.

Emission trading schemes under the Climate Change Act 2008

34. Section 44(1) of the 2008 Act provides that national authorities may make provision by regulations for trading schemes relating to greenhouse gas emissions. Section 44(2)(a) provides that a trading scheme is a scheme that operates by limiting or encouraging the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions. The long title to the 2008 Act says that it confers "powers to establish trading schemes for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere".

35. Section 45(1) identifies particular activities which are to be regarded as indirectly causing or contributing to greenhouse gas emissions, including the consumption of

[8] *R (Assisted Reproduction and Gynaecology Centre) v Human Fertilisation and Embryology Authority* [2002] EWCA Civ 20 at para 15.
[9] *R (British Union for the Abolition of Vivisection) v SSHD* [2008] EWCA Civ 417 at para 54.
[10] See *Plan B Earth v SSfT* at para 68.

energy, the use or disposal of materials in whose production energy was used, and the production or supply of things the use of which causes or contributes to greenhouse gas emissions.

36. Schedule 2 to the 2008 Act specifies matters to be covered in regulations under s44. Part 1 of Schedule 2 relates to trading schemes which limit activities. Paragraphs 3 and 4 relate to the activities and the participants to be covered by a trading scheme and allow them to be identified by reference to any criteria.

37. A trading scheme under s44 needs to do no more than encourage the limitation of activities that consist of the emission of greenhouse gases or that cause or contribute to such emissions. An ETS does not need to encompass all activities that cause or contribute to greenhouse gas emissions. An ETS can encourage the limitation of activities that cause or contribute to greenhouse gas emissions; it does not have to limit the activities directly. Moreover, s44 says nothing about the extent to which an ETS should limit or encourage the limitation of activities. Activities do not have to be limited to any particular extent or so as to achieve any particular level of greenhouse gas emissions.

The UK emissions trading scheme

38. The UK has long been an advocate of the development of carbon pricing internationally. The UK established Europe's first emissions trading scheme in 2002, which served as a pilot for the EU Emissions Trading System (EU ETS). Both the EU ETS and the new UK ETS are cap and trade schemes, where a collective limit – the cap – is set for greenhouse gas emissions produced by activities within the scope of the scheme. The cap is reduced over time, so that emissions fall broadly according to the trajectory in the reduction of the cap.

39. An ETS works to incentivise effective emissions reductions in a number of ways. First, putting a price on carbon incentivises decarbonisation directly if the price of carbon is greater than the cost of abatement. The design of an ETS ensures that decarbonisation takes place where and when it is cheapest to do so. This helps decarbonisation to take

place in a more economically efficient way. Secondly, the expectation of rising prices over time also incentivises participants to reduce their emissions as soon as possible, to avoid paying the increased carbon price on those abated emissions. Thirdly, if businesses are successful in reducing emissions, they are also able to sell any excess allowances that they hold at this higher price. The expectation amongst participants of rising allowance prices incentivises emissions reductions. The cap is, however, only one factor which contributes to rising prices in the future, alongside market behaviour, market intervention, and the market participants' expectation of policy changes and their effects.

40. In October 2017, pursuant to s13 of the 2008 Act, the Secretary of State published the Clean Growth Strategy, setting out the Government's policies and proposals for decarbonising the national economy through the 2020s. The CCC's 2019 net zero report included the advice that the Clean Growth Strategy provided the right framework for the ambitious action needed to deliver the 2050 net zero target.

41. The Clean Growth Strategy provided for a new UK ETS which would be at least as ambitious as the existing EU ETS and provide a smooth transition for the relevant sectors (p44). The Clean Growth Strategy also said (p45):

> "we remain firmly committed to carbon pricing as an emissions reduction tool whilst ensuring energy and trade intensive businesses are appropriately protected from any detrimental impacts on competitiveness".

42. The UK ETS was only one element of the Clean Growth Strategy. Whilst carbon pricing via a UK ETS is an important part of tackling climate change, it is only one of a range of actions being planned or taken to tackle climate change.

43. The UK ETS has been established to ensure that there is a fully functioning UK emissions trading system from January 2021, which gives industry certainty and continues to deliver significant emission reductions in line with current carbon budgets, bearing in mind also the unprecedented covid-19 pandemic and associated economic emergencies (the full and long-term impact of which on traded emissions cannot be assessed). The scheme was designed in order to deliver a UK ETS which could be

operational immediately following the end of the transition period on 31 December 2020, ensuring no carbon pricing gap emerged when the UK ceased to participate in the EU ETS and a smooth transition. The UK ETS is a UK replacement for the EU ETS, to stimulate emissions reduction from large UK emitters within the energy-intensive industry, power generation and aviation sectors currently participating in the EU ETS.

44. The objective of the UK ETS, as set out in 'The Future of UK Carbon Pricing Impact Assessment' dated June 2020 ("the Impact Assessment"), is to "incentivise cost-effective emissions reductions for sectors currently in scope of the EU ETS, while balancing this ambition with the competitiveness of UK industry" [CB/39/423]. The Impact Assessment made clear that [CB/39/440, para 66]:

> "The key aim and benefit of the policy is the reduction of GHG emissions. This is achieved by setting a cap on emissions, with a trajectory that decreases the amount of permissible emissions over time. Emissions reductions are achieved by individual installations / operators for whom it is cost-effective to carry out abatement or reduce their output at the prevailing carbon price."

45. The UK ETS is both a new system and one which is much smaller than the existing EU ETS market, both in terms of the number of participants and the market size. There was and remains uncertainty about how the new UK ETS market will behave, especially initially. For the UK ETS to be effective in reducing emissions, the UK ETS system, including the market, needs to function effectively. The uncertainties around how the market would respond, particularly in the early years of the scheme, were considered when designing the initial UK ETS, including when setting the cap.

46. The UK ETS was designed taking into account a range of factors, not only the objective of addressing climate change. This included the need to maintain UK business competitiveness and to provide a smooth transition given the pressures that businesses face as a result of the UK's departure from the EU and covid-19. The design of an ETS, including the cap and trajectory for the cap, needs to set a credible pathway for emissions reductions across a number of business sectors. The pathway needs to be one which encourages emissions reductions at a rate which is technologically and

economically feasible and which does not result in the transfer by businesses of activities to other countries with less stringent emission constraints (known as carbon leakage).

47. In letters to the CCC dated 2 May 2019 and 4 March 2020 seeking its advice, the decision-makers set out the principles which govern the design of the UK ETS [CB/21/220, CB/33/340], including:

    (1) be an operational system which facilitates cost effective decarbonisation through trading of allowances;

    (2) be deliverable for operation from 1 January 2021;

    (3) meet the UK Government's commitment in the Clean Growth Strategy that "our future approach is at least as ambitious as the current scheme and provides a smooth transition for the relevant sectors";

    (4) maintain industrial competitiveness whilst supporting delivery of the UK's and devolved administrations' domestic and international climate change commitments and targets;

    (5) be capable of being linked to the EU ETS.

48. In the May 2019 consultation document, it was stated that, in terms of sectors and activities covered, it was proposed that the scope of the UK ETS should align with the EU ETS [CB/22/252, para 6]. It was said that this would deliver continuity [CB/22/252, para 7]. If municipal waste incinerators were included in the UK ETS, the scope of the UK ETS would not align with the EU ETS.

49. There is, however, a separate commitment to consider the option of expanding the future scope of the UK ETS to the most appropriate additional sectors in the first UK ETS review, to be conducted from 2023, to enable implementation of any potential changes to scope by no later than 2026 [CB/38/366, para 51].

50. It was announced on 14 December 2020 that the Defendants would be proceeding with a standalone UK ETS, not linked to the EU ETS. The design of the UK ETS, including the initial cap, is explained in more detail in the witness statement of Mr Charlie Lewis of BEIS provided with these detailed grounds.

The level of the initial cap in the design of the UK ETS

51. The overall reduction in carbon emissions in an ETS is established by means of setting a limit on the level of available emission allowances (the cap) and the rate by which those allowances are reduced over time (the trajectory). The initial cap for the UK ETS has been set 5% lower compared to the notional cap the UK would have had if it had remained in the EU ETS for Phase IV (ie 2021-2030). This starting point cap demonstrates clear climate ambition from the start of the UK ETS, whilst also taking into account the risks associated with transition from the EU ETS, and so provides a balance between a tightening of the cap on emissions and stability and competitiveness for UK business [CB/37/353].

52. Under the UK ETS as it currently stands, the initial cap will be reduced annually so that it will remain 5% below where the UK's notional share of the Phase IV EU ETS cap would have been expected to be, year-on-year. The UK ETS is designed to go further and faster than the EU ETS. The legislative framework of the EU ETS for its next trading period (Phase IV) was revised in early 2018 to enable it to achieve the EU's 2030 emission reduction targets and as part of the EU's contribution to the Paris Agreement.

53. The May 2019 consultation document explained that ensuring a smooth transition from the EU ETS to the UK ETS could mean setting a trajectory so that the effects of a tighter cap materialise over the course of a phase of the UK ETS rather than at the beginning [CB/22/254, para 17]. This does not amount to deferring reductions. It is an element of the range of judgements which go into designing a UK ETS to ensure that it is effective in practice and viable in the long-term.

54. As stated in the consultation document [CB/22/231, 253], Annex A to that document considered the potential impacts to UK businesses and society of different levels of ambition in a UK ETS. Annex A explained that it was the allowance prices that resulted from trading between market participants which created the incentive to reduce emissions [AB/4/85, para 5]. It said:

> "installations / operators whose cost of abatement is lower than the purchase price of allowances are incentivised to abate (and can benefit by selling any surplus allowances to the market) while installations / operators whose cost of abatement is higher than the prevailing allowance price can buy allowances on the market to meet their compliance obligations. In this way, the ETS ensures emissions reductions occur when and where it is most cost-effective."

55. The consultation document itself had explained that the trading of allowances provides the flexibility to ensure emissions are reduced where it costs least to do so [CB/22/251, para 3].

56. Annex A explained that the UK represented only around 10% of EU emissions and that there was an issue as to whether the UK market would be sufficiently large to be effective as a standalone system. It said that the conclusion had been reached that it would be, provided that the UK ETS was designed appropriately [AB/4/85, para 7]. It went on to consider the issues which affected whether a standalone UK ETS would be effective, including the need for a sufficient volume of trading for the system to be effective, and recognising that market power would be more concentrated, with few individual participants.

57. Annex A reported the proposals for a standalone UK ETS which would be effective, recognising that it would have a market of a different size and dynamics from the EU ETS and a linked UK ETS [AB/4/91, para 44]. It noted the question of where the level of the cap should be set in a standalone UK ETS to meet the policy objectives "in the context of a smaller market" [AB/4/92, para 46].

58. Annex A explained the approach which was ultimately adopted of setting a cap which was tighter than the UK's share of the EU ETS Phase IV cap, which was the counter-

factual situation. It explained the implications of setting a tighter cap [AB/4/92, para 51] as follows:

> "the tighter the cap (all else constant) the greater the scarcity of allowances in the ETS and the higher the resulting carbon price. Very high carbon prices may impose significantly higher carbon costs to UK participants (who continue to purchase allowances rather than invest in abatement) compared to the counterfactual and may impact their competitiveness in the primary markets in which they participate (described in more detail later in this annex)."

59. It went on to say [AB/4/92, para 52]:

> "The extent to which such an outcome may materialise depends on a number of factors such as wider economic conditions, other policies in effect, technological developments and strategic market behaviour by system participants (e.g. banking and borrowing of allowances)."

60. The Claimant's argument that the existence of some 'headroom' in an ETS cap above projected 'business as usual' emissions (ie the level of expected emissions in the absence of the carbon pricing policy) reduces the short to medium term effectiveness of an ETS is wrong. Efforts to reduce greenhouse gas emissions within an ETS are driven by the participants' expectations of future tightening of the cap. The design of the UK ETS initial cap already demonstrates ambition to reduce emissions from the start of the new scheme. The cap is only one factor which drives abatement in an ETS, with other factors, such as participants' expectations of the direction of changes in allowance prices, also driving abatement.

61. The cap is reduced over time to meet long-term emissions reduction targets and this shapes UK ETS participants' expectations. The cap trajectory creates a clear long-term signal about future increases in the carbon price, which can provide the certainty for participants to make short and long-term decisions on investment that would be necessary to cut their emissions.[11] The EU ETS has a surplus of allowances which is proportionately much larger than the UK ETS initial headroom.

[11] In fact, merely publicly stating plans to change the trajectory can provide a similar signal.

62. An ETS is a market and in order to function properly there needs to be liquidity in the market. The UK ETS aims to incentivise cost-effective emissions reductions by pricing carbon. This provides emitters with a choice: reduce their emissions where it is economic to do so, or pay for them where it is not. Paying for emissions requires a viable market with sufficient liquidity.

63. The allowance prices that result from trading between market participants creates the incentive to reduce emissions [AB/4/85, para 5]: installations and aircraft operators whose cost of abatement is lower than the purchase price of allowances are incentivised to abate (and can benefit by selling any surplus allowances to the market), while those whose cost of abatement is higher than the prevailing allowance price can buy allowances on the market to meet their compliance obligations. In this way, the ETS ensures emissions reductions occur when and where it is most cost-effective.[12]

64. A liquid and stable market is required for an effective ETS in order to incentivise businesses to reduce emissions. It enables participants to predict future rises in allowance prices so that they can set long-term investment plans to abate emissions, being able to judge when it would be cost-effective to do so. A new ETS is especially susceptible to spikes and volatility in allowance prices at the start, which would risk undermining the effectiveness of the UK ETS. Some headroom is crucial to avoid this, as the CCC recognises [CB/36/352].

65. The cap is reduced over time to meet long-term emissions reduction targets. If the initial cap was set at the level of existing or 'business as usual' emissions this would considerably reduce liquidity on its launch and therefore increase the risk that the new market would not have sufficient liquidity to function effectively. This could in turn lead to disproportionately high carbon prices in the UK ETS, especially at the commencement of the new market under the UK ETS, causing carbon leakage as businesses relocate abroad to places where carbon emission costs are lower [CB/38/363-363, para 27]. This could increase total emissions, contradicting the collective objective of the Paris Agreement.

[12] This is explained in paragraph 5 of Annex A to the May 2019 consultation document [AB/4/85].

66. This was reflected in the Response, which said (para 63): "in the interim, particularly given the current uncertainties, we believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the UK ETS" [CB/38/368].

67. Prior to the implementation of a new, standalone UK ETS, the UK participants were part of the EU ETS. That is a large market with which they were familiar and in which they had established hedging positions. Overnight on 1 January 2021 they moved to a new UK ETS. It was a policy position, but also common sense, that there must be a smooth transition for participants from the EU ETS to the new UK ETS [CB/33/340; CB/22/254, paras 15-17]. There was a move to a position of significant uncertainty with the new UK ETS [CB/39/451, para 126]. It would be a new and much smaller market with different dynamics [CB/39/439, para 64; AB/4/92]. The new market would be more uncertain [CB/39/437, para 54]. Participants in the new market would need not only to acquire allowances to cover their current needs but also build-up their hedging positions afresh [CB/39/437, para 55]. There would be a smaller volume of trading, with fewer participants, each having a larger share of the market [AB/4/86]. The change to the new market would happen during the covid-19 pandemic and at the end of the EU exit transition period.

68. The new, standalone UK ETS market has to function effectively if it is going to be effective in limiting greenhouse gas emissions. High allowance prices in the market could lead to carbon leakage. This would defeat the purpose of the UK ETS in limiting greenhouse gas emissions. The Defendants took the view that it was appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the UK ETS [CB/38/368, para 63; CB/39/429, para 24].

69. To lead to the limiting of activities which cause greenhouse gas emissions, there needs to be a signal to the participants of the UK ETS that they have to act. This was given by setting the cap at 5% below the level which would have applied had the UK continued to participate in the EU ETS and by making clear that the cap would be tightened in the foreseeable future. This would make clear to participants that they have to invest in addressing emissions if they can, or prepare to pay more for their emissions.

To be effective, participants must be able to invest in addressing emissions. It defeats the purpose of the ETS otherwise.

70. The position was summarised in the 4 March 2020 letter to the CCC which said [CB/33/339]:

> "Having analysed a number of scenarios, we intend to set the cap on the total number of allowances at 95% of the UK's expected notional share of the EU ETS Phase IV cap. The cap will then be reduced annually, in line with the EU ETS Phase IV trajectory1. The rationale for setting the cap at this level is that we believe it provides the right balance between climate ambition and business competitiveness in the early years of a UK ETS by signalling our ambition in cutting carbon emissions, whilst minimising the risk of high and volatile prices which could destabilise a new market which could occur if the cap is tightened beyond 95%. We will make it clear in the government response to the consultation that this will be the cap for the initial years of the system, and make a commitment to reconsult on the level of the cap in 2021 following receipt of your advice later this year on Carbon Budget 6 and a net zero consistent cap."

71. This made clear that the proposal to set the initial cap at 5% below the UK's share of the EU ETS in Phase IV ensured that the 'climate ambition' did not go so far that it undermined business competitiveness (with its risk of carbon leakage) and addressed the risk of high and volatile prices which could destabilise a new market.

72. The final decision was explained in the 1 June 2020 letter to the CCC which said [CB/37/353-354]:

> "it is the joint governments' view that for the launch of the UK ETS, it is important to put in place a policy which provides a pragmatic and feasible approach to meeting net zero through the ETS. Our approach, as set out below, provides the necessary flexibility to raise ambition in the near future and supports the traded sector to decarbonise, while appropriately mitigating the risks of carbon leakage.
>
> Ensuring we have a fully functioning UK market from January 2021, which gives industry certainty and continues to deliver significant emission reductions in line with current carbon budgets, is key. This task is further complicated by an unprecedented pandemic and associated economic emergencies, whose full, long term impact on traded emissions cannot be assessed at present, making it difficult to accurately adjust the cap or set an auction reserve price (ARP) in advance.

> As such, we are proposing a two-stage approach. The first stage is intended to be purely temporary in nature. We will continue to demonstrate clear climate ambition by cutting the cap by 5% compared to the notional cap the UK would have had if we remained in the EU ETS. Our analysis suggests that this starting point cap, combined with a transitional ARP of £15 and temporary market stability mechanisms, would also minimise the risks associated with transition from the EU ETS. This provides a balance between a tightening of the cap on emissions and stability and competitiveness for business. ...
>
> We hope the above adequately illustrates the rationale for our policy position as demonstrating clear environmental ambition and commitment while maintaining protections for businesses' competitiveness in a hugely uncertain economic context."

73. Following receipt of the CCC's advice on 20 March 2020, consideration had been given to further tightening the initial cap for the UK ETS but it was judged that this would go too far [CB/38/368, paras 61-63]. The initial cap level was set to seek to provide appropriate mitigation of extreme high or low price risks in the initial years of the UK ETS market [CB/39/429, para 24].

74. The initial design of the UK ETS is intended to be purely temporary in nature [CB/37/353]. This is because the UK ETS had to be operational for 1 January 2021 but the advice from the CCC on the net zero trajectory was not due until late 2020. The Defendants decided to send an immediate signal by ensuring the initial cap was 5% below the level which would have applied with the EU ETS and by committing to revise the cap and trajectory as soon as possible once the CCC's advice was produced.

75. The UK ETS has been designed to provide the necessary flexibility to raise the requirements of the UK ETS in the near future. It was in particular designed bearing in mind that the CCC was due to produce its advice on the sixth carbon budget, for the period 2033-2037, in late 2020. The Response and the 1 June 2020 letter to the CCC make it clear that there is a commitment to review the approach adopted in the initial design of the UK ETS in light of this advice from the CCC.

76. There will be a consultation on the level of and appropriate trajectory for the cap for the remainder of Phase 1 of the UK ETS within nine months of the CCC's advice on the sixth carbon budget being published. This advice was provided on 9 December

2020. The CCC set out a proposed UK ETS cap, in line with its Balanced Net Zero Pathway, with proposed cap figures for each of the years from 2023 to 2030. This advice will inform the evolution of the UK ETS after its initial launch. Any resultant changes will be implemented by January 2023 if possible, and certainly no later than January 2024.

77. The position with the cap is summarised in the explanatory memorandum to the Greenhouse Gas Emissions Trading Scheme Order 2020 as follows [AB/5/105]:

> "The cap on allowances that are created under the UK ETS each year will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to roughly 156 million allowances in 2021. The initial cap will be reduced annually by a little over 4.2 million allowances, meaning that the UK ETS cap will remain 5% below where we would have expected the UK's notional share of the Phase IV EU ETS cap to be year on year. These cap figures include the aviation scope. As set out in the Government Response, it is the Government's intention that this is a temporary cap. The Government will consult on an appropriate trajectory for the UK ETS cap for the remainder of the first phase within nine months of the Committee on Climate Change publishing its advice on the Sixth Carbon Budget. We aim to appropriately align the cap with a Net Zero trajectory by January 2023, and no later than January 2024, while aiming to give the industry at least one year's notice to provide the market with appropriate forewarning."

78. For the reasons given above, it is factually wrong, and misunderstands the UK ETS, for the Claimant to contend that setting the cap above 'business as usual' emissions: defers cuts necessary to meet the 2050 net zero target until closer to 2050; allows greenhouse gas emissions to increase post-2020; and, means the UK ETS will not be able to achieve substantial or any reductions in emissions until after 2029.

Municipal waste incinerators

79. The reasons why municipal waste incinerators were not included in the UK ETS are set out at paragraph 52 of the Response [CB/38/366]. This was unrelated to the view taken by the Defendants on the level of the initial cap in the UK ETS.

80. Although not relevant to either ground for which permission was granted, the Claimant contends that, unless municipal waste incinerators are included in the UK ETS, there is no mechanism to incentivise the reduction of emissions from such incinerators. This is wrong. Waste management policy and regulation interventions to reduce the amount of municipal waste going for incineration are a means of encouraging the limitation of the incineration of municipal waste and thereby reducing emissions from municipal waste incinerators.

81. It is notable that, in its June 2020 progress report, the CCC recommended increased re-use and recycling to address emissions from waste incineration [CB/40/468, 470]. The CCC says that increased recycling will be "key" to "limiting fossil emissions from energy from waste plants" and:

> "Achieving significant emission reductions in the waste sector requires a step-change towards a circular economy, moving away from landfill and incineration (and the associated methane and fossil CO_2 emissions), and towards a reduction in waste arisings and collection of separated valuable resources for re-use and recycling".

82. In England, the December 2018 'Resources and Waste Strategy for England' seeks to maximise the amount of waste sent to recycling instead of incineration (or landfill) and reduce the amount of waste (including municipal waste) that is produced in the first place. Legislation is coming forward in the Environment Bill to provide the legislative framework needed to deliver on many of the commitments in this strategy (eg separate collection of certain waste streams, including plastic, in England). As another example, from October 2020, Regulation 21(5) of the Waste (Circular Economy) (Amendment) Regulations 2020 amends the Environmental Permitting (England and Wales) Regulations 2016 to impose a condition on all environmental permits for waste incineration plants which prevents separately-collected plastic waste from being incinerated.

83. There are other similar strategies in the devolved administrations, eg the Welsh Government's 'Towards Zero Waste' and 'Beyond Recycling' strategies and the Scottish Government's circular economy strategy 'Making Things Last'. The Waste (Wales) Measure 2010 sets increasingly challenging statutory recycling targets for local

authorities with the aim of at least 70% of municipal waste being recycled or composted/anaerobically digested by 2025, thus reducing the quantity of material being incinerated or landfilled. In Northern Ireland, the Department of Agriculture, Environment & Rural Affairs is currently developing the 'Environment Strategy for Northern Ireland'. Scotland already restricts the incineration of materials for recycling and the 'Circular Economy Package policy statement' published by the four administrations in July 2020 seeks to increase recycling of municipal waste and restrict the waste materials which can be incinerated.

84. The environmental requirements placed on municipal waste incinerators under the environmental permitting regime in England and Wales do seek the reduction of greenhouse gas emissions from municipal waste incinerators. Under this regime, the Environment Agency ensures that the global warming potential of the incinerator is minimised by the use of best available techniques to maximise the energy efficiency of the incinerator and minimise nitrous oxide emissions from de-NOx systems.

85. There are also other mechanisms available to reduce greenhouse gas emissions from municipal waste incinerators, such as a potential incineration tax. The potential for an incineration tax was set out in the October 2018 Budget, which said at paragraph 3.58:

> "The government recognises the important role incineration currently plays in waste management in the UK, and expects this to continue. However, in the long term the government wants to maximise the amount of waste sent to recycling instead of incineration and landfill. Should wider policies not deliver the government's waste ambitions in the future, it will consider the introduction of a tax on the incineration of waste, in conjunction with landfill tax, taking account of the possible impacts on local authorities."

86. The Claimant also contends that incineration of municipal waste leads to the highest level of carbon emissions of all means of dealing with such waste, including landfill. That is wrong. Obtaining energy from the waste via municipal waste incinerators is better than landfill in terms of environmental impacts, including greenhouse gas emissions. For example, landfilling biodegradable waste leads to the release of methane, which is a far more potent greenhouse gas than the CO_2 released by incineration.

87. It is factually wrong for the Claimant to contend that: municipal waste incinerators lead to the release of greater greenhouse gas emissions than all other forms of waste disposal; there is no mechanism to incentivise the reduction of greenhouse gas emissions from municipal waste incinerators; and that nothing is being done to address greenhouse gas emissions from municipal waste incinerators.

88. The position with municipal waste incinerators is explained in more detail in the witness statement of Mr Christopher Preston of Defra provided with these detailed grounds.

Ground 1: failure to consider the UK's Paris Agreement commitments

89. The Claimant contends that, in designing the UK ETS, the only aspect of climate action to which regard was had was meeting the 2050 net zero target set out in the 2008 Act. That is not the case. The Response refers to action on climate change generally and not only in the context of the 2050 net zero target (see eg paras 12, 14, 25, 26 and 58) [CB/38/361-362, 368]. The 1 June 2020 letter to the CCC also makes it clear that regard was had to tackling climate change generally and not only in relation to the 2050 net zero target [CB/37/353-354]. The explanatory memorandum to the Greenhouse Gas Emissions Trading Scheme Order 2020 says that the UK ETS "is an important part of the UK's efforts to achieve its net zero target and tackle climate change" [AB/5/104].

90. The Claimant originally contended in her Statement of Facts and Grounds that no consideration was given to the Paris Agreement. That is also not the case. It is apparent that the Paris Agreement itself was taken into account in designing the UK ETS. The Paris Agreement is repeatedly referenced in the consultation document [CB/22/234, 236, 254, 266-267, 270, 273, 288], the Response [CB/38/360, 367, 382, 391-392, 400, 406] and the 1 June 2020 letter to the CCC [CB/37/354].

91. The extent to which the Paris Agreement was taken into account in the design of the UK ETS is reflected by the fact that the reviews under the UK ETS were designed to align with the Paris Agreement Global Stocktakes. As was stated in the Response, aligning the review points with the Paris Agreement Global Stocktake dates ensures

that a UK ETS remains aligned with the UK's global ambitions on carbon [CB/38/382, para 151].

92. Moreover, as the Paris Agreement led directly to the 2050 net zero commitment in the 2008 Act, it is artificial to suggest that someone can consider the 2008 Act's net zero target without also having in mind the Paris Agreement that led directly to it and is the primary context for it. The 2050 net zero commitment arises from Article 4(1) of the Paris Agreement. The two cannot be divorced from each other. They are inextricably linked. They are so closely connected that it is unsustainable to contend that someone can address their mind to one without also having the other in mind.

93. Ultimately, in her skeleton argument for the permission hearing, the Claimant conceded that "the Defendants did consider some aspects of the Paris Agreement: specifically, the procedural deadlines for filing returns for the Global Stocktake, and the long-term target of achieving net-zero emissions" (para 9).

94. The Claimant also contends that the decision-makers failed to consider reducing, or further reducing, emissions in the short to medium term. This again is not correct. Indeed, the design of the UK ETS for the initial period of 2021-2025 was primarily about the reduction of emissions in this timeframe.

95. Consideration was given to setting the cap and the trajectory in the UK ETS to seek further reductions in the short to medium term. This was specifically and expressly considered in the Response at paragraphs 58-63 [CB/38/368-369]. The 1 June 2020 letter to the CCC also makes it clear that there was consideration of tightening the cap on emissions further [CB/37/353-354]. Consideration was given to how far the initial design of the UK ETS should go in the short to medium term.

96. The substantive issue – whether the cap in the initial UK ETS design should be tighter for the short to medium term, including the initial period of 2021-2025 – was expressly considered in the Response and the 1 June 2020 letter to the CCC. The Defendants did what the Claimant says was required, that is considering whether the emissions reductions under the UK ETS should go further, faster.

97. The core allegation in Ground 1 is a failure to have regard to the so-called "short and medium-term aspects of the Paris Agreement". At the permission hearing, the Claimant's argument focussed on one sentence in Article 4(1) of the Paris Agreement: "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible". The Claimant argued in essence:

(1) the aim in Article 4(1) to reach global peaking of greenhouse gas emissions as soon as possible is a separate and distinct commitment in the Paris Agreement which is independent from the longer-term aspects of the Paris Agreement;

(2) this places a requirement on the UK to act urgently and in the short-term when seeking to address climate change in order to contribute to global peaking as soon as possible;

(3) this aim in the Paris Agreement was a mandatory material consideration that had to be considered by the Defendants when designing the UK ETS;

(4) there is no evidence the Defendants considered this aim when designing the UK ETS.

98. Each of these steps in the argument are addressed in turn below.

99. First, the Claimant's contention that the aim to reach global peaking of greenhouse gas emissions as soon as possible is a separate and distinct commitment in the Paris Agreement, which is independent from the longer-term aspects of the Paris Agreement, involves artificially dividing the longer and shorter-term elements of the Paris Agreement. Article 4(1) of the Paris Agreement is clear that one is an aspect of the other:

> "In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible … and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century" (emphasis added).

100. In the Paris Agreement, reaching "global peaking of greenhouse gas emissions as soon as possible" is inextricably linked to achieving net zero emissions in the second half of this century and the long-term temperature goal in Article 2.[13] The aim of reaching global peaking of greenhouse gas emissions as soon as possible is so as to achieve net zero emissions in the second half of this century. It is part and parcel of the journey to net zero: a step on the pathway to 2050 net zero. It is not a separate and distinct commitment in the Paris Agreement, independent from the longer-term aspects of the Paris Agreement.

101. The Claimant can only argue that "short and medium-term aspects of the Paris Agreement" were not taken into account by treating them as entirely separate, freestanding elements of the Paris Agreement. Seeking to divorce the two elements from each other is wholly artificial. The short to medium-term aspects are part and parcel of the longer-term aspects.

102. To the extent that there is a dispute between the parties on the interpretation of Article 4(1), this is not an issue on which the Court ought to adjudicate. It is not appropriate for a court to rule on the disputed meaning of an international treaty which has not been implemented into domestic law. In *R (Corner House) v Director of the Serious Fraud Office* [2009] 1 AC 756,[14] Lord Brown (with whom Lord Rodger agreed) said at paragraphs 65-66 that it would be "remarkable" for a national court to be required to assume the role of determining the meaning of an international instrument, particularly where the contracting parties have chosen not to provide for the resolution of disputed questions of construction by an international court but rather to create a working group through whose continuing processes it is hoped a consensus view will emerge.

103. The Paris Agreement does not provide for any mechanism of enforcement by which the provisions are construed and applied by a court. On the contrary, Articles 14 and 15 provide for the facilitation of implementation by a non-adversarial and non-punitive

[13] See also how the Supreme Court summarised Art 4(1) in *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52 at para 70.
[14] See also *R (ICO Satellite Ltd) v Office of Communications* [2010] EWHC 2010 (Admin) at paras 88-95.

committee, and for global stock-takes at 5-year intervals. It would be wrong for all the reasons given in *Corner House* for the Paris Agreement to be interpreted and applied in determining the lawfulness of a decision as if it were a domestic statute.

104. Secondly, this aim in Article 4(1) does not place any requirement on the UK as to how urgently it should act when seeking to address climate change through domestic policy or legislation. The case law summarised above makes clear that there is no such obligation. Moreover, the case law also makes clear that there is no commitment for the purposes of domestic law to perform the obligations in the Paris Agreement. They are not part of UK law and they give rise to no legal obligations in domestic law.

105. Thirdly, the aim to reach global peaking of greenhouse gas emissions as soon as possible in Article 4(1) was not itself a mandatory consideration to which the Defendants were obliged by law to have regard when designing the UK ETS. Whilst it would be lawful to have regard to this part of Article 4(1), as an unincorporated treaty provision, it would not be unlawful if regard was not had to it.[15] If this aim in Article 4(1) had been left out of account, as the Claimant contends, that would not amount to an error of law.

106. There is no requirement, express or implied, in the 2008 Act to have regard to this specific aim of the Paris Agreement when establishing an ETS. It would only qualify as a mandatory consideration on the basis that it was so obviously material to the decision that anything short of direct consideration of it would not be in accordance with the intention of the Act.[16] This is to be tested using the *Wednesbury* irrationality test.[17] Where a decision-maker does not turn his mind to a particular consideration, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness.[18]

107. The phrase in Article 4(1) is: "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible". It would not have been irrational to leave this aim in

[15] *R (Friends of the Earth) v Heathrow Airport* [2020] UKSC 52 at para 118.
[16] *Heathrow Airport* at paras 117-119.
[17] *Heathrow Airport* at paras 125 and 152.
[18] *Heathrow Airport* at para 120.

Article 4(1) out of account (if that is what had happened). The aim is a collective aim of all parties to the Paris Agreement relating to global peaking. The UK's greenhouse gas emissions peaked in the early 1990s.

108. Moreover, the UK had committed to reach net zero by 2050 and was one of the few nations globally to do so. This commitment went further than the UK's then NDC. The CCC had judged in its May 2019 net zero report that this would fully meet the UK's commitments under the Paris Agreement and represented the highest possible ambition for the UK. To the extent that this aim in Article 4(1) added anything to the 2050 net zero commitment, it would mean going beyond this highest possible ambition. It would mean the UK going further than had been judged necessary and indeed possible in order to make a greater contribution globally.

109. Taking this aim into account in the way suggested by the Claimant would also mean setting a tighter initial cap for the UK ETS which would not, in any event, tackle global GHG emissions as it would encourage 'carbon leakage', ie the transfer by businesses of activities to other countries with less stringent emission constraints. It would also risk undermining the effective functioning of the UK ETS in the initial period.

110. The task was to set a temporary, initial cap for the UK ETS in order to get a functioning ETS up and running. It was acknowledged that the initial cap was not set to achieve a net zero trajectory and there was a simultaneous commitment to revise the cap to meet a net zero trajectory once advice on this had been received from the CCC. The UK ETS delivered for January 2021 was not supposed to be the final product but only an interim policy. Setting an initial cap and then revising it in this way was intended both to avoid adverse impacts on the effectiveness of the UK ETS at its commencement and to allow the cap and trajectory to be set for net zero properly in light of the CCC's advice on the sixth carbon budget.

111. In these circumstances it would not be irrational to leave out of account the specific aim in Article 4(1) to reach global peaking of greenhouse gas emissions as soon as possible. The decision challenged would not be unlawful if that had been left out of account.

112. Fourthly, the contention that the Defendants did not take into consideration this phrase in Article 4(1) is untenable where the Claimant accepts that the Defendants had regard to the Paris Agreement generally and did consider "the longer-term target of achieving net zero emissions" in the Paris Agreement.[19] The Claimant's position involves submitting that the Defendants left out of account part of one sentence[20] in Article 4(1) of the Paris Agreement, whilst accepting they took into account a later part of the same sentence.[21]

113. Further, the Claimant accepts that the Defendants did consider the 'global stocktake' aspect of the Paris Agreement. This is defined in Article 14(1) as a process to:

> "periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals (referred to as the 'global stocktake')".

114. The global stocktake is about progress towards the long-term goals of the Paris Agreement. This necessarily relates to the period before the long-term, ie progress in the short to medium-term. The Claimant's position involves submitting that the Defendants took into account the global stocktake exercise but not the fact that the exercise is intended to consider progress in the short to medium-term towards the long-term goals.

115. Further, there was no legal duty on the decision-makers to refer in the Response to all the particular provisions of the Paris Agreement. The fact that the Response did not expressly refer to specific provisions of the Paris Agreement – such as Article 2(1) or a part of Article 4(1) – does not mean that it should be inferred that they were left out of account. It is not credible to suggest that these specific provisions were excluded from consideration by the Defendants when regard was had to the Paris Agreement more generally. It cannot be inferred that parts of the Paris Agreement were left out of account simply because they were not expressly mentioned in the Response, especially when the very purpose of part of the Response was to consider whether the initial cap

[19] See para 9 of the Claimant's skeleton argument for the oral permission hearing dated 17 November 2020.
[20] "Parties aim to reach global peaking of greenhouse gas emissions as soon as possible".
[21] "so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century".

should be tighter at the start of the UK ETS.[22] In cases like this, there is only scope for drawing an inference that a matter not expressly mentioned has been left out of account when all other known facts and circumstances appear to point overwhelmingly to a different decision.[23]

116. A review has been undertaken to seek to identify if there were any express references to this specific aim within Article 4(1) in the documents relating to the design of the UK ETS. No express reference to this specific aim has been identified. Nonetheless, this is not enough to lead to a conclusion that no regard was had to this specific aim. The civil servants involved in the design of the UK ETS were well-aware of and familiar with the Paris Agreement and its provisions. The fact that there is no written record referring to this aim does not mean that it was disregarded during the design of the UK ETS. They can be taken to have had regard to the relevant provisions of the Paris Agreement without having to provide contemporaneous documentation demonstrating this. The witness statement of Mr Lewis explains that the officials involved in the design of the UK ETS were aware of the provisions of Article 4(1) when developing proposals for the initial cap and trajectory for the UK ETS. The decision-making Secretary of State (and Minister Kwarteng) were also well-aware of and familiar with the Paris Agreement and its provisions.

117. In relation to the specific contentions made in paragraphs 60(a) and 60(c) of the claim, it has been explained above that these are misconceived, as well as being merits points.

(1) It is not the case that incineration gives rise to greater greenhouse gas emissions than all other forms of waste disposal. It is also wrong to contend that incineration of municipal waste is inconsistent with the goals of the Paris Agreement. The goals of the Paris Agreement must be met at an economy-wide level and, given the scale and complexity of matters involved, no one single decision could be said to be inconsistent with the Paris Agreement. In any event, emissions from municipal waste incinerators are capable of being controlled as a consequence of waste management policy and regulation. The

[22] See, for an example from a different field, *R (McDonald) v RBKC* [2011] UKSC 33 at para 24.
[23] See *Bolton MDC v SSE* [2017] PTSR 1091 at 1096C.

fact that municipal waste incinerators are not included within the UK ETS (as is the case with the EU ETS) does not obviate the potential to reduce their emissions. Moreover, the decision not to bring municipal waste incinerators within the scope of the new UK ETS was not as a result of the level of climate ambition which was adopted in the Response for the UK ETS [CB/38/366, paras 50-52].

(2) The level of the initial cap in the UK ETS does not involve deferring the reduction of greenhouse gas emissions. It was set to ensure that the UK ETS would be workable and would incentivise cost-effective emissions reductions. The initial cap has been set to ensure that the UK ETS – as a new ETS and a much smaller one than the EU ETS – functions effectively. If the UK ETS does not function effectively it will not be effective in reducing emissions. The initial cap was set having regard to the factors which bear upon achieving this overall objective.

118. The Claimant's contention that there has been a "failure to account for" particular provisions of the Paris Agreement goes beyond a contention that matters were left out of consideration and into a disagreement with judgements on the underlying merits of the considerations, especially the policy decision on the level of the cap in the initial UK ETS design. Such a contention would not amount to an error of law.

Ground 4: s44 power exercised for improper purposes

119. Section 44(1) of the 2008 Act provides for trading schemes relating to greenhouse gas emissions. Section 44(2) provides that a trading scheme for the purposes of s44(1) can be a scheme which operates by encouraging the limitation of activities that consist of, or cause or contribute to, the emission of greenhouse gas. The purpose of an ETS pursuant to s44(2)(a) is limiting greenhouse gas emissions, as set out in the 2008 Act's long title. The statute is no more specific or prescriptive than that. It does not require emissions to be limited to any specific extent, let alone the maximum possible extent. It does not require the limitation of activities to cause a reduction in greenhouse gas

emissions when compared to the pre-existing level of emissions. It is enough for s44 purposes if the scheme leads to limiting greenhouse gas emissions.

120. The Claimant contends that the power in s44 has been exercised for an improper purpose because, it is alleged, the decision to set the cap on the emissions allowable under the UK ETS above the projected 'business as usual' emissions for 2021 was in order to alleviate "pressures that business currently face as a result of our departure from the EU".

121. This ground is based on a misreading of the Response. It does not say that the initial level of the cap was set above 'business as usual' emissions with the purpose of alleviating pressures on businesses arising from EU exit. The Claimant's argument depends impermissibly on taking one part of one sentence of the Response and reading it in isolation.

122. The Response said that "the key considerations in setting the level of the cap are climate ambition balanced with the costs to business" (para 58) and that "initially tightening the cap by 5% provides the appropriate balance between the UK's climate ambition in the context of the UK's net zero commitment and any risks of disproportionate costs to businesses which could arise in the early years of a UK ETS" (para 60) [CB/38/368].

123. Paragraph 59 needs to be read as a whole rather than just focussing on the reference to EU exit. It said [CB/38/368]:

> "The UK is committed by law to reducing emissions to net zero by 2050, and the UK ETS will play a key role in decarbonising the power sector, EIIs and aviation. However, it is important that in meeting this commitment the UK Government considers the traded sector's competitiveness, and other pressures that businesses currently face as a result of our departure from the EU. In addition, the UK ETS will be a new emissions market, whereby any uncertainties around how the market will respond will need to be considered when setting the cap."

124. As noted in paragraph 61, regard was also had to "the uncertainties and risks posed by COVID-19" [CB/38/368]. It is clear that the "pressures that businesses currently face as a result of our departure from the EU" was one of a number of considerations taken

into account. Paragraph 60 of the Response makes clear that the judgement on the initial cap was formed "to balance these objectives".

125. When designing the elements of a UK ETS – including the initial cap – for the purpose of limiting greenhouse gas emissions or encouraging activities that reduce such emissions or remove greenhouse gas from the atmosphere, it was permissible to take such matters into account. Doing so did not mean that the power was exercised for "improper purposes".

126. It is apparent from this part of the Response, read as a whole, that it was neither the purpose nor the dominant purpose of the design of the UK ETS to alleviate EU exit-related pressures on businesses.

127. It cannot seriously be suggested that the context in which the UK ETS would be imposed upon businesses was legally irrelevant when deciding upon the appropriate design of the UK ETS. An ETS is intended to incentivise businesses to take action to reduce greenhouse gas emissions, which can only be achieved if businesses can afford to take such action. The focus of an ETS cannot be on driving down emissions regardless of the impacts on businesses.

128. It has been explained above that setting the initial cap above the level of 'business as usual' emissions (ie the level of expected emissions in the absence of the carbon pricing policy) was an aspect of ensuring a UK ETS which functioned effectively. This was wholly in accordance with the purpose of s44 and establishing an ETS which operates effectively to limit or encourage the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions. The initial level of the cap was set not above the level of 'business as usual' emissions to assist businesses, but rather to ensure that the UK ETS functioned effectively as an emissions trading system. Setting the cap at this level will facilitate, and not frustrate, the UK ETS in effectively limiting or encouraging the limitation of relevant activities.

129. In order for the UK ETS to be effective and avoid increasing global emissions, it is important to avoid 'carbon leakage', ie the transfer by businesses of activities to other

countries with less stringent emission constraints.[24] Consideration of the circumstances in which businesses operate is part of considering whether the UK ETS would undermine business competitiveness, which is in turn relevant to whether the UK ETS would be effective in reducing emissions – rather than just displacing them to another country. Considering business competitiveness has climate aims, to mitigate carbon leakage.

130. Overall, the position can be summarised as follows:

(1) an ETS is intended to incentivise businesses to take action to reduce greenhouse gas emissions, which can only be achieved if businesses can afford to take such action and do not transfer activities to other countries with less stringent emission constraints (carbon leakage);

(2) it is therefore appropriate, when setting the initial cap, to take into account the costs to businesses which could arise in the early years of the new UK ETS, and the other pressures that businesses face, to ensure the UK ETS would be effective in reducing emissions;

(3) the initial cap was set at the level it was to ensure that the UK ETS functioned effectively as an emissions trading system and would therefore facilitate limiting or encouraging the limitation of relevant activities;

(4) the initial cap was set in line with the purpose of s44, namely to establish an ETS which operates effectively to limit or encourage the limitation of activities that consist of the emission of greenhouse gas or that cause or contribute, directly or indirectly, to such emissions.

131. The effective functioning of the UK ETS is absolutely necessary to ensure the scheme's climate change objectives are achieved. Achieving the reduction of greenhouse gas emissions through an ETS is not as simple or blunt an exercise as just setting a low cap. Setting the UK ETS cap simply to drive down UK emissions, regardless of the impacts

[24] Carbon leakage was raised in the letters to the CCC at CB/21/219-220 and CB/37/353.

of business, would be counter-productive. It would prevent the UK ETS market from functioning effectively, and encourage carbon leakage, and not make a contribution to reducing global greenhouse gas emissions. Considering the costs to business is not a negative in terms of tackling climate change. It is not something which must be regarded as compromising or reducing the ability of the UK ETS to tackle climate change. It is part and parcel of ensuring that the UK ETS is effective in actually tackling climate change in practice.

132. There is nothing in s44 which means that taking into account the costs to businesses to judge how far the scheme should go in encouraging the limitation of activities was exercising the power for an improper purpose. It was proper, when judging how far to go in setting the initial cap, to decide not to go as far as was possible in limiting greenhouse gas emissions due to the costs that would be caused for businesses. This is especially the case when setting the temporary, initial cap for a new UK ETS, which would be replaced within a few years. The approach of setting a temporary cap and then adjusting it following receipt of the CCC's advice on the sixth carbon budget was recommended by the CCC [CB/25/297, CB/36/351].

133. The weight to be given to different factors when judging where precisely to strike the balance in terms of the level of the initial cap of the UK ETS was a matter for the decision-makers to judge. There is no basis whatsoever for suggesting that the weight given to considerations relating to maintaining business competitiveness was *Wednesbury* irrational. This was "eminently a decision to be taken at a very high level by democratically elected representatives [and] … a decision with which the Court would be very slow to interfere".[25]

134. At the permission hearing, the Claimant relied on *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement* [1995] 1 WLR 386 to argue that the Defendants were only allowed to take into account costs to business if the UK ETS would achieve the statutory purpose. The Claimant went on to argue that setting the cap at the level of the initial cap, above 'business as usual' emissions, meant that there would be no downward pressure on greenhouse gas emissions and that the

[25] *Save Guana Cay Reef Association* [2009] UKPC 44 at para 45.

UK ETS would not lead to any abatement of emissions at all, so that the UK ETS was not pursuing the statutory purpose. This is wrong.

135. The Impact Assessment reports the modelling which was undertaken of the abatement of greenhouse gas emissions which the UK ETS would cause in its initial years, from January 2021 to December 2024. The estimated total level of abatement, even where there was an over-supply of allowances relative to demand,[26] was between 4 and 11 $MtCO_2e$ in greenhouse gas emissions in total from 2021 to 2024 [CB/39/438-439]. The modelling also concluded that there would be additional abatement under the UK ETS when compared to the counterfactual of remaining in the EU ETS [CB/39/438; CB/39/450, para 123].[27]

136. The evidence shows that the UK ETS, with the initial cap as designed, would in its initial years (2021 to 2024) create a minimum reduction of 4 $MtCO_2e$ in greenhouse gas emissions. The UK ETS will not just lead to *limiting* the emission of greenhouse gases – which would be enough to ensure it was within the statutory purpose – but will go further and lead to a *reduction* in the emission of greenhouse gases.

137. It is apparent that the UK ETS would operate to encourage the limitation of activities that consist of, or cause or contribute to, the emission of greenhouse gases. The UK ETS with its initial cap is within the statutory purpose. The power in s44 has been exercised for the purpose for which it was conferred.

Whether the outcome for the Claimant would have been substantially different

138. Section 31(2A) of the Senior Courts Act 1981 provides that the Court must refuse to grant relief on an application for judicial review if it appears to the court to be highly

[26] The low end of the range (4 $MtCO_2e$) arose where there was an over-supply of allowances relative to demand. The high end of the range (11 $MtCO_2e$) also arose where the cap was higher than 'business as usual' emissions but took into account the anticipated hedging behaviour driving increased demand for allowances and additional abatement effort.

[27] The BEIS carbon price models which were used in the scenario analysis and decision-making were explained in the Annexes to the Impact Assessment [CB/39/453-459].

likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

139. Although misguided, it is clear from the Claimant's witness statement that the outcome at which this challenge is aimed is municipal waste incinerators being within the scope of the UK ETS. It is highly likely that the outcome in this respect would not have been substantially different if the conduct complained of had not occurred.

140. It would have been incompatible with a fundamental objective of the UK ETS – that there must be a smooth transition for industry from the EU ETS to the UK ETS – to have included municipal waste incinerators within the scope of the UK ETS from the start of Phase 1. The proposals consulted upon were that the scope of the UK ETS in terms of sectors should align with the scope of the existing EU ETS, ie not including municipal waste incinerators [CB/22/252, para 6]. The consultation only referenced "the potential to expand scope in later years of UK ETS operation" [CB/22/231].

141. Even if it had been concluded that a higher level of climate change ambition should be reflected in the design of the UK ETS, this would not have led to municipal waste incinerators being included within the full UK ETS. Municipal waste incinerators were not excluded from the UK ETS as a result of the level of climate ambition which was adopted in the Response for the UK ETS [CB/38/366, paras 50-52].

142. Moreover, in relation to Ground 1 in particular, the Defendants did consider having a tighter initial cap. Their reasoning on why a tighter initial cap should not be imposed was set out in the Response [CB/38/368, paras 61-63] and in the 1 June 2020 letter to the CCC [CB/37/353]. Consideration was given in this case to going further, faster. The Defendants went as far as they thought they could for the initial design of the new UK ETS. There is no reason to think that they would have gone further when setting the initial cap. Even if the Court concludes on Ground 1 that the Paris Agreement's Article 4(1) aim to reach global peaking of greenhouse gas emissions as soon as possible had wrongly been left out of account, it can also conclude from this material that it is highly likely that the level of the initial cap would not have been different if the aim had been taken into account.

Conclusion

143. The claim should be dismissed. The Claimant simply disagrees with the technical, policy and political judgements made by the decision-makers – the UK Government and the devolved administrations – on the initial design of the UK ETS. This does not amount to an error of law.

RICHARD HONEY

7 January 2021

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Your ref: CO/3093/2020
Our ref: Z2010640/CBG/JD3

8 January 2021

Dear Sirs

R(oao Georgia Elliott-Smith) v (1) Secretary of State for Business, Energy & Industrial Strategy & (2) DAERA & Others

I act on behalf of the Department of Agriculture, Environment and Rural Affairs, Northern Ireland, the Second Defendant in the above proceedings.

My Client has had the benefit of being sighted on the Detailed Grounds of Defence prepared on behalf of the First Defendant, the Secretary of State for Business, Energy and Industrial Strategy, along with the Witness Statement and bundle of documents which accompany those Grounds. Having considered the contents of those documents, the Second Defendant is in agreement with and supports the arguments as put on behalf of the Secretary of State. As such, with the Court's valuable time, the public purse, and avoiding unnecessary duplication in mind the Second Defendant does not propose to file its own separate Detailed Grounds but rather to adopt and support what is said in the Detailed Grounds filed on behalf of the Secretary of State

In accordance with the directions issued following the Oral Permission Hearing on 1 December 2020 my Client has conducted a search of its files for relevant documents. Please find enclosed documents held by my Client which it considers are necessary to provide in line with its Duty of Candour. As mentioned in the previous paragraph my Client has had the benefit of being sighted on the documents to be provided by the Secretary of State. Therefore, subject to any concerns that the Court may have, my Client has limited the documents it discloses to those which it owns rather than providing duplicate disclosure of documents owned, for example, by BEIS but which my Client holds a copy in its records. A number of the documents attached contain redactions, these redactions have been made in line with ours duties in relation to Data Protection. My Client is

aware that the Duty of Candour is an ongoing duty and therefore should any further relevant documents come to its attention they will be provided without delay.

The Claimant and other defendants are copied to this letter and its attachments by way of service.

Should hard copies be required, please do let me know by return. Please note, however, due the current national lockdown there may be a delay in being able to get hardcopies sent out.

Yours faithfully

Chris Burge
For the Treasury Solicitor

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Julia Eriksen

From:	Luke.Walsh001@gov.wales
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Cc:	Ellen.Richardson@governmentlegal.gov.uk; Rowan Smith; Julia Eriksen; Joe.Vester@governmentlegal.gov.uk; Chris.Burge@governmentlegal.gov.uk; Emel.Djevdet@governmentlegal.gov.uk; Erica.Devine@governmentlegal.gov.uk
Subject:	[EXTERNAL] RE: CO/3093/2020 - Georgina Elliott-Smith v SoS for BEIS & Others - Disclosure of Fourth Defendant

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Dear Sirs

R (oao Georgia Elliot-Smith) v SSBEIS & Others CO/3093/2020

I act for the Fourth Defendant in this matter, the Minister for Environment, Energy and Rural Affairs at Welsh Government.

Further to my previous email below, the Fourth Defendant is in agreement with and supports the arguments as put on behalf of the First Defendant (the Secretary of State for Business, Energy and Industrial Strategy), having seen the Detailed Grounds of Defence, Witness Statements, and bundle of documents. Therefore, the Fourth Defendant does not propose to file its own separate Detailed Grounds but rather to adopt and support those filed by the First Defendant.

Regarding the filing below of the Fourth Defendant's disclosure, and for the avoidance of doubt, my client has limited the documents it discloses to those which it owns rather than providing duplicate disclosure of documents owned, for example, by BEIS but which my client holds a copy in its records.

The claimant's solicitors and the other defendants' representatives are copied.

Kind regards

Luke Walsh
Cyfreithiwr |Lawyer
Tim Amgylchedd ac Ynni |Environment and Energy Team
Gwasanaethau Cyfreithiol |Legal Services
Swyddfa'r Prif Weinidog |Office of the First Minister
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Rhagenwau: ef/iddo ayyb Ω Pronouns: he/him

PB 243

Good afternoon

R (oao Georgia Elliot-Smith) v SSBEIS & Others CO/3093/2020

I act for the Fourth Defendant in this matter, the Minister for Environment, Energy and Rural Affairs at Welsh Government.

Please find enclosed by way of filing the disclosure of the Fourth Defendant.

Please let me know if you have any difficulty with accessing the attached.

Kind regards

Luke Walsh
Cyfreithiwr |Lawyer
Tim Amgylchedd ac Ynni |Environment and Energy Team
Gwasanaethau Cyfreithiol |Legal Services
Swyddfa'r Prif Weinidog |Office of the First Minister
Llywodraeth Cymru |Welsh Government
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Rwy'n cefnogi pobl LHDTRh+ | I support LGBTI+ people

Rhagenwau: ef/iddo ayyb Ω Pronouns: he/him

PB 244

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Your ref: CO/3093/2020
Our ref: Z2010828/JCV/JD3

14 January 2021

Dear Sirs

R (Georgia Elliott-Smith) v (1) SSBEIS (2) DAERA, Northern Ireland (3) Scottish Ministers (4) Minister for Energy, Environment and Rural Affairs, Welsh Government

CO/3093/2020

I represent the Third Defendant, the Scottish Ministers, in the above case.Please find enclosed:

- A letter to the Claimant's solicitors
- Briefing to Ministers dated 30 April 2020, which is the Third Defendant's evidence in this case.

The Third Defendant was served with the order granting permission (dated 4 December 2020) on 10 December 2020, and has complied with that order by filing its evidence within 35 days of that date.

Yours faithfully

Joe Vester
For the Treasury Solicitor
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Cc. First, Second, and Fourth Defendants
Representatives for the Claimant

CO/3093/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

CLAIMANT'S REPLY TO THE DETAILED GROUNDS

Introduction

1. The Claimant makes this Reply in response to the First Defendant's Detailed Grounds for Contesting the Claim **("DGs")**, along with which the First Defendant served witness statements from some of his civil servants (relating to the decision making by the First Defendant and the deliberations of his civil servants).

2. The other Defendants have (essentially through correspondence) adopted those DGs, but, while each has disclosed some of the contemporaneous documents leading up to the decision under challenge, none has provided any separate witness evidence about their decision-making.

3. That all matters because the UK ETS under challenge here was made by the four defendants together, each acting pursuant to their power (as a "relevant national authority") under section 44(1) of the Climate Change Act 2008 **("CCA 2008")**.

4. As explained further below, it follows that, in ascertaining the legality of the decision, the court is concerned only with what was set out and explained in the documents which evidence the common approach as taken by all the Defendants (save to the extent, as noted below, that contemporary documents show that particular of the Defendants had a different understanding which undermines the overall picture which the Defendants seek to present).

5. Evidence relating to additional matters said to have been known to, or taken into account by, one or other Defendant (but not the others) cannot save the overall legality of the UK ETS; all the more so in relation to legal submissions which are not founded in evidence as to approach actually taken by the Defendants, or evidence about deliberations by civil servants (as opposed to the Defendants themselves) in either England or any one of the devolved administrations.

6. In any event, the Claimant also continues to rely on the points made in her Reply to the First Defendant's Summary Grounds of Resistance **("SGR")** and in her Statement of Facts and Grounds **("SFG")**.

7. In summary, this Reply addresses the following:

   (1) Ground 1: The short and medium-term aspects of the Paris Agreement were mandatory relevant considerations. However, the Defendants failed to account for these considerations. Had they done so, they may well have decided to expand the scope of UK ETS to cover municipal waste incinerators **("MWIs")** and to set a more ambitious cap on the allowable emissions.

   (2) Ground 4: The lawful purpose of the statutory scheme needed to be to limit or encourage the limitation of greenhouse gas **("GHG")** emissions. However, the Defendants' expressly stated purpose when choosing the cap for the UK ETS was to protect the competitiveness of businesses, particularly in light of Brexit. That was not a lawful purpose in circumstances where the Defendants did not (by setting the cap above Business As Usual **("BAU")**) act for the statutory purpose. Such other considerations could have lawfully been taken into account provided that the UK ETS still secured the statutory purpose, but they could not be used (as here) as basis not to secure that purpose. The Defendants also now advance a new

purpose (ensuring that the UK ETS "functioned effectively"). That was not the purpose for which they acted at the time (and the materials which advance that point are plainly not to be admitted or given weight in establishing the legality of what happened at the time), but, anyway, was no answer when the scheme did not operate for the required purpose.

(3) Contrary to what the Defendants suggest, there is no basis on which the Court could here be confident that the decision would "highly likely" have been the same if these legal errors had not occurred. Even if there were a basis for such a finding, there is an exceptional public interest here that anyway warrants granting the declaratory relief sought: The Defendants are due to review the scheme in 2023 or 2024 and are at risk of repeating the same legal errors a unless this is addressed by the Court.

Ground 1: Paris Agreement

The short and medium-term aspects of the Paris Agreement were mandatory relevant considerations

8. As to DG paragraphs 104-111, the Claimant does not argue that the Defendants were obliged by domestic law to "act compatibly with" the Paris Agreement – that would be a bad point.

9. They were, however, required to take into account its short and medium-term aspects when designing the UK ETS. The Defendants were thus legally required to consider both the net-zero commitment and the short and medium-term Paris Agreement elements, which create separate (though linked) imperatives.

10. Whilst considering the former (albeit through a focus on the Net Zero target in the CCA 2008), the Defendants completely failed to consider the latter[1].

11. That need came about because the short and medium-term aspects of the Paris agreement are unincorporated international law principles that were "obviously material" to the discharge of a statutory purpose at issue (i.e. limiting GHG emissions).

[1] As explained below, even if it could somehow be said that the First Defendant went further – which would be a bad point as it happens – there would be absolutely no basis for such a submission in relation to the other Defendants, which matters, as above.

12. First off, they come within the "third category" of considerations in *R v Somerset County Council, Ex p Fewings* [1995] 1 WLR 1037, at 1049, which must be accounted for when they are "obviously material": *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26.

13. Secondly, as the Court of Appeal in *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214 made this clear:

> "237. … the only reasonable view open to [the Secretary of State] was that the Paris Agreement was so obviously material that it had to be taken into account. It is well established in public law that there are some considerations that must be taken into account, some considerations that must not be taken into account and a third category, considerations that may be taken into account in the discretion of the decision-maker (see, for example, the opinion of Lord Brown of Eaton-under-Heywood in *Hurst*, at paragraphs 57 to 59). As Lord Brown observed of that third category (in paragraph 58 of his opinion), there can be some unincorporated international obligations that are "so obviously material" that they must be taken into account. The Paris Agreement fell into this category." (emphasis added)

14. The Supreme Court in *Heathrow Airport* specifically left that conclusion of the Court of Appeal in place:

> "122. The Divisional Court (para 648) and the Court of Appeal (para 237) held that the Paris Agreement fell within the third category identified in *Fewings*. In so far as it is an international treaty which has not been incorporated into domestic law, this is correct. …
>
> 134. In light of the factual position, it is not necessary to decide the different question whether, if the Secretary of State had omitted to think about the Paris Agreement at all (so that this was a case of the type described in para 120 above), as an unincorporated treaty, that would have constituted an error of law. That is not a straightforward issue and we have not heard submissions on the point. We say no more about it."

15. The Supreme Court left that conclusion from the Court of Appeal in place, because of its conclusion that, on the facts of the case, not only had relevant aspects of the Paris Agreement had been incorporated into the domestic CCA 2008 (see paragraphs 122-125), but also the evidence was that the Secretary of State had indeed considered those aspects of the Paris Agreement.

16. The same cannot be said here, either in terms of whether the short and medium-term aspects of the Paris Agreement had been given effect via the CCA 2008, or whether the Defendants had directly or indirectly considered those aspects in their decision-making.

17. The starting point is that the short and medium-term aspects of the Paris Agreement were indeed "so obviously material" as to be mandatory relevant considerations in the design of the UK ETS.

18. However, unlike in *Heathrow Airport* (which centred on the long-term target under the CCA 2008), the relevant aspects of the Paris Agreement on the facts of this case are its short and medium-term aspects. These have not been incorporated into the CCA 2008 (as explained below and at paragraphs 11-19, 20-24 and 54-55 of the SFG).

19. Critically then, the statutory purpose of the power under which the UK ETS is made (s.44 CCA 2008) is to limit GHG emissions (this purpose is addressed in detail in ground 4 below). That purpose applies from the moment the power is exercised and the scheme is operational (namely, the short and medium term). That is the fundamental objective and timescale of the short and medium-term aspects of the Paris Agreement. The Paris Agreement is also the central organising instrument through which the effectiveness of the statutory purpose at issue will be determined.

Failure to account for that mandatory relevant consideration

20. There is nothing in the materials which suggests (let alone shows) that any of the Defendants, let alone all of them, took into account the short and medium-term aspects of the Paris Agreement. The submissions in the DGs and arguments in the witness statement of Mr Lewis on this point fall into six categories, all of which should be dismissed.

21. First, the DGs argue (at paragraphs 92 and 99-101) that consideration of the net zero emissions target is an effective proxy for, or can be conflated with, consideration of the short and medium-term aspects of the Paris Agreement. That is wrong as explained at paragraphs 11-24 and 54-55 of the SFG. Evidence of consideration by the Defendants of the net zero commitment in the CCA 2008 is no answer to this claim.

22. The CCC's *Net Zero* report of May 2019 (on which the First Defendant relies at paragraph 27 of the DGs) also explains this: while the net zero commitment in the CCA 2008 is necessary in order for the UK to meet the requirements of the Paris Agreement, it is far from sufficient and does not displace the need for short and medium-term cuts:

> "A net-zero GHG target for 2050 would respond to the latest climate science and fully meet the UK's obligations under the Paris Agreement: … If replicated across the world, and coupled with ambitious near-term reductions in emissions, it would deliver a greater than 50% chance of limiting the temperature increase to 1.5°C." (emphasis added)

23. Moreover, as stated in the explanatory memorandum to the statutory instrument (Exhibit CL, paras 7.5 and 7.6, page 870), the net zero target was enacted to deal with the long-term goals of the Paris Agreement, without reference to its separate and discrete short and medium-term ambitions.

24. Second, at paragraphs 95-96, the DGs assert that "consideration was given to setting the cap and the trajectory in the UK ETS to seek further reductions in the short to medium term" and that the "substantive issue … was expressly considered". The First Defendant refers here to paragraphs 58-63 of the Response. These paragraphs show that environmental considerations (namely and exclusively, "reducing emissions to net zero by 2050") were weighed against competitive and international pressures on the UK economy when choosing the level of the cap. However, nowhere in these paragraphs or in any of the contemporaneous documents disclosed by the Defendant was any consideration given to the need under the Paris Agreement for emission reductions *on a short to medium timeline*. That is the "substantive issue". It was that failure to consider the reasons from the Paris Agreement to make swift emission reductions that is the issue under ground 1.

25. The mere fact (even if correct) of the Defendants consideration of different options for the UK ETS would be no answer to that. The disclosed documents, show even that simple fact to be inaccurate: for example, the Second Defendant does not appear to have been briefed on the possibility of increasing the ambition of the cap at start of the UK ETS.

26. Third, at paragraph 112 the DGs misconstrue the Claimant's case, suggesting that she is seeking to split apart one concept in Article 4 of the Paris Agreement. That is wrong. The Paris Agreement contains separate principles and concepts. The Claimant accepts that the Defendants account for the CCA 2008 and, to the extent that overlaps with the Paris Agreement, some aspects of the latter were taken into account as a result. However, there is also no evidence of the Defendants considering the short and medium-term aspects of the Paris Agreement. It is that failure to consider the substance of the Paris Agreement that is the error of law.

27. Fourth, at paragraphs 89-91 and 113-114 the DGs note that the Defendants made broad references in the Response to tackling climate change and some references to the Paris Agreement, such as the global stocktake procedure. That is correct. But none of these addresses the substance of the short and medium-term aspects of the Paris Agreement. The documents disclosed confirm that the only substantive climate or environmental issue considered by any of the Defendants in the design of the UK ETS (let alone all of them, which is what matters) was the net zero commitment.

28. Fifth, at paragraph 115 the DGs imply that the Court should assume the Defendants accounted for the short and medium-term aspects of the Paris Agreement on the basis that to do otherwise would infer a failure simply from the absence of express references to Articles 2 and 4. This misunderstands the claim. It is not the absence of express references to particular parts of the Paris Agreement that is the problem. It is the failure to consider the substance of it (i.e. the importance arising from the Paris Agreement of GHG cuts in the short to medium term) that is tellingly absent from the decision-making documents. This is despite the Defendants disclosing over 2,000 pages of documents and, presumably, reviewing many more.

29. Sixth, at paragraph 116 the DGs argue that the Court should assume the Defendants accounted for the relevant considerations on the basis of Mr Lewis's evidence that he and the other officials involved in the design of the UK ETS were aware of these matters. Taken at its very highest, this argument would only go to the First Defendant (namely the official involved from the English ("UK Government") side of the decisions); there is no equivalent evidence at all from the Second, Third or Fourth Defendants.

30. More fundamentally, however, Mr Lewis's evidence as to what he and his colleagues thought about is not attributable to the First Defendant (or other Ministers at the Department). The relevant decisions were taken by Ministers personally; they were not taken by civil servants. A Minister only knows what he or she is actually told and is not taken to know what the civil servants know simply because they know it, as McCombe LJ explained in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1354 at paragraph 26(3):[2]

> "The relevant duty [the Public Sector Equality Duty] is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26-27] per Sedley LJ."

Evidence of the extent to which the Four Defendants failed to account for the mandatory considerations

31. There is simply no evidence that the decision-makers (i.e. all the four Defendants) took account of the mandatory relevant considerations at issue. This telling absence of consideration of the short and medium-term aspects of the Paris Agreement is confirmed by the inconsistencies as to the purpose and effect of the UK ETS between the Defendants.

[2] See also, *Buckinghamshire CC v SSfT* [2013] EWHC 481 (Admin) at [830]; *Kohler v Mayor's Office for Policing and Crime* [2018] EWHC 1881 at [67-69]; and *Stephenson v SSfHCLG* [2019] EWHC 519 (Admin) at [50] and [68].

32. Indeed, the Third Defendant was (incorrectly) told that the chosen cap would lead to higher carbon prices than under the EU ETS and that this was necessary for hedging:

> "UK ETS cap at 5% lower than status quo would generate carbon values of £50 (compared to peak EU ETS prices of €24, which provides 17% headroom above 2018 emissions, necessary for the power sector to rebuild hedging positions)" **[Scottish disclosure p.3]**

33. This appears to have informed the Third Defendant's view that the design of the UK ETS would "not jeopardise" the net zero commitment **[Scottish disclosure p.4]**. There is also no mention anywhere within the disclosure from the Third Defendant of the impact of the scheme on short and medium-term emissions, the lack of downward pressure given the chosen cap and the possibility of expanding its scope.

34. Similarly, the Second Defendant was (inaccurately) told that the design of the UK ETS would lead to downward pressure on emissions across the UK, that the -5% notional cap was more ambitious than the EU ETS and that it was set "in light of" the net zero commitment:

> "The overall cap for the UK ETS determines the limit on total emissions allowances. The aim is to ensure that the UK ETS cap is set to meet long-term climate commitments while ensuring economic competitiveness for UK companies." **[NI disclosure p.4]**
>
> "In light of UK's commitment to reaching net-zero emissions by 2050, the UK ETS will show greater climate ambition from the start. The cap will initially be set 5% below the UK's notional share of the EU ETS." **[NI disclosure p.17]**

35. In contrast, the First Defendant was told that the chosen cap would lead to lower prices than those in the EU ETS, while officials within the First Defendant's department were aware that the surplus of allowances was likely to be more than that required for hedging (so it was certainly not "necessary" as the Third Defendant had been told):

> "The EU carbon price is around £22 (€22) and expected to rise (see fig. 3). In 2021 the EU price It is likely to be higher than £15 and could be higher than £25.

… [For the UK ETS] Recommendation: An [Auction Reserve Price] of £15." **[CL1 p.1224]**

"Our modelling indicates that with a Notional -5% cap, UK carbon values would fall to the ARP set between £5 and £25" **[CL1 p.893]**

"Both the Notional -5% and the notional -10% are above our projections of UK business as usual emissions.

However, when we factor in the additional demand we project based on our hedging assumptions, projected demand for allowances is above the notional -10% cap each year up to 2023.

Whether the notional -5% is above or below projected demand falls within the uncertainty range." **[CL1 p.905]**

36. The First Defendant was also aware that there would be no downward pressure from the chosen cap (which neither the Second or Third Defendants were told). The submissions to Ministers on 13 January 2020 made this clear:

"Little/No abatement is needed to meet the Notional Cap or Notional -5% cap across our range of demand scenarios (see fig. 1)." **[CL1 p.1100]**

37. Similarly, the Fourth Defendant was briefed on 22 January 2020 that there would be no downward pressure from the chosen cap. Significantly (and undermining of the Defendants' assertion these matters can be corrected when the scheme is eventually reviewed), the Fourth Defendant was told that this was in order to avoid the possibility of any negative competitive effect on businesses at any point within the first decade ("phase") of the UK ETS (but without any recognition of the relevance of that to the statutory purpose/power in play, which is relevant further below):

"BEIS had also analysed notional a -10%[3] decrease in the total cap, which would mean the number of allowances would start above BAU in early years (allowing businesses to manage the impact of Brexit) and then further into the phase would take effect to create more pressure to decarbonise.

[3] The -10% cap considered here was even tighter than the -5% cap actually chosen

Whitehall officials were nervous about this approach particularly the response of industry to the policy, so a compromise has been brokered. Officials are jointly recommending a day 1 cap of 5% below the notional EU cap, demonstrating a direction of travel." **[Welsh disclosure pp.9-10]**

38. While the First and Fourth Defendants were briefed on the possibility of expanding the scope of the UK ETS from its inception, neither the Second nor Third Defendant were briefed on this. Unlike the other Defendants, the Second Defendant was not briefed on the possibility of increasing the ambition of the cap.

39. But most significantly, none of the Defendants were briefed on the Paris Agreement's short and medium-term aspects as potential reasons for increasing the ambition of the scheme, whether in general or specific to the level of the cap or scope (i.e. the potential inclusion of MWIs).

40. The consequence of all of this, is that the Defendants' own evidence makes clear that they did not account for the mandatory considerations when designing the UK ETS at all, and certainly not in relation to the two aspects at issue in this case (the exclusion of MWIs and level of the cap).

Consequences of failing to consider the Paris Agreement: exclusion of MWIs

41. The exclusion of MWIs from the UK ETS was not inevitable. Had the Defendants properly considered the scale of emissions from this sector, the absence of other effective means of putting downward pressure on these emissions in the short and medium term, and the importance of these emissions under the Paris Agreement, they may well have decided to include MWIs within the UK ETS. The First Defendant appears to dispute this on two bases, both of which should be rejected.

42. First, at paragraphs 48 and 140, the DGs observe that the inclusion of municipal waste incinerators **("MWIs")** within the scope of the UK ETS would not align with the EU ETS nor would it provide continuity. "Continuity" would, self-evidently, not have been reason alone to fail to consider the Paris Agreement's short and medium-term aspects. The DGs do not go on to state why aligning the scope of the UK ETS with the EU ETS was seen to be important other than to provide continuity. The only conceivable reason is that the two schemes may be linked in the future. However, the

EU ETS already accommodates a number of variations between the emissions trading schemes in its member states through article 24 of Directive 2003/87/EC. A UK ETS that included MWIs within scope could be linked to the EU ETS. Moreover, as the witness statement of Janek Vähk (para. 7) shows, both Denmark and Sweden include MWIs in their respective schemes within the wider EU ETS.

43. Second, paragraph 117 of the DGs and paragraph 54 of Mr Preston's witness statement argue that it is "not necessary" to include MWIs within the scope of the UK ETS because of the existence of "regulations and current and future policies" that "help to ensure that the UK complies with its climate change commitments". This is an entirely new – and therefore inadmissible – possible reason for excluding MWIs. It was not a reason given in the Response, which were limited to (i) alleged complexities, and (ii) the relationship between MWIs and landfill (paragraph 52).

44. This is confirmed by the advice to ministers dated 22 April 2020, which identified only the two reasons noted by the Claimant as the reasons for the exclusion of MWIs **[CL1 1216]**:

> "11. The complex environmental requirements placed on municipal waste incinerators (something a number of respondents called for inclusion of in the ETS), as well as their role in diverting waste from landfill, make it difficult to include them in a UK ETS.
>
> 12. The CCC also advised to expand the scope to include agriculture and land use. While we agree that emissions from these sectors will need to be abated to meet our net zero target, there are additional questions to address before deciding these sectors are suitable for an ETS, including the availability of abatement measures and costs relative to existing sectors. There may be more appropriate measures than the UK ETS for doing so and this will be for the appropriate government departments to consider following the CCC's advice on CB6 and a net zero trajectory."

45. This precisely matches the language used in paragraph 52 of the Response. The only difference is that the two separate paragraphs became one. This makes clear that the

suggestion that there are "more appropriate measures" for putting downward pressure on emissions related to agriculture and land use and not to MWIs.

46. In any event, Mr Preston's evidence (even if were relevant and admissible) does not point to any existing means of putting downward pressure on emissions from existing MWIs in the short to medium term. In paragraphs 38-39 he accepts that the existing regulatory system "does not place any limits on the actual amount of CO2 emitted by the plant". Mr Preston also explains at paragraph 38 that the EA permit system only requires Best Available Techniques for proposed installations (i.e. not existing installations which are generating emissions in the short and medium term). The only, entirely indirect, limit on emissions from MWIs comes from the fact that regulations prevent them from burning waste that was separately collected with the intention of it being recycled (see Mr Preston's evidence at paragraphs 36-37). That is an exceptionally low level of ambition. As the Claimant set out in paragraphs 42-48 of the SFG and in her witness statement, the scale of emissions from MWIs is staggering and it has substantial negative effectives on recycling rates. That exceptionally low level of climate ambition means it is not possible to say it is "not necessary" to include MWIs within the scope of the UK ETS because other regulatory systems already address these emissions.

47. What follows from this is:

    a. The reason now given by Mr Preston for it being "not necessary to include MWIs in the UK ETS" were not the Defendants' actual reasons for the decision;

    b. When making their decisions, the Defendants did not take account of the need under the Paris Agreement for substantial short and medium-term reductions in emissions;

    c. Their considerations in relation to MWIs were not even related to GHG emissions at all – they were exclusively on the two matters identified in the Response and the advice to ministers of 22 April 2020: alleged difficulties and the relationship to landfill; and

    d. Had the Defendants consider the emission from MWIs, and particularly if they had considered them in the context of the Paris Agreement, they may have

decided that there was good reason to include MWIs within the scope of the UK ETS. This would be so even if Mr Preston were right that it is "not necessary" – which he is not – as the Defendants may well have decided that it would be desirable to accelerate emission reductions from MWIs nonetheless.

Consequences of failing to consider the Paris Agreement: the chosen cap

48. The Claimant sets out below the evidence demonstrating that the Defendants acted for an improper purpose (and/or did not, as they needed to do, act for the proper purpose) when choosing the cap for the UK ETS. The same evidence applies to claim 1 as well. It shows that the cap chosen was not inevitable. Had the Defendants considered the Paris Agreement's short and medium-term aspects, they would have had good reason to set a more ambitious cap and may well have done so.

Ground 4: failure to exercise the s.44 power for the lawful purpose

49. The statutory purpose for which an emissions trading scheme can be established is to limit or encourage the limitation of GHG emissions. This is clear from the terms of section 44 CCA 2008, which grants the relevant power. If there were any doubt that these are the statutory purposes for section 44, it is confirmed by Part 3: Trading Schemes of the Explanatory Memorandum to the CCA 2008:

> "13. Part 3 and Schedules 2, 3 and 4 provide the Secretary of State and the devolved administrations with powers to set up trading schemes relating to greenhouse gas emissions though secondary legislation. Trading schemes may limit activities that lead, directly or indirectly, to emissions of greenhouse gases (for example, by capping emissions from a particular set of activities and allow trading of emissions within the cap), or they may encourage activities that directly or indirectly lead to a reduction in greenhouse gas emissions or the removal of greenhouse gases from the atmosphere."

50. The Defendants did not act for that purpose. Instead, they acted for the purpose of protecting the competitiveness of businesses, particularly in light of Brexit pressures. That was an additional matter that could only have been taken into account if the Defendants nonetheless secured the statutory purpose: see, *R v Secretary of State for*

Foreign and Commonwealth Affairs Ex p World Development Movement Ltd [1995] 1 WLR 386 *("Pergau Dam")*, at 401-403, particularly:

> "The Secretary of State is, of course, generally speaking, fully entitled, when making decisions, to take into account political and economic considerations such as the promotion of regional stability, good government, human rights and British commercial interests. In the present case, the political impossibility of withdrawing the 1989 offer has been recognised since mid-April of that year, and had there, in 1991, been a developmental promotion purpose within section 1 of the Act, it would have been entirely proper for the Secretary of State to have taken into account, also, the impact which withdrawing the 1989 offer would have had, both on the United Kingdom's credibility as a reliable friend and trading partner and on political and commercial relations with Malaysia. But for the reasons given, I am of the view, on the evidence before this court, that there was, in July 1991, no such purpose within the section. It follows that the July 1991 decision was, in my judgment, unlawful. This, of course, serves to reinforce the conclusion already indicated, that the Applicants have standing.
>
> …
>
> When the decision was made in July 1991, there was nothing in aid terms to justify the use of public money for the Pergau project. The Secretary of State's power to provide financial assistance under section 1(1) of the 1980 Act was not triggered. Had it been, that would have brought into play the opportunity for the Secretary of State to take into account political and wider economic considerations, such as British commercial interests. But it was not." [underlining added]

Consequences of failing to meet the statutory purpose

51. The wider practical and legal importance of this failure (i.e. the failure to produce a scheme which acts to discourage GHG emissions) is highlighted by the Court of Appeal's recent judgment in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited* [2021] EWCA Civ 43. The Defendant

there (the same as the First Defendant here) decided that GHG emissions from power stations were not a reason to refuse development consent, because of the assumption that the EU ETS (which would be read as the UK ETS) would be able to tackle these emissions. This was stated in paragraph 5.2.2 of the Energy National Policy Statement (see paragraph 30 of the judgment):

> "5.2.2 CO2 emissions are a significant adverse impact from some types of energy infrastructure which cannot be totally avoided (even with full deployment of CCS technology). However, given the characteristics of these and other technologies … and the range of non-planning policies aimed at decarbonising electricity generation such as EU ETS … , Government has determined that CO2 emissions are not reasons to prohibit the consenting of projects which use these technologies or to impose more restrictions on them in the planning policy framework than are set out in the energy NPSs (e.g. the CCR and, for coal, CCS requirements). Any ES on air emissions will include an assessment of CO2 emissions, but the policies set out in Section 2, including the EU ETS, apply to these emissions. The IPC does not, therefore, need to assess individual applications in terms of carbon emissions against carbon budgets and this section does not address CO2 emissions or any Emissions Performance Standard that may apply to plant." (emphasis added)

52. That assumption was a necessary part of the Court's reasoning (see paragraphs 84-97), particularly:

> "88. The Secretary of State's understanding of the policy was, in my view, the correct one. Having concluded that "the presumption in favour of fossil fuel generation" applied, she directed herself to consider "whether any more specific and relevant policies … in the relevant NPSs clearly indicate that consent should be refused", given the examining authority's conclusion that "there would be significant adverse effects from the [development] in respect of GHG emissions which gave rise to a perceived conflict with the decarbonisation objective of EN-1" (paragraph 4.14). She thought not, for three reasons. First, as she reminded herself in the light of section 2.2 of EN-1, "climate change and the UK's GHG emissions reduction targets contained in

> the [Climate Change Act] have been taken into account in preparing the suite of Energy NPSs" (paragraph 4.15 of the decision letter). Secondly, having in mind the policy in paragraph 5.2.2 of EN-1 and paragraph 2.5.2 of EN-2, she acknowledged "the significant adverse impact of the proposed Development on the amount of greenhouse gases that will be emitted to atmosphere", but recognised that the policy "makes clear that this is not a matter that … should displace the presumption in favour of granting consent" (paragraphs 4.15 and 4.16). And thirdly, she concluded, unequivocally, that "the Development's adverse carbon impacts do not lead to the conclusion that the Development is not in accordance with the relevant NPSs or that they would be inconsistent with the [Climate Change Act]" (paragraph 4.17)." (emphasis added)

53. In other words, it was not necessary to focus within that development control process on the GHG emissions involved (and the need to reduce GHG emissions) because that would happen via the ETS, within which the power station would fall. The consequence is that not only have the Defendants failed to meet the statutory purpose in s.44 in design of UK ETS, but also that their decision on the cap then undermines a swathe of other climate-related policies.

The Defendants' real (and expressly stated) purpose: business competitiveness and Brexit

54. The Defendants did not act for the lawful purpose. The Response itself makes this clear, as the Claimant set out in the SFG, paragraphs 72-73.

55. The DGs dispute this, arguing at paragraphs 120-126 that the Claimant has misread the Response. However, the documents disclosed by the Defendant make clear that the Claimant has correctly interpreted the Defendants' reason for acting. To take one particularly clear example: the briefing to the Fourth Defendant on 22 January 2020 explained that the cap would be set above the level of BAU emissions because of concerns about the impact of Brexit on businesses. In particular, it noted that the First Defendant's officials wanted to avoid the risk of any downward pressure having a negative effect on businesses even in the latter stages of the first decade (first "phase") of the UK ETS:

"BEIS had also analysed notional a -10%[4] decrease in the total cap, which would mean the number of allowances would start above BAU in early years (allowing businesses to manage the impact of Brexit) and then further into the phase would take effect to create more pressure to decarbonise.

Whitehall officials were nervous about this approach particularly the response of industry to the policy, so a compromise has been brokered. Officials are jointly recommending a day 1 cap of 5% below the notional EU cap, demonstrating a direction of travel." **[Welsh disclosure pp.9-10]**

56. Indeed, the disclosed documents also demonstrate that the Defendants knowingly set aside the statutory purpose. The assertion at paragraphs 134-136 of the DGs that there is downward pressure is not borne out by the evidence. For example:

    a. First, the fact that the cap is 5% below the notional UK cap under the EU ETS does not represent any climate ambition nor indicate that there would be any downward pressure. It was not a "tightening" of the cap in the real world but rather a consequence of the UK moving to smaller market, which needs a corresponding reduction in liquidity, as explained to the First Defendant on 28 February 2019:[5]

        "11. Given that the UK is a net seller of allowances to EU sectors, our traded sector emissions are expected to be lower than our notional share of the EU ETS cap, so any cap set at this level would give prices close to zero (without price management). Thus, the consultation explains that meeting our "at least as ambitious" commitment under the CGS would require a cap that is likely to be set tighter than our notional share of EU ETS allowances." **[CL1 p.430]**

    b. Second, the "Cap Options Analysis" provided to the First Defendant within submissions to Ministers on 13 January 2020 candidly acknowledged that downward pressure would not be achieved by the chosen cap:

[4] The -10% cap considered here was even tighter than the -5% cap actually chosen

[5] In addition, the Response makes clear that the assumptions underlying the notional cap are not accurate (paragraph 23).

"Little/No abatement is needed to meet the Notional Cap or Notional -5% cap across our range of demand scenarios (see fig. 1)." **[CL1 p.1100]**

c. Third, the briefing prepared for the Fourth Defendant acknowledged that setting the cap above the level of BAU emissions would lead to there being no downward pressure:

"The Cap & Trajectory

This sets the ambition level for the scheme. Analysis using the most recent available data applied to BEIS economic models suggests setting the ambition level of the UK ETS at the notional phase 4 EU ETS cap would mean that the cap is higher than projected business as usual (BAU) emissions. This means the policy would have no effect at stimulating additional decarbonisation. This is not consistent with UK wide Ministerial ambition to drive action on climate change." **[Wales p.7]**

d. Fourth, the Joint Emissions Trading Scheme Board (which the Claimant understands was made up of officials representing each of the Defendants) conducted analysis that showed even a cap of -10% notional (i.e. tighter than that chosen) would not put any downward pressure on emissions:

"In our projections of greenhouse gas emissions in the early years of a UK ETS, tightening the cap by up to 10% does not substantially increase the amount of emissions reductions projected." **[CL1 p.885]**

"In an ETS, the cap sets the ambition level. Setting the ambition level of the UK ETS at the level of the notional phase IV cap would mean that the cap is <u>higher than projected BAU emissions.</u>

This means that no effort would be needed from participants to achieve the set level of ambition and we would not expect any traded sector abatement to be driven by the UK ETS." **[CL1 p.889]**

"Both the Notional -5% and the notional -10% are above our projections of UK business as usual emissions.

… Whether the notional -5% is above or below projected demand falls within the uncertainty rang" **[CL1 p.905]**

e. Fifth, the Policy Design Group within the First Defendant's Department concluded that downward pressure, even theoretically, could only occur with the chosen cap if carbon costs are very high. Given that the Defendants expect costs to be low, it follows that they cannot expect any downward pressure at all:

"Based on these [Marginal Abatement Cost Curves] – and assuming hedging behaviour continues unchanged – our modelling shows that some abatement could theoretically be driven by the Notional -5% and Notional -10% caps.

Notional -10% has more theoretical potential to drive additional abatement but only if our hedging assumptions hold and carbon values are very high.

… No abatement would be driven in either scenario if the power sector chooses not to build up hedges as we expect." **[CL1 p.907]**

"The EU carbon price is around £22 (€22) and expected to rise (see fig. 3). In 2021 the EU price It is likely to be higher than £15 and could be higher than £25.

… [For the UK ETS] Recommendation: An [Auction Reserve Price] of £15." **[CL1 p.1101]**

"Our modelling indicates that with a Notional -5% cap, UK carbon values would fall to the ARP set between £5 and £25" **[CL1 p.893]**

The Defendants' new purpose: effective functioning of the UK ETS

57. At paragraph 130 of the DGs, the First Defendant states that a different purpose underlies the chosen cap: "the initial cap was set at the level it was to ensure that the UK ETS functioned effectively".

58. This is not the reason the Defendants gave for their decision in the Response. The disclosed documents also reveal that it was not the purpose for which they acted. The

Defendants did not tailor the cap so that there would be trading of allowances between installations, so that emission abatement would occur where it is cheapest (i.e. to ensure the market "functioned effectively"). Instead, the cap was set in the knowledge that it would drive the price of allowances down to the auction reserve price **("ARP")**; i.e. there would be no market between installations at all, and instead every installation would have sufficient allowances to cover all of their existing emissions as well as building up a bank of allowances to cover future emissions ("hedging"). This is demonstrated by the following documents.

59. First, the CCC had expressly warned in its letter of 20 March 2020 that the chosen cap would lead to excessive liquidity and damage the effective functioning of the market:

> "However, the interim proposals for the scheme set out in your letter are inconsistent with the UK's Net Zero ambitions in some respects, primarily relating to the relatively high level of allowed emissions under the proposed cap. … It also risks undermining the scheme as a trading system, since if the cap is set too high the floor price in the scheme will set the price and become a de-facto tax. … The cap as currently proposed would begin the scheme in 2021 with considerably higher allowed emissions from stationary sources of 150 $MtCO_2$ (around 17% above the actual emissions in 2018). That implies a large surplus continuing until the point when a revised cap in line with the sixth carbon budget advice comes into force (e.g. 2023)." (emphasis added)

60. Second, the advice to ministers dated 16 April 2020 from officials in the First Defendant's department considered this advice from the CCC. This rejected the CCC's advice in order to avoid putting additional pressures on businesses in light of COVID-19. It made clear that neither climate ambition nor the need to ensure the effective functioning of the market were the purpose behind the chosen cap:

> "7. The CCC advised that our proposal on the cap at the starting point of the new UK ETS market was not tight enough, potentially leading to an initial oversupply of allowances in the market, and that it would be more appropriate to set the cap based on actual UK emissions (rather than the UK's expected notional share of the EU ETS cap). They acknowledged some headroom may be needed, however.

8. In light of the potential over-supply, the CCC indicated their preference for a higher ARP under the current plans for the cap but noted that £15 could work if the cap was tightened. Their rationale being that because of the loose cap, the price will sit at the ARP, which would be below the EU ETS price (notwithstanding any effects of Covid19).

9. Our legal obligation is that we must obtain and take into account the advice from the CCC2, but we are not obliged to follow their advice. Although it is unusual to not follow their advice, circumstances have moved on significantly in terms of Covid since the advice was given and we are fundamentally in agreement with the CCC in our intention to, in the near term, align the cap to a net-zero consistent trajectory." **[CL1 p.1184]**

61. Third, the First Defendant was told on 6 September 2019 that the cap chosen would exceed demand for allowances (even assuming "hedging" occurred) such that carbon prices would fall to zero without an ARP; i.e. the surplus of allowances provided by the chosen cap was far in excess of what any market had an appetite for:

> "Our modelling indicates that with a Notional -5% cap, UK carbon values would fall to the ARP set between £5 and £25" **[CL1 p.893]**

62. The surplus, coupled with the Defendants' decision that there would be no limit on the ability to bank allowances (see paragraphs 236-244 of the Response), means that even a tightening trajectory will not put downward pressure on emissions until long into the future.

63. Fourth, the Second Defendant was told in advice from October 2020 that the cap was chosen in order to weigh "business competitiveness" against "climate ambition":

> "33. The UK Government and DAs Impact Assessment (1st June 2020) stated that the Cap on allowances would initially set at 5% below the UK's expected notional share of the EU ETS cap. It estimated that in 2021 this would equate to 156 Million Tonnes CO2 (e), which is higher than the 'business as usual' emissions projections ranging from 126 – 131 Million Tonnes CO_2 (e). This allows for sufficient 'headroom' of allowances for a time limited period, striking a balance between climate ambition in the context of net zero

commitments and business competiveness, especially in early years' market behaviour." **[NI disclosure p.28]**

64. Fifth, the Third Defendant was told that the CCC's advice of 20 March 2020 was rejected, not in order to ensure that the UK ETS "functioned effectively", but rather to protect businesses from the pressures of competition:

> "The UK Government is seeking your agreement to continue with the -5% proposal for the interim UK ETS cap with future tightening (and the Auction Reserve Price of £15), as agreed at the February Quadrilateral, despite the CCC advice.
>
> The UK Government's rationale is that tightening the cap further would risk the economic recovery after COVID-19, and that the CCC's detailed advice in CB6 (due later this year) is needed to inform a net zero consistent UK ETS cap" **[Scottish disclosure pp.2-3]**

65. Sixth, much of the briefing to the Fourth Defendant on 27 April 2020 addressing the CCC's advice has been redacted **[Welsh disclosure p.22]**. However, even the disclosed parts demonstrate that "the current economic slowdown due to Covid-19" motivated the rejection of the CCC's advice on the impact of the chosen cap on the effective functioning of the UK ETS market.

66. It is, thus, clear that the Claimant has correctly identified that the Defendants' purpose in the chosen cap was to protect businesses from competitive pressures, particularly in light of Brexit. The assertion in the DGs that the purpose was, in fact, to ensure that the UK ETS "functioned effectively" is disproven by the ministerial briefings to each Defendant following the CCC's advice that the cap would undermine the effective functioning of the market. Instead of addressing the functioning of the market, the Defendants chose to prioritise competitiveness concerns.

67. Thus, even if the cap could have been set at 150 $MtCO_2e$ as a *bona fide* way of ensuring liquidity in and proper functioning of the market, that was not the actual purpose for which the Defendants acted. It is not permissible for the Defendants to seek to give an inconsistent explanation to the one given in the contemporaneous documents.

Section 31 of the Senior Courts Act 1981

68. It is noted that the First Defendant raises an argument based on s.31 of the Senior Courts Act 1981 only in relation to ground 1 (DGs paragraphs 139-142). They do not raise it in relation to ground 4.

69. The applicability of section 31 of the Senior Courts Act 1981 in this context was considered and rejected as misconceived by the Court of Appeal in *Plan B*:

> "233. We would add this observation. It was not submitted to us that in designating the [Airports National Policy Statement] ANPS the Secretary of State committed no error of law – or that, if he did, the error itself was immaterial – because the relevant consequences of meeting the targets already in place under the Climate Change Act would have been, or at least might have been, the same as those of implementing the United Kingdom's commitments under the Paris Agreement. Such an argument, had it been put forward, would in our opinion have been mistaken. If the Secretary of State was to comply with his duty under section 5(8) of the Planning Act, the implications of the Paris Agreement for his decision, and whether they were different from the implications of meeting the targets under the Climate Change Act, were matters for him specifically to consider and explicitly address in that very exercise. But he did not do so. It is clear that, in deciding to designate the ANPS, he did not take the Paris Agreement into account at all. On the contrary, as we understand it, he consciously chose – on advice – not to take it into account. And in our view, as we have said, his failure to take it into account was enough to vitiate the designation."

70. There is no basis for the First Defendant's assertion that the outcome would have been the same, let alone that this is "highly likely". The outcome is a UK ETS that has been designed without urgency: it permits substantial emissions over the short and medium-term and ignores the additional emissions generated by incineration relative to other forms of waste disposal and energy production. It *may* have been possible for the Defendants lawfully to design such a scheme, but the fact that they did so having failed to consider the short and medium-term aspects of the Paris Agreement

(from which where urgency as a relevant consideration is derived) means the Court can have no confidence that that would be the case.

71. But, in any event, there is an exceptional public interest that warrants granting the declaratory relief sought. There has been a fundamental failing in the Defendants' decision-making for the UK ETS. There will likely be many more decisions responding to climate change in the near future, to which the Paris Agreement will similarly be a mandatory relevant consideration. Clarification from the Court of the need to consider the short and medium-term aspects of the Paris Agreement would lead to improved decision-making and be in the public interest.

72. In particular, the fact that the Defendants will review some aspects of the UK ETS in the future demonstrates this public interest. That is because, if the Court finds that the decision was unlawful, the outcome of that future review may well be different, given that the Court would have clarified for the Defendants what they were lawfully required to be account for and identified the lawful purposes of the scheme. As such, it is not highly likely that the outcome (i.e. the scheme) would be the same if the Claimant is granted declaratory relief.

Conclusion

73. For the reasons given above, in the SFG and in the Reply to the SGR, the Claimant submits that relief should be granted in respect of grounds 1(a), 1(c) and 4.

DAVID WOLFE QC, Matrix
BEN MITCHELL, 11KBW

11 February 2021

In the High Court of Justice
Queen's Bench Division
Administrative Court

CO/3093/2020

In the matter of an application for judicial review

THE QUEEN on the application of

GEORGIA ELLIOTT-SMITH

Claimant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

On an application by the Claimant

Following consideration of the documents lodged by the parties

ORDER by the Honourable Mr Justice Holgate

1. The Claimant has permission to rely on the witness statement of Janek Vahk.
2. Costs in the case.

Reasons

No objection has been made to the application and it is appropriate for permission to be granted.

Signed Sir David Holgate 26 February 2021

The date of service of this order is calculated from the date in the section below

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For completion by the Administrative Court Office

Sent / Handed to
either the Claimant, and the Defendant [and the Interested Party]
or the Claimant's, and the Defendant's [and the Interested Party's] solicitors

Date: 01/03/2021

Solicitors:

Ref No. RWS/JEK/00255697/1

Statement on behalf of the Claimant
G Elliott-Smith
First
Exhibit: "GES1"
Date: 1 September 2020

IN THE HIGH COURT OF JUSTICE CO/ /2020
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

GEORGIA ELLIOTT-SMITH

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

1st Defendant

-and-

MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE

2nd Defendant

-and-

THE SCOTTISH MINISTERS

3rd Defendant

-and-

MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

4th Defendant

FIRST WITNESS STATEMENT OF GEORGIA ELLIOTT-SMITH

I, Georgia Elliott-Smith, of 36 Chase Court Gardens, Enfield EN2 8DJ, WILL SAY AS FOLLOWS:

Introduction

1. I make this statement in support of my application for judicial review on the Defendants' recent decisions on the design of a carbon emissions trading scheme for the UK.

2. On 1 June 2020 the Defendants issued: The future of UK carbon pricing: UK government and devolved administrations' response ("the Response"). This included the following decisions ("the Decisions"):

    2.1. Waste Incineration plants will be exempt from the UK's carbon emissions trading scheme;

    2.2. The UK's carbon emissions trading scheme will contain an opt-out for installations with emissions lower than 25,000t CO2e per annum; and

    2.3. The UK's carbon emissions trading scheme will allow unused carbon allowances to be "rolled forward", to be sold and used at a later date.

3. The purpose of this statement is threefold, namely to: (i) explain to the Court the background to my involvement in the case; (ii) provide relevant evidence on the operation of the waste incineration industry; and (iii) provide a schedule of financial resources pursuant to CPR r45.42(1)(b).

4. In this statement, I exhibit and refer to certain documents contained in the bundle of supporting documents. The references to those documents will be expressed as: "[**X/y**]", where "X" is the tab letter and "y" is the page number. I also exhibit certain documents, using the reference: "[**Exhibit GES1**]".

5. Insofar as the facts in this statement are within my knowledge, they are true. Insofar as the facts in this statement are not within my direct knowledge, they are true to the best of my knowledge and belief.

<u>Background to my involvement in the case</u>

6. I am an environmental engineer and Chartered Environmentalist, having worked mainly in the property and construction industry as an environmental professional since 1995. I educate my clients on global environmental and social issues, and work to identify and reduce the impacts of their businesses. My work includes assessing and reducing corporate carbon emissions, improving waste management practices and auditing supply chains, a role that has enabled me to visit numerous waste operations including incinerators. Over the years, I have gained a great deal of experience in waste management and minimisation, but have been continually frustrated at the negative social, economic and environmental impacts of the waste industry

and the lack of economic and regulatory stimulus to encourage more sustainable solutions.

7. I live in the London Borough of Enfield with my husband and two children. In July 2019, I found out about the planned £1.2bn expansion of the Edmonton incinerator in Enfield and began campaigning against the project alongside many other concerned residents and campaign groups including Stop the Edmonton Incinerator Now, Extinction Rebellion, the Enfield Climate Action Forum and the UK Without Incineration Network (UKWIN).

Exclusion of municipal waste incinerators from the UK ETS

8. In 2018, 6.3Mt CO2 were emitted by municipal waste incinerators in the UK[1]. This is equivalent to all the CO2 emissions from Manchester and Birmingham put together[2]. There are currently 48 operational municipal incinerators in the UK with dozens more under construction or in planning, meaning that CO2 emissions from the sector will greatly increase in the short to medium term.

9. By excluding municipal waste incinerators from the UK ETS, the government is missing a key opportunity to regulate and reduce the climate impacts of this carbon-intensive industry sector. I believe this is contrary to the requirements of the Paris Agreement. Having ratified the Paris Agreement, the UK government must "undertake and communicate ambitious efforts" to achieve the purpose of the agreement, as set out in Article 2.

10. In June 2020, the Committee on Climate Change (CCC) released *Reducing UK emissions: 2020 Progress Report to Parliament,* assessing the UK government's progress to reducing CO2 emissions and recommendations to achieve net zero by 2050. The report identifies waste incineration as a major source of CO2 emissions and recommends that "increased reuse & recycling [is] needed to prevent lock-in of fossil emissions from waste incineration."[3]

11. The report addresses CO2 emissions from existing and planned future facilities, saying:

[1] D/312
[2] https://naei.beis.gov.uk/laco2app/
[3] D/468

"Fossil emissions from energy from waste plants are growing rapidly (currently at 6.8 $MtCO_2e/yr$) and will continue to do so in the near term. Once built, the main emissions mitigation option from these plants will likely be CCS [carbon capture and storage], even at modest plant scales."[4]

12. The CCC recommends that, by the mid-2020s, existing waste conversion plants (including incineration, gasification & pyrolysis facilities) should start retrofitting Carbon Capture Storage (CCS), and new plants are to be built with CCS or 'CCS ready' in regions where the CO_2 network is soon to expand.[5]

13. However, there is no requirement for plants to install such CCS equipment, as confirmed in an email received from the CCC in reply to questions posed by a fellow campaigner on 12 February 2020[6]. The campaigner asks:

"How will it be decided which of the plants need to install CCS technology? The FAQ page for the Edmonton incinerator currently says: 'Carbon capture technology isn't something that's used in the energy from waste sector at present because it's not currently technologically or economically viable.' Is this statement accurate?"

14. The CCC responds:

"The decision is likely to be that of the individual plant operator/owner whether or not to install CCS technology, based on the added costs vs added benefits of doing so, i.e. based on a commercial business decision, in light of the UK policy framework at that time. It is unlikely to be a Government decision, unless the Government takes ownership of the energy and CCS sectors. The CCC expects the Government to incentivise the installation of CCS through the development of policy instruments, and for the Government to develop a shared CCS transport and storage infrastructure…

The FAQ page is correct in saying that CCS isn't currently used in the EfW sector, and that there are not sufficient UK policy incentives to make it economically viable to install CCS at present."

[4] D/470
[5] D/466
[6] D/334-335

15. According to the UK Without incineration Network (UKWIN) report *Evaluation of the climate change impacts of waste incineration in the United Kingdom,* October 2018:

> "Over the next 30 years the total cost to society of fossil CO2 released by UK's current incinerators would equate to more than £25 billion pounds of harm arising from the release of around 205 million tonnes of fossil CO2."[7]

10. Moreover, the EU Taxonomy report, a key part of the European Union's Action Plan on Sustainable Finance, determines the scope of what activities, investments and assets can and can't be considered as supporting a transition to a low carbon, climate-resilient economy, in accordance with the Paris Agreement, the UN Sustainable Development Goals (SDGs), and the European Commission's long-term decarbonisation strategy. In that Taxonomy report it is stated that the transition to a low carbon economy will require the phase-out of some economic activities, such as unabated fossil fuel power generation and waste-to-energy incineration. Waste-to-energy incineration is therefore excluded from the list of economic activities considered "sustainable finance" i.e. those that can make a substantial contribution to climate change mitigation and which do no significant harm to other environmental objectives such as transition to a circular economy, waste prevention and recycling[8].

11. In addition, the justification for omitting municipal and hazardous waste incinerators from the UK ETS, on the basis that it would be too difficult, falls someway short of a high level of climate ambition. Aviation, which is subject to some of the most complex and wide-ranging environmental regulations of any industry, is included in the scope of the UK ETS. These complex regulations include:

- CORSIA – a scheme to purchase carbon offsets and achieve annual net reductions. Implemented in 2019, compulsory participation from 2026.
- Compulsory participation in UK, EU and Swiss Emissions Trading Schemes, reporting to schemes in all countries in which they operate.

[7] D/155
[8] D/300-303

- Hugely complex and onerous on-board and land-based waste handling and segregation requirements to manage the risk of biological contamination and disease transmission.
- Regulations to prevent and detect illegal wildlife trafficking.
- Limiting, monitoring and reporting noise emissions.
- Local air pollution controls.
- Complying with emissions standards for existing and new aircraft. Decommissioning end-of-life aircraft.
- Separate national taxes applied to aviation, e.g. Sweden, Netherlands.
- Aviation-specific environmental management standards.

12. The international nature of aviation results in trans-boundary regulatory complexity that is not a feature of UK municipal waste incineration.

13. As a result, I believe that the decision to exclude incineration from the UK ETS on the grounds of difficulty and complexity, whilst including aviation, is inconsistent and flawed.

14. Waste incineration plants claim that incineration is a more environmentally friendly solution than landfill. The website of the proposed new incinerator in Edmonton states in the "Myth Busting" section of their website that:

    "The project is part of the climate solution because it will prevent our residents' non-recyclable waste being sent to landfill. There isn't a 'do nothing' option and the alternative would be landfilling."

15. There are several reasons why this is misleading:

    a) Only biodegradable waste in landfill generates methane, a potent greenhouse gas. Fossil waste such as plastic does not biodegrade in landfill and therefore remains stable for hundreds of years, preventing its embodied carbon from being released into the atmosphere. Studies show that the overall emissions of greenhouse gases from incineration are greater than landfill. According to the UK Without incineration Network (UKWIN) report

Evaluation of the climate change impacts of waste incineration in the United Kingdom, October 2018[9]:

> "When waste is landfilled a large proportion of the carbon is stored underground, whereas when waste is burned at an incinerator the carbon is converted into CO2 and immediately released into the atmosphere…
>
> Over its lifetime, a typical waste incinerator built in 2020 would release the equivalent of around 1.6 million tonnes of CO2 more than sending the same waste to landfill. Even when electricity generation is taken into account, each tonne of plastic burned at that incinerator would result in the release of around 1.43 tonnes of fossil CO2. Due to the progressive decarbonisation of the electricity supply, incinerators built after 2020 would have a relatively greater adverse climate change impact."

b) Municipal waste incinerators do not pre-sort waste to remove recyclable waste prior to incineration. Several studies show that at least half of what is incinerated is readily recyclable. Research conducted by South Gloucestershire Council in 2014-15 and found that 52% of the contents of black bins could be recycled through the existing kerbside service and an additional 10% could be recycled at special recycling centres[10]. Therefore, the claim made by NLHPP and other incinerators that only "non-recyclable" waste is being incinerated is untrue.

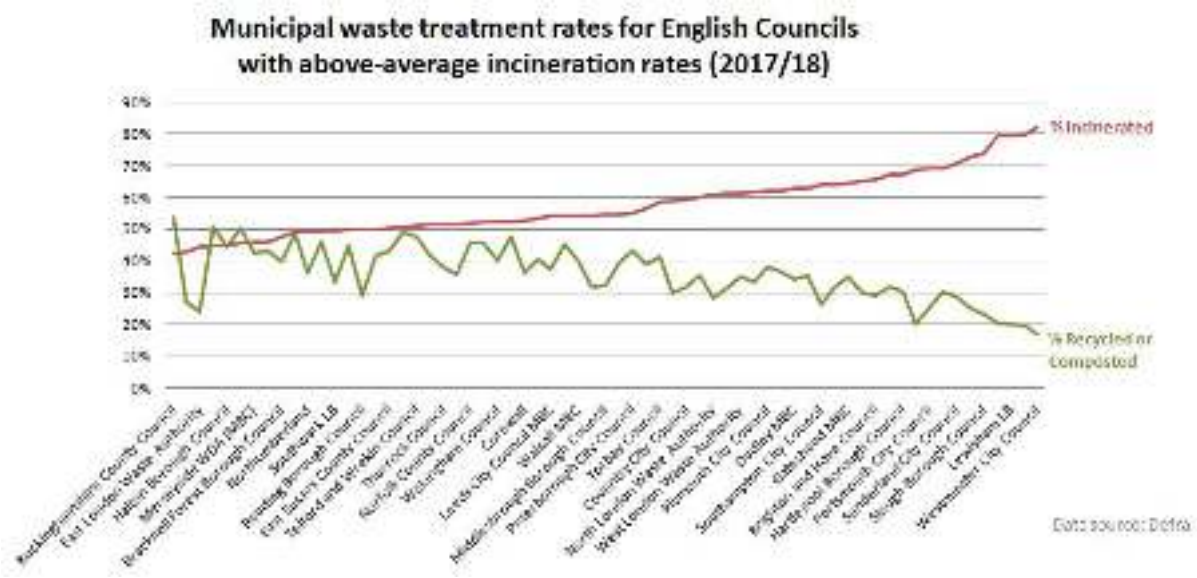
c) Waste disposal is not a binary choice between landfill or incineration. The UK government should demonstrate greater ambition in driving the 4Rs (reduce, repair, reuse, recycle), reducing waste at source and introducing economic stimulus to encourage more sustainable solutions, such as reuse and recycling and to penalise polluters that emit greenhouse gases.

16. It is also widely considered that incineration capacity acts as a kind of 'pressure valve' that reduces the impetus to improve recycling and waste reduction measures. This is especially true in areas where there is an over-capacity of

[9] D/155
[10] D/110-116

incinerators (which essentially require waste that may otherwise be disposed of in a different manner to be sent to incinerators). An example of this analysis comes from UKWIN's report Evaluation of the climate change impacts of waste incineration in the United Kingdom, October 2018[11], which tracks recycling rates against the volume of incinerator capacity in various local authorities. This shows a clear trend: the greater the incinerator capacity, the less recycling that takes place.

17. Further evidence comes from Defra's LA and Regional Waste Statistics 2017-18 shown in graphical form below:



18. This shows that across UK councils, as incineration capacity increases, recycling rates correspondingly decrease. The Government target for England is 65% recycling for municipal solid waste by 2035 and no more than 10% landfill. As some residual waste is not combustible, the Government's 65% recycling target implies that the rate of incineration should be no higher than approximately 30%. However, in 2017/18, 42% of England's local authority collected waste was incinerated[12].

19. The Government's own resources and waste strategy, Our Waste, Our Resources: A Strategy for England, also recognises this, saying:

> "Our priority will continue to be preventing plastic entering the environment in the first place and eliminating avoidable plastic waste over the lifetime of

[11] D/176-178
[12] D/213-214

the 25 Year Environment Plan. … What does that mean in practice? It means avoiding unnecessary use of plastics – as with all materials – in the first place. And where we do, for good reasons, continue to use plastics, stopping them being sent to landfill or incineration."[13]

"Residual waste is the mixed material that is typically incinerated for energy recovery or landfilled. Much of the products and materials contained in this waste could have been prevented, reused or recycled. This is inefficient not only because materials that hold value are being lost, but also incineration and landfill are the most expensive ways to treat waste."[14]

20. The calculation of CO2 emissions from municipal waste incinerators is not especially complex. The carbon emissions factor of municipal solid waste (MSW) is currently known to be in the range of 0.7-1.2 tons of CO2 per ton of MSW incinerated with 33-50% from biogenic sources and the remainder from fossil sources[15]. The range is due to the varying nature of waste composition. Achieving a more accurate carbon emissions factor for incineration in the UK could be achieved relatively simply if scientists and specialists were to regularly assess the UK's average waste composition at both micro level (by assessing the typical composition of household waste) and macro level (by assessing the effectiveness and application of waste reduction and recycling policies) in order to provide an appropriate annual carbon emissions factor.

21. To give a real-life example, the North London North London Heat and Power Project (NLHPP) is a proposed new £1.2bn waste incinerator in Edmonton, North London. It is the third largest municipal waste incinerator in the UK and is significant enough to be considered 'national infrastructure'.

22. According to the IPCC, the carbon emissions from municipal solid waste (MSW) are in the range of 0.7-1.2 tons of CO2 per ton of MSW incinerated, with 33-50% from biogenic sources (e.g. food & paper) and the remainder from fossil sources (e.g. plastics)[16].

[13] D/216
[14] D/218
[15] D/480-481
[16] D/480-481

23. NLHPP will incinerate 700,000 tons of MSW per year. Therefore, if we take even the most conservative of the above carbon estimates, we arrive at a figure of 245,000 tons of CO2 emitted from fossil sources per year.

24. Another example is the Riverside incinerator in Belvedere, East London, which was granted an Environmental Permit by the Environment Agency (EA) in January 2020. In their decision document[17], the EA states that:

> "The major source of greenhouse gas emissions from the installation is however CO2 from the combustion of waste. There will also be CO2 emissions from the burning of support fuels at start up, shut down and should it be necessary to maintain combustion temperatures. BAT for greenhouse gas emissions is to maximise energy recovery and efficiency.
>
> "The electricity that is generated by the Installation will displace emissions of CO2 elsewhere in the UK, as virgin fossil fuels will not be burnt to create the same electricity."

25. These statements are fundamentally incorrect.

26. The best available technique (BAT) to reduce greenhouse gas emissions is to reduce the quantity of waste that is incinerated by introducing pre-sorting prior to incineration and remove recyclable material from the feedstock.

27. The emissions of fossil CO2 associated with energy exported to the UK national grid are as follows for various fuel types:

    a) Combined cycle gas turbines = 340g fossil CO2 per kWh exported[18]

    b) Average for UK incinerators (2017) = 797g fossil CO2 per kWh exported[19]

    c) Coal = 870g fossil CO2 per kWh exported[20]

    d) Incineration of plastic = 1,099g fossil CO2 per kWh exported[21]

28. The UK energy mix currently includes approximately 40% renewable energy from renewable sources such as wind and solar power. During the 30-year operational lifetime of the Riverside incinerator, this proportion will increase

[17] D/304
[18] D/165
[19] D/189
[20] D/293
[21] D/293

significantly – in fact, if the UK is to achieve net zero by 2050, the national grid must quickly work to reach low-to-zero carbon.

29. Domestic energy solutions are also increasing in popularity and rapidly decreasing in cost. Air source heat pumps are an example of low-carbon technology now regularly installed in homes and offices providing substantially lower CO2 emissions than gas boilers or other fossil fuel-generated heat.

Application for Aarhus Costs Cap

30. In order to bring these legal proceedings, I aim to raise £30,000 and have created a crowd funding campaign via Crowd Justice[22] to allow friends, family, my professional network and members of the public to make donations. In addition, I am approaching environmental charities and philanthropists who may be interested in offering some financial support to this cause.

31. The total fundraising target would cover the following:

- £5,000 Aarhus cap for adverse costs exposure
- £1,500 court fees
- Legal fees and Council's fees, which are subject to a Discounted Fee Agreement

My Financial information

32. In respect of my own financial situation, I am a director of Element 4 Group Ltd, an environmental consultancy, which I established in March 2019. As a new business, my earnings in 2019/20 were £24,000 plus a small income from a rental property. This combined income is relatively low. My husband is also a director of Element 4 Group Ltd and has low earnings from the business in addition to a rental property which also provides a small income. We have no other sources of income

33. As such, without a costs cap in place, I would not be able to accept the financial risk of continuing as the Claimant in these proceedings. I exhibit the attached document **[Exhibit GES1],** which I confirm is an accurate summary of all of my significant assets, liabilities, income and expenditure.

[22] https://www.crowdjustice.com/case/make-incineration-polluters-pay/

34. Lastly, I would also like to emphasise that I have no private interest in this matter. My involvement is from a personal ambition to help prevent catastrophic climate change and prevent highly polluting industries profiting from environmental destruction and social degradation.

Concluding remarks

35. In the circumstances outlined above I respectfully request permission to proceed with this judicial review, together with an order under CPR45.42(2)(a) capping my combined liability in costs to all other parties to the proceedings at £5,000.

Statement of truth

36. This statement has been produced following telephone calls and email exchanges with my legal representatives at Leigh Day.

37. I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Dated: 1 September 2020

Statement on behalf of the Claimant
G Elliott-Smith
First
Exhibit: GES1
Date: 1 September 2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO/ /2020

BETWEEN:

GEORGIA ELLIOTT-SMITH

Claimant

-and-

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

1st Defendant

-and-

MINISTER FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE

2nd Defendant

-and-

THE SCOTTISH MINISTERS

3rd Defendant

-and-

MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

4th Defendant

EXHIBIT "GES1"

I exhibit the documents referred to in this statement in the bundle of supporting documents at the tab letter and page references given; as well as the following document to this statement.

Signed: 

Dated: 1 September 2020

PERSONAL FINANCIAL STATEMENT

As of 1st September 2020

NAME GEORGIA RUTH ELLIOTT-SMITH
ADDRESS 36 Chase Court Gardens, Enfield, EN2 8DJ
DOB 18th May 1977

	INCOME	OUTGOING	BALANCE	
Employment				
Element 4 salary	24,000	-	24,000	
Element 4 dividends	6,000	-	6,000	
Rental Income				
3 Hillside Crescent, Anderton	7,800	(3,600)	4,200	
	37,800	(3,600)	34,200	per annum
Savings / Capital				
Cash in hand	500	-	500	
Savings	2,000	-	2,000	
Shares	-	-	-	
Investment Property				
3 Hillside Crescent, Anderton	160,000	-	160,000	
Debts				
Credit Cards	-	(1,000)	(1,000)	
Personal Loans	-	(9,000)	(9,000)	
Mortgages				
3 Hillside Crescent, Anderton	-	(135,000)	(135,000)	
	162,500	(145,000)	17,500	Net Worth

Notes

> All information provided is correct as of 1st September 2020.

> All income demonstrated above is provided gross. All income is taxed at the prevailing HMRC rates.

>

Name: Charlie Lewis
On behalf of: The First Defendant
Witness Statement No 1
Dated: 8 January 2021
Exhibit: CL1

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

CLAIM NO CO/3093/2020

B E T W E E N : -

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

AND

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE
(3) THE SCOTTISH MINISTERS
(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

WITNESS STATEMENT OF CHARLIE LEWIS

I, Charlie Lewis, of the Department for Business, Energy and Industrial Strategy (**"BEIS"**) of 1 Victoria St, London SW1H 0ET, will say as follows:

1. I am the Deputy Director for Emissions Trading in BEIS. In this role my responsibilities include leading the policy development and delivery of the UK's carbon pricing policy, including specifically the UK Emissions Trading Scheme (UK ETS).

2. I have been in this role since August 2019. I have been a civil servant since September 2000. Before this role, I was head of industrial decarbonisation in BEIS, including a period where I was responsible for development of the UK ETS. Prior to that I had a number of roles in the Department of Energy and Climate Change,

including leading work on Electricity Demand Reduction and also in the Electricity Market Reform Programme. Prior to 2010, I worked in HM Treasury.

3. I provide this Witness Statement on behalf of the First Defendant. This is in response to a claim for judicial review brought by the Claimant, regarding decisions by the Secretary of State and the Devolved Administrations on the appropriate design of a UK emissions trading scheme ("UK ETS"). These decisions were published on 1 June 2020 by way of the document entitled *'The future of UK carbon pricing: UK Government and devolved administrations' response'* ("the Response"). This statement provides evidence on the international and UK responses to climate change and the creation and design of the UK ETS.

4. I am duly authorised by the First Defendant to make this witness statement on his behalf. This witness statement has been prepared with the assistance of the Government Legal Department and with input from a number of BEIS policy colleagues. It has been prepared based on the underlying documents as well as through telephone and email discussions with those colleagues.

5. Save where it is stated otherwise, the contents of this statement are within my actual knowledge and are true. Where I refer to matters that are not within my actual knowledge, I believe those matters to be true and identify the source of my information or belief.

6. I have seen an advanced draft of the detailed grounds and can confirm that the content of them is true.

7. In making this statement, I have read the claim bundle and the pleadings of the parties. In this statement references in the form [**CB/X/Y**] are to the tab and page numbers in the claim bundle served by the Claimant. There is also now produced and shown to me a bundle of true copy documents marked "Exhibit CL1**"** which are to be served with this statement. References in the form [**CL1/tab/page**] are to the tab and page numbers of this exhibit.

8. This statement provides evidence on the international and UK responses to climate change and the creation and design of the UK ETS. It is structured as follows:

    a. Section A sets out the wider context under which a number of policy and design decisions were made, specifically in relation to climate commitments and goals and including the Climate Change Act 2008 ("CCA ") and the Paris Agreement.

    b. Section B outlines how cap and trade systems work, including the purpose of carbon pricing, how emissions trading schemes are intended to function, and the steps that can be taken to ensure effective delivery of the policy.

    c. Section C outlines how the Government and the Devolved Administrations decided the level of the UK ETS cap.

Section A: The Climate Change Act 2008, the Paris Agreement, and Net Zero

9. The UK ETS is a key policy to tackle climate change (covering approximately a third of UK emissions). This policy must be understood in the context of the UK overall response to climate change at domestic and international level. This section provides the wider context under which a number of policy and design decisions were made,

specifically in relation to climate commitments and goals. It considers: The CCA, the Paris Agreement, the 2050 net zero target and the system of carbon budgets, including how the Paris Agreement was considered.

The Climate Change Act 2008

10. In November 2008, the CCA came into force. The CCA is the legislative centrepiece of the UK's domestic efforts to tackle climate change. I set out below the key aspects of the CCA, so far as relevant to the issues raised by the Claimant.

Part 1 of the CCA: The target for 2050 and carbon budgeting

11. Prior to the CCA, the UK's emissions target was set by policy rather than statute, and was for a 60% reduction of carbon dioxide ("CO_2") emissions by 2050 compared to 1990 levels[1]. This target covered CO_2 emissions only. In 2008, the CCA imposed a statutory duty to ensure that emissions of CO_2 and five other[2] greenhouse gases (GHGs) were reduced by at least 80% by 2050 compared to GHG levels in 1990 ("the 2050 Target"). This target was set to ensure the UK played its role in limiting the global temperature rise to 2℃. It followed interim advice given to Government by the Committee on Climate Change (the "CCC") (an independent advisory Committee established by the CCA) in October 2008 which included a recommendation to adopt an 80% target in the CCA rather than the pre-existing 60% target [**CL1/2/30-35**][3].

12. Section 2 of the CCA provides a power to the Secretary of State to amend the target for 2050 by amending the percentage figure, if it appears to the Secretary of State that there have been significant developments in: (i) scientific knowledge about climate change, or (ii) European or international law or policy, that make it appropriate to do so. The target for 2050 has been so amended and this is discussed in more detail below.

13. Through the CCA, the UK became the first country to set legally binding carbon budgets, introducing limits on the amount of GHGs the UK can emit over successive five-year periods. Under the CCA the Secretary of State must:

    a. Set for each succeeding period of five years, beginning with the period 2008-2012, ("budgetary periods") an amount for the net UK carbon account (the "carbon budget"), and ensure that the net UK carbon account for a budgetary period does not exceed the carbon budget (section 4).

    b. Set any new budgets with a view to meeting the target for 2050 (section 8).

    c. Take into account the advice of the CCC (discussed further below) and any representations made by the other national authorities before setting a carbon budget (section 9).

[1] The 60% target was recommended in 2000 by the Royal Commission on Environmental Pollution in its Twenty-second Report, 'Energy - The Changing Climate'. The government accepted the recommended 2050 target as confirmed in the 'Energy White Paper: Our Energy Future', issued by the Department of Trade and Industry in February 2003.

[2] Methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride.

[3] Letter from the Committee on Climate Change to the Secretary of State dated 7 October 2008.

d. Take into account, when setting the budgets, certain matters including scientific knowledge about climate change, technology relevant to climate change, and fiscal, economic and social circumstances (section 10).

e. Prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under the CCA to be met, and prepare these proposals and policies with a view to meeting the target for 2050 (section 13).

f. Lay before Parliament, as soon as is reasonably practicable after a new carbon budget is set, a report setting out proposals and policies for meeting carbon budgets for the current and future budgetary periods, up to and including the period for the new budget (section 14).

g. Lay before Parliament, in respect of each calendar year, annual statements of UK emissions, which must include a statement of the net UK carbon account for the year (section 16).

h. Lay before Parliament, by 31st May in the second year following the end of a budgetary period, a final statement for that budgetary period to include certain information allowing for a determination as to whether the carbon budget in question has been met (section 18).

14. While the Government regularly sets legally binding carbon budgets, the Scottish Government is also driven by annual targets under the Climate Change Act (Scotland) 2009 ("CCA (Scotland)") and the Welsh Government through The Environment (Wales) Act 2016. Northern Ireland also contributes towards UK carbon budgets.

Part 2 of the CCA: The Committee on Climate Change

15. Part 2 of the CCA establishes the CCC. This is an independent expert body which advises the Government and Devolved Administrations on, amongst other things, matters relevant to the setting of new carbon budgets (section 34). The CCC also lays before Parliament and each of the devolved legislatures an annual report on progress towards meeting the carbon targets (section 36) and each year the Government must respond, having first consulted the other national authorities (section 37).

Part 3 of the CCA: Trading schemes and carbon pricing

16. Part 3 of the CCA provides a power to establish trading schemes, as defined in section 44. I discuss in detail below the creation of the UK ETS in accordance with these provisions.

17. As per sections 48(1) and (2), the Government and the Devolved Administrations obtained and took into account the advice from the CCC including when setting the cap. This is explained further in section C below.

The Paris Agreement

18. The Paris Agreement was adopted in late 2015 by the 197 State Parties to the UN Framework Convention on Climate Change ("UNFCCC"). The UNFCCC was ratified by the UK in December 1993. The Paris Agreement was ratified by the UK in November 2016.

19. Article 2 of the Paris Agreement sets a collective aim of holding the global temperature increase to well below 2℃ above pre-industrial levels and pursuing efforts to limit the increase to 1.5℃ [**CB/E44/485**].

20. In order to achieve this long-term temperature goal, Parties collectively aim to reach global peaking of GHG emissions as soon as possible, recognising that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs in the second half of this century[4] as set out in Article 4.1 of the Paris Agreement. The Government's position is that, while this aim points towards parties not delaying action, it is not a legally binding requirement.

21. Article 4 of the Paris Agreement requires every Party to prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve. These NDCs embody efforts by each country to reduce national emissions. NDCs are required to be communicated to the UNFCCC secretariat every five years, who make them publicly available. Each successive NDC will represent a progression from the previous NDC. The Paris Agreement itself does not create a binding obligation on Parties to meet the emission reduction pledges communicated in their NDCs, or to take any particular mitigation action. This is nationally determined by each Party.

22. The CCC's 3 December 2020 advice to the Government on setting an NDC stated that:

> "*We recommend that the UK commits to reduce territorial emissions by at least 68% from 1990 to 2030, as part of the UK's nationally determined contribution (NDC) to the UN process. This would constitute a decisive commitment to a net-zero emissions trajectory, consistent with the Paris Agreement. It would place the UK among the leading countries in climate ambition."*[5]

23. On 12 December 2020, the UK communicated to the UNFCCC a new NDC which commits to reducing GHG emissions by at least 68% by 2030 on 1990 levels[6]. This represents a significant increase from the UK's previous contribution and commits the UK to the highest level of emissions reductions by 2030 of any major economy to date, compared to 1990 levels. The level of the UK's NDC is consistent with advice from the CCC and our commitment to be net zero by 2050, outlined below. It was set taking into account the temperature goal of the Paris Agreement and the same equity principles as used by the Intergovernmental Panel on Climate Change ("IPCC").

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[4] The UK's emissions peaked in the early 1990s and then have continued to decrease over time. This is shown by published statistics for the UK's GHG emissions since 1990, being the baseline year for UK domestic and international emissions reduction targets: see '2018 UK greenhouse gas emissions: final figures - statistical release', and in particular the chart on page 5. https://www.gov.uk/government/statistics/final-uk-greenhouse-gas-emissions-national-statistics-1990-to-2018.

[5] https://www.theccc.org.uk/publication/letter-advice-on-the-uks-2030-nationally-determined-contribution-ndc/

[6] https://www.gov.uk/government/publications/the-uks-nationally-determined-contribution-communication-to-the-unfccc

The UK's net zero commitment and carbon budgets

Amendment of the target for 2050 to 'net zero'

24. In June 2019, the UK became the first major economy to legislate for a 2050 net zero GHG emissions target through the Climate Change Act 2008 (2050 Target Amendment) Order 2019 ("the 2019 Order"). Section 1 of the CCA now requires the Secretary of State "to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline". This is commonly referred to as the "net zero target". While the target is UK-wide, the Devolved Administrations can and have set their own targets.

25. The CCC's May 2019 advice to the Government on setting a net zero target stated that

> *"We do not believe an equal per capita share of emissions in 2050 would be a sufficient contribution to the Paris Agreement, given its emphasis on equity and given the UK's capability to go further….We therefore consider that an appropriate UK contribution to the Paris Agreement in 2050 should go beyond what is required for the world overall.*
>
> *A net-zero GHG target for the UK (i.e. a 100% reduction in emissions) would go beyond per capita emissions reductions in global pathways that are necessary to limit temperature rise to well below 2°C and would be towards the high end of the estimated range of necessary reductions for a limit of 1.5°C."* [**CL1/10/455**.

26. The advice also advised that:

> *"We do not recommend changes to the fourth or fifth carbon budgets at this time, but note that both were set on the path to the existing 80% target and therefore are likely to be too loose.*
>
> *We reiterate that recommendation and we will consider whether the fourth and fifth carbon budgets should be tightened in legislation as part of our advice on the sixth carbon budget."* [**CL1/10/466**].

27. The Government took the Paris Agreement into account when proposing a net zero target, ensuring that national legislation was consistent with the Paris Agreement's goals. Parliament can be taken to have had regard to these same matters when legislating for a net zero target, as demonstrated by the Explanatory Memorandum (EM) to the 2019 Order [**CL1/13**]. The EM outlined how the Paris Agreement was taken into account when setting the net zero target, including through consultation with the CCC. It states that:

> *7.5 In response to the IPCC's Special Report[7] the Government requested advice from the Committee on Climate Change on the implications of the Paris Agreement and the report for the UK's long-term emissions reduction targets, asking whether further action was needed to meet goals of the Paris Agreement.*

[7] The IPCC released this Special Report on 8 October 2018. The report contains the most up-to-date assessment of the science on impacts and associated greenhouse gas emissions pathways for 1.5°C, compared to 2°C

7.6 On 2 May 2019 the Committee on Climate Change provided that advice. This recommended that that the UK should legislate as soon as possible to reach net-zero greenhouse gas emissions.

7.7 The Government accepts and agrees with the Committee's advice that the greenhouse gas emissions target for 2050 should be amended to provide for net zero emissions and, having taken into account representations from the devolved administrations who have not raised any issues with the amendment proposed, this instrument gives effect to that decision."
[**CL1/13/870-1**]

28. While there is no requirement in the Paris Agreement for countries individually or collectively to achieve net zero by 2050, the UK's net zero GHG target for 2050 represents an ambitious contribution to the global efforts required to meet the mitigation targets under Article 2.1(a) and Article 4.1.

29. The Government does not dispute that the Paris Agreement has mitigation aims that cannot be met simply through setting a net zero GHG target by 2050. However, as stated above the UK is legally required to set shorter-term domestic carbon budgets, as well as shorter-term contributions through the Paris Agreement. The UK has already set five carbon budgets which cover five-year periods up to 2032, and submitted an NDC that covers emissions up till 2030. The UK is also in the process of setting the sixth carbon budget which will cover a period of 2033-2037.

30. As stated above, the Paris Agreement does not set requirements for how Parties should reduce their emissions. Instead developed countries "should" set economy-wide targets in their NDCs. Parties can determine whether they set further sectoral targets and the policies and measures to meet their economy-wide target. This includes whether to put in place an emissions trading scheme and, should that be done, which emissions and installations that scheme would cover.

The Sixth Carbon Budget

31. To date five carbon budgets have been set for the periods 2008–2012, 2013–2017, 2018–2022[8], 2023–2027[9] and 2028–2032[10].

32. The government has always set carbon budgets in accordance with latest scientific evidence and CCC's advice.

33. The fifth of these carbon budgets ("CB5"), set in 2016, was the first one to be legislated after the UK signed the Paris Agreement and takes the Paris Agreement as one of its key guiding principles. The CCC advised in their 26 Jan 2016 letter on the Implications of the Paris Agreement for the fifth carbon budget[11] that their previous recommendation for CB5 still stood, and that the Government should legislate on this basis.

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[8] All three set under the Carbon Budgets Order 2009/1259.

[9] Carbon Budget Order 2011/1603.

[10] Carbon Budget Order 2016/785.

[11] https://www.theccc.org.uk/publication/implications-of-the-paris-agreement-for-the-fifth-carbon-budget/ [12] https://www.legislation.gov.uk/ukia/2016/152/pdfs/ukia_20160152_en.pdf

34. Similarly, scientific evidence is a key consideration in setting carbon budgets. Section 4.3 of the Impact Assessment for the Fifth Carbon Budget[12] , for example, reviews factors that must be taken into account by the Secretary of State under the CCA when making a decision on a carbon budget level, including scientific knowledge about climate change. The Impact Assessment states the following (p.65) in relation to it:

> *"271. Climate science underpins the UK's 2050 target to reduce emissions by 80% on 1990 base levels. The UK's 80% target was advised by the Committee on Climate Change as an appropriate share of global action to limit global surface warming to around 2° Celsius above preindustrial levels by 2100. In its advice for the fifth carbon budget level, the CCC reaffirmed the appropriateness of the UK's 80% target for a global 2° Celsius pathway. The 1.5° Celsius aspiration from the recent Climate Conference in Paris underwrites the global long term goal to keep global temperature increase well below 2° Celsius.*

35. In 2021[13], the Government will set the Sixth Carbon Budget ("CB6") covering the budgetary period 2033-37. CB6 will need to be set with a view to reaching the net zero target for 2050. Before setting CB6 the Government will take into account the CCC's advice on CB6, which was published on 9 December 2020 [**CL1/39**][14].

36. The advice recommended a 78% emissions reduction by 2035 (against 1990 levels), recognising this would achieve well over half of the emissions required by 2050. The advice sees emissions over the 2020s fall more rapidly than required by the Fifth Carbon Budget:

> *"[e]missions must fall more quickly to 2030 than required by the currently legislated Fifth Carbon Budget"*

37. As promised in their May 2019 advice on a net zero target (see paragraph 26), the CCC notes in its CB6 advice [**CL1/39/1580**] its view on whether previously set carbon budgets need to be changed in light of the new 2050 target:

> "*It is for the Government to decide whether the currently legislated budgets are amended to bring them in line with the revised 2050 target or the 2030 NDC, but the Committee does not consider it to be necessary."*

And

> *"With the NDC for 2030, and the fourth and sixth carbon budgets in the right places, it is not necessary to change the Fifth Carbon Budget."*

38. The Government will take this advice into account when setting CB6. Necessary policy and analytical work is already being done in preparation for setting CB6 in 2021. Government intends to publish, as soon as reasonably practicable after CB6 is set, a strategy setting out how the Government plans to meet budgets to CB6. The setting of CB6, and the policies and proposals contained in the strategy, will address emissions across the UK economy.

39. Specifically relating to emissions trading, 'The future of UK carbon pricing: UK Government and devolved administrations' response' [**CB/38, para 4**] commits us to resetting the UK ETS cap in line with this advice:

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[12] https://www.legislation.gov.uk/ukia/2016/152/pdfs/ukia_20160152_en.pdf

[13] And not later than 30 June 2021 pursuant to the duty under section 4(2) CCA.

[14] https://www.theccc.org.uk/publication/sixth-carbon-budget/

"The Committee on Climate Change (CCC) will advise later this year on a cost-effective pathway to net-zero, as part of their advice on the Sixth Carbon Budget. We will consult again on what an appropriate trajectory for the UK ETS cap is for the remainder of the first phase within nine months of this advice being published. Our aim is that any changes to the policy to appropriately align the cap with a net zero trajectory will be implemented by 2023 if possible and no later than January 2024, although we would also aim to give the industry at least one year's notice to provide the market with appropriate forewarning."

40. In the December 2020 advice[15], the CCC recommends that:

"the cap for the UK ETS should be set in line with the Balanced Net Zero Pathway developed in this report, implying a 53% reduction in emissions from 2019 to 2030 for the sectors currently covered by the EU ETS" [**CL/39/1576**].

41. Policy and analytical work is already underway to align the UK ETS cap with this advice, as per the commitment made in the Government response to align the cap with the net zero pathway, by 2023 if possible and no later than January 2024. This includes commissioning updated Marginal Abatement Cost Curves (MACCs) and emissions projections, and planning for a consultation within 9 months of the CB6 advice being published.

Government commitments on climate action

42. A number of policy commitments have been made to deliver on the targets set by the carbon budgets and the net zero commitment. As policies and proposals to reduce GHG emissions are developed and implemented, their contribution to reducing emissions and helping the UK meet the legislated climate targets are quantified and published regularly in the updated Energy and Emissions Projections. A number of key polices are outlined below, which demonstrate Government's commitment to delivering net zero.

43. In October 2017 the Secretary of State, pursuant to his duties under section 14 of the CCA, laid the 'Clean Growth Strategy' before Parliament [**CL1/5**][16]. This sets the Government's policies and proposals for decarbonising the UK economy through the 2020s. The Strategy sets out policy milestones, together with illustrative pathways, showing how decarbonisation[17] efforts might be distributed across the UK economy, noting that the Government needs to retain some flexibility to respond to changes in technology over the coming 15 years.

44. The Clean Growth Strategy commits to establishing a future carbon pricing system at least as ambitious as the EU ETS (pg. 44):

"The EU Emissions Trading System (EU ETS) covering the "traded sector" (power, heavy industry and intra EEA aviation) which collectively account for around 40 per cent of UK emissions under carbon budgets. We remain committed to reducing emissions in these sectors and the UK already has a

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[15] https://www.theccc.org.uk/publication/sixth-carbon-budget/

[16] On 16 April 2018 an updated Clean Growth Strategy was published, but the updates were limited to factual corrections only. See https://www.gov.uk/government/publications/clean-growth-strategy and in particular the document entitled 'Clean Growth Strategy: correction slip'.

[17] Decarbonisation refers to efforts to reduce the GHG emissions created by a business, sector, or country.

range of domestic policies in place to support this. We will seek to ensure that our future approach is at least as ambitious as the existing scheme and provide a smooth transition for the relevant sectors" [**CL1/5/246**].

45. The Clean Growth Strategy also makes clear that (page 54) technologies in different sectors develop at different rates, meaning that over time some sectors will find it easier to reduce emissions than others [**CL1/5/256**]. The Clean Growth Strategy mentioned the power sector as an example where efficiency improvements and faster than expected cost reductions in wind and solar technologies have contributed to that sector's substantial emissions reductions (page 24) [**CL1/5/226**]. Any net emissions increase from a particular policy or project is therefore managed within the Government's overall strategy for meeting carbon budgets and the net zero target for 2050, as part of an economy-wide transition. It is the role of Government to determine how best to make that transition.

46. In 'Leading on Clean Growth'[18] [**CL1/17**], the Government described in detail the progress made during 2019 in delivering the commitments made in the Clean Growth Strategy [**CL1/5**].

47. In October 2019, it was announced that the Prime Minister was to chair a new Cabinet Committee on Climate Change. That committee, the Climate Action Strategy Committee, has since been established with its terms of reference being to "consider matters relating to the delivery of the UK's domestic and international climate strategy".

48. The Secretary of State for BEIS chairs the "Climate Action Implementation Committee", with its terms of reference being to "consider matters relating to the delivery of COP26, net zero and building the UK's resilience to climate impacts". Additionally, the Spring Budget 2020 reinforced the UK's strong commitment on climate change with: increased ambition on carbon capture and storage; a significant expansion in tree planting and peatland restoration; a new levy to fund a greener gas grid; over £1 billion of further support for ultra-low emission vehicles; at least doubling funding for energy innovation; and tax measures to encourage greater energy efficiency and tackle plastic waste[19]. This builds on the £5 billion new funding for buses and cycling, announced by the Prime Minister in February 2020.

49. The Government Response to the CCC's 2020 Progress Report to Parliament of October 2020[20] provided an update on the progress made in delivering the commitments made in the Clean Growth Strategy [**CL1/34**] and committed to publishing a comprehensive Net Zero Strategy in the lead up to COP26.

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[18] https://www.gov.uk/government/publications/committee-on-climate-changes-2019-progress-reports-government-responseshttps://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839555/CCS0819884374-001_Government_Response_to_the_CCC_Progress_Report_2019_Web_Accessible.pdf

[19] I understand that the accompanying witness statement by my DEFRA counterpart will go into more detail on UK waste management policies.

[20] https://www.gov.uk/government/publications/committee-on-climate-changes-2020-progress-report-government-response

50. On 12 November 2020 the Prime Minister announced a Ten Point Plan for a Green Industrial Revolution [**CL/37**][21], supporting the UK to rebuild from the pandemic in a way that supports green jobs, levelling up and accelerates our path to net zero. The Energy White Paper[22] was published on 14 December 2020 and builds on this, setting out plans for a historic transformation of the UK's energy system, including plans to implement the world's first net zero carbon cap and trade market in the UK ETS, fully decarbonising our electricity generation by 2050, creating a fair deal for consumers and enabling new green industries such as Hydrogen and Carbon Capture, Usage and Storage.

Section B: How cap and trade systems work

51. Given that this claim is about the design of and decisions taken in relation to the UK ETS by the Government and the Devolved Administrations, it is necessary to set out the policy intention and policy drivers of emission trading schemes. These drivers influenced the development and design of the UK ETS as will be outlined in the next section. This section outlines the objectives of carbon pricing, how emissions trading schemes are intended to function, and the steps that can be taken to ensure effective delivery of the policy.

The market failure and the objective(s) for carbon pricing

52. Carbon pricing policy addresses the market failure associated with the externality[23] of GHGs. That is, the cost of emitting CO_2 and other GHGs which cause climate change is not – in the absence of a carbon pricing system such as emissions trading – paid for by the firm emitting that carbon. Carbon pricing policies aim to correct this by levying a cost on those who emit GHGs.

53. In addition to just addressing a market failure, there is further policy rationale for pricing carbon. Making products that involve producing large amounts of GHG emissions more expensive incentivises companies that produce such products to reduce the associated emissions, by becoming more efficient or investing in and switching to less emissions intensive production processes. It also makes alternative products that are less polluting more cost competitive. Pricing carbon also means the cost of GHG emissions is better reflected in prices, meaning consumers can make better decisions based on the emissions associated or embedded within a product.

54. Taking no or insufficient action to reduce emissions would, obviously, be contrary to the net zero target and international objectives. However, the cost to fully decarbonise an economy, such as the UK's, is not negligible. The CCC estimate the cost would be equivalent of less than 1% of GDP over the next 30 years[24]. It is

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[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936567/10_POINT_PLAN_BOOKLET.pdf

[22] https://www.gov.uk/government/publications/energy-white-paper-powering-our-net-zero-future

[23] An externality means a cost caused by a producer that is not financially incurred by that producer. For more info see IMF: What Are Externalities? https://www.imf.org/external/pubs/ft/fandd/2010/12/basics.htm

[24] For example, the Climate Change Committee (CCC) recently stated that: "The CCC finds that these savings substantially reduce the cost of Net Zero compared with previous assessments: now down to

therefore prudent to try to reduce emissions in a cost-effective way. Trading of carbon allowances, as explained below, is one way to achieve this.

How cap and trade works

55. The UK ETS, like the EU ETS, is known as a 'cap and trade' scheme, or just simply as an 'emissions trading' scheme. 'Cap and trade' is one way to price carbon that addresses the market failure outlined above. It is a market-based carbon pricing tool to incentivise and control the reduction of GHG emissions in a cost-effective way.

56. There are currently at least 20 emissions trading systems operating across five continents, with the EU ETS as the largest.[25]

57. A limit (the cap) is set on the total amount of certain GHGs that can be emitted by the sectors covered by the scheme over a given time period, usually over a period of around 10 years. The cap is divided into allowances[26], and participants receive or purchase emission allowances which they can buy and sell with one another as needed. This cap is reduced over time, so that the limit on total emissions fall. Participants[27] are required to monitor their emissions[28] during a calendar year, surrendering one emissions allowance for every tonne of carbon dioxide equivalent (CO_2e) they have emitted at the end of each reporting year. Failure to surrender sufficient allowances results in civil penalty fines for each missing allowance.

58. The cap must ensure that the system is viable for businesses to continue operating, while incentivising cost-effective emissions reductions. The cap is reduced over time in line with the emissions reduction target, providing a long-term market signal so companies can plan and invest in abatement[29] accordingly.

59. The 'trade' aspect comes from the purchasing and/or trading of allowances within the ETS, either through auctions where participants bid for allowances or through trading on the market. Allowances are sold through auctions by the respective government who administers the scheme. Participants will need to buy allowances needed to

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less than 1% of GDP throughout the next 30 years." https://www.theccc.org.uk/2020/12/09/building-back-better-raising-the-uks-climate-ambitions-for-2035-will-put-net-zero-within-reach-and-change-the-uk-for-the-better/ See also report from the IMF: https://www.imf.org/external/pubs/ft/fandd/2019/12/the-true-cost-of-reducing-greenhouse-gas-emissions-gillingham.htm

[25] See ICAP website: https://icapcarbonaction.com/en/

[26] The EU ETS and UK ETS uses 'allowances' to refer to this unit, which gives the holder the right to emit a fixed amount of GHG (usually 1 tonne of CO2 equivalent per allowance); other jurisdictions refer to this instead as a 'permit'. The UK ETS uses 'permit' to refer to what is, in effect, a licence each polluter covered by the ETS must get, which entitles them to emit GHG with a requirement to surrender ETS allowances or be subject to a fine.

[27] We use 'participants' to mean any entity involved in emissions trading scheme including those who must surrender allowances and those that only trade allowances. 'Operators' refers to any entity which emits GHGs and must surrender allowances the ETS; operators include both 'installations', which are operators that, simply put, do not move around, and aviation operators.

[28] Emissions data submitted by participants must be verified by an independent third party prior to reporting them to the Regulator. This procedure is known as Monitoring, Reporting and Verification (MRV). In the EU ETS, under the Verification and Accreditation Regulation operators must submit annual data that has been verified by an accredited verifier, administered by accreditors such as UKAS.

[29] Abatement refers to any measure taken to reduce, control or eliminate GHG emissions from the respective process covered by the cap and trade scheme.

cover their total annual emissions. The price that participants are willing to pay for allowances is the carbon price.

60. At any particular point, a polluter can choose to either invest in decarbonising their production processes (e.g. by purchasing more efficient boilers, or installing their own solar panels to replace an on-site generator) or just purchase allowances and carry on emitting GHGs. This decision will be based on their assessment of the cost to decarbonise their production processes, and their expectations of the price of allowances now and in the future. As such, at an economy scale, the reduction in emissions happens where it is cheapest to do so, and progressively more expensive forms of emissions reduction happen as the carbon price is expected to increase over time.

61. 'Cap and trade' schemes can give some allowances for free to certain sectors that are at risk of carbon leakage. Carbon leakage relates to competitiveness issues that could arise if businesses deem the costs associated with the system to be too high. These might include tight targets leading to a shortage of allowances in the market or excessively high allowance prices. Significantly, this may lead to carbon leakage in more energy intensive industries, whereby those businesses transfer production or operation to other countries with less ambitious or stringent emission constraints to avoid these extra costs. Carbon leakage would therefore cause an increase in total global emissions, so there is both an economic and environmental role in avoiding it.

62. Giving free allowances means the recipient needs to purchase fewer allowances from the market, and so reduces the overall carbon price they pay. The number of free allowances made available to operators reduces from year to year. Certain sectors can also acquire free allowances from government to assist operators with their transition to lower carbon processes.

63. As the cap is reduced over time, the availability of allowances also decreases and, as a result, the market price of the progressively scarcer allowances is likely to increase. Therefore, all operators are incentivised to progressively reduce GHG emissions since this reduces their need to purchase potentially increasingly expensive allowances to cover their emissions. Those sectors who receive some free allowances also have a financial incentive to reduce emissions since they can sell any surplus allowances on the market.

64. It is worth noting that it is not incompatible with the successful functioning of a scheme if the number of allowances in circulation in the market exceeds the cap in any given year, due to demand for allowances for reasons other than meeting compliance obligations (note this point is covered in more detail below). In a scheme year, it is a combination of:

    a. The number of allowances issued by the government that year (via free allocation and via auctions, as mentioned above).

    b. The number of allowances banked or hedged[30] by installations and traded in secondary markets.

[30] Banking and hedging refer to two expected market behaviours, which motivate participants to purchase allowances in advance. Banking is undertaken to manage the timings of abatement, for

c. If two ETSs are linked then depending upon the linking agreement, market participants would be able to buy or sell further allowances to or from the other ETS market.

Setup of a new cap and trade scheme

65. Cap and trade schemes take time to design and implement. Problems can arise which can significantly undermine the confidence in the market and the policy in general. Participants' confidence in the market-led nature of emissions trading is critical for the long-term success of an ETS: in particular the credibility of potential future price increases, where these reflect the equilibrium price consistent with the cap and scheme objectives. Having such confidence means participants will be willing to invest in abatement to offset what they will predict to be progressively increasing carbon prices. As such, it is prudent for new schemes to reduce risks of events that would undermine this confidence.

66. A liquid and stable market is valuable for an effective ETS in order most effectively to incentivise businesses to reduce emissions [**CL1/3**].[31] It enables participants to form reasonable expectations of future prices so that they can set long-term investment plans to abate emissions, being able to judge when it would be cost-effective to do so. For the system to operate most efficiently, the market requires sufficient availability of allowances for transactions to occur. This liquidity provides flexibility for sub-sectors to decarbonise at different rates, buying or selling allowances as required at proportionate costs. Larger markets will typically have greater liquidity than small markets. Allowances can be traded by a number of different parties, and so these are the parties which contribute to liquidity of the market:

- Operators, to account for their emissions in the current scheme year.
- Operators, to account for emissions in future years and 'hedge' against uncertainty.
- Third parties, such as traders or other investors, who trade based on their expectations of future prices.

67. Therefore, if the cap in the early years is only set at the level of actual emissions, this would not account for allowances held by traders and operators who are hedging and so give a limited supply of allowances.

68. Providing sufficient headroom – i.e. a surplus of allowances above expected emissions – early on for a new system would reduce the risk of illiquidity and disproportionately rising costs for businesses, and potential carbon leakage (see CCC's letter of 20 March 2020 at [**CB/36**]. This would improve the effectiveness of the system, in anticipation of an ongoing reduction of allowances each year. Previously established schemes have allowed the cap to exceed business-as-usual (BAU) emissions and still led to a reduction in emissions. For example, the EU ETS in 2014 had a carry-over from Phase II of approximately 1800 MtCO2, which is

example based on information about when abatement is most cost effective; while hedging is about managing the risk of future price movements.

[31] World Bank: Domestic Emissions Trading: Existing and Proposed Schemes https://openknowledge.worldbank.org/handle/10986/21831

estimated to be greater than expected cumulative emissions for Phase III [**CL1/4**][32]. The EU ETS has already delivered significant emissions reductions despite carrying an effective total surplus representing 87% of annual emissions in 2019. In 2019, there were 1.6bn tonnes of verified emissions in the EU ETS[33]. The surplus of allowances was 1.39bn (i.e. equivalent to 1.39bn tonnes of CO_2e)[34]. Despite this, emissions from installations covered by the EU ETS nonetheless declined by about 35% between 2005 and 2019[35].

69. Previously established schemes have also taken greater time to fully launch the scheme[36]. This provides advantages for both operators, who have more time to adjust to the new policies, and for policymakers, who can learn from the experience to review and adjust design features of the scheme appropriately. For example, some emissions trading schemes have chosen not to introduce a cap on emissions allowances for the first few years (New Zealand) [37], or have instead chosen to give all allowances free of charge (South Korea) [38], or allowed unrestricted offsets through international credits (New Zealand[39] and EU ETS[40]). Some ETSs are also voluntary at the start (e.g. Switzerland)[41] [**CL1/6**].

70. A transition from an established, large, and stable market to a new and much smaller alternative – as is the case for the UK replacing the EU ETS with the UK ETS – has not been done by any other economy. Instead, regional pilots usually transition into larger nation-wide schemes, or national ETSs have joined with others to form international schemes. There is therefore no precedent that the Government could use to predict market behaviours in the new UK ETS in January 2021.

Price extremes

71. While movement in prices provides market participants with the information to make investment decisions to decarbonise, extremely low prices could undermine the ETS' decarbonisation incentive. At the same time, extremely high prices could undermine businesses' ability to invest in decarbonisation. It is therefore commonplace for ETSs to design mechanisms to guard against these price extremes and so support effective and efficient decarbonisation. Such mechanisms focus on price, supply of allowances, or a combination of both. For example:

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[32]Oxford Energy Associates and ECOFYS, (2014), Cap-Setting, Price Uncertainty and Investment Decisions in Emissions Trading systems https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/311355/cap_setting_investment_decisions_emissions_trading_systems_report.pdf

[33] https://www.eea.europa.eu/data-and-maps/dashboards/emissions-trading-viewer-1

[34] https://ec.europa.eu/clima/sites/clima/files/ets/reform/docs/c_2020_2835_en.pdf

[35] https://ec.europa.eu/clima/policies/ets_en

[36] E.g. EU ETS Phase 1 'learning-by-doing' - https://ec.europa.eu/clima/policies/ets_en#tab-0-2

[37] https://www.tandfonline.com/doi/full/10.1080/14693062.2018.1467827

[38] https://www.tandfonline.com/doi/full/10.1080/14693062.2018.1467827

[39] https://www.tandfonline.com/doi/full/10.1080/14693062.2018.1467827

[40] https://ec.europa.eu/clima/policies/ets/credits_en

[41] https://www.tandfonline.com/doi/full/10.1080/14693062.2018.1467827

a. A price floor may be set at an appropriate level to guarantee a minimum price at which allowances can be sold during auctioning. An example of this is in the UK ETS which will have an Auction Reserve Price ("ARP") of £15.

b. Price-based supply adjustment can also take place to guard against low prices. I understand that the Regional Greenhouse Gas Initiative ("RGGI") in North-eastern US states uses an Emissions Containment Reserve ("ECR")[42], which reduces a fixed quantity of allowances supplied when prices fall below a pre-determined trigger level.

c. Supply adjustment can also take place on the basis of supply thresholds. For example, the EU ETS' Market Stability Reserve ("MSR")[43] is an adjustment mechanism that alters the supply of allowances to auction if supply thresholds are crossed, to address surpluses of allowances and improve resilience to macroeconomic shocks.

d. Systems can also have a price ceiling designed to provide a safeguard against significant in-year price spikes. Examples of this include the provisions in Article 29a of Directive 2003/87/EC in the EU ETS, the Cost Containment Mechanism ("CCM") in the UK ETS, and the Cost Containment Reserve ("CCR") [44] in the RGGI.

Incentivising emissions reduction

72. As outlined above at paragraph 63, as the cap is reduced over time the reduction in supply should, all things equal, lead to a rise in the price of carbon. The prospect of rising prices would provide increasing incentives to businesses to decarbonise and reduce their own allowance requirements. The trading of allowances provides flexibility and ensures that emissions are reduced in the most cost-effective areas.

73. It is worth noting that an ETS incentivises emissions reductions in a number of different ways:

a. Firstly, it puts a price on current carbon emissions, incentivising decarbonisation directly if the price of carbon is greater than the cost of abatement. This means that each participant can make their abatement decisions based on their own potential costs, ensuring that decarbonisation takes place where and when it is cheapest to do so. This helps to deliver decarbonisation in as economically efficient a way as possible.

b. Secondly, the expectation of rising prices over time, as a result of the downward trajectory of the cap, incentivises participants to make investment decisions now to reduce future emissions, helping them to avoid paying a higher price to emit carbon in the future.

a. Thirdly, participants are incentivised to reduce emissions because any allowances that they hold now but do not need for compliance can be sold to raise revenue. These can either be sold now or held to be sold at an expected higher price in the future.

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[42] https://www.rggi.org/program-overview-and-design/elements

[43] https://ec.europa.eu/clima/policies/ets/reform_en

[44] https://www.rggi.org/program-overview-and-design/elements

Section C: The UK Emissions Trading Scheme

74. This section first outlines the policy and legislative basis for establishing a UK ETS as a whole. I then set out the rationale for how the Government and the Devolved Administrations decided the level of the UK ETS cap, specifically: I outline the context in which the cap decision was taken, the chronology for the decision and then address specific points raised by the Claimant. I also address decisions on the scope of the UK ETS.

Policy for establishing the UK ETS

Replacing membership in the EU ETS

75. Successive UK governments have long advocated the development of carbon pricing internationally and the Government is firmly committed to carbon pricing as an effective tool for decarbonising the UK economy. The UK established Europe's first emissions trading scheme in 2002, which served as a pilot for the EU ETS which launched on 1 January 2005. Over the three phases that have taken place since then, the UK has played a leading role in developing the EU ETS and London has established itself as a global centre of carbon trading.

76. As EU countries moved into Phase IV (2021-2030) of the EU ETS on 1 January 2021, the UK ended its participation and established the UK ETS[45]. The UK ETS replicates many features of the EU ETS and continues to apply to energy intensive industries (EIIs), the power generation sector and aviation.

77. The proposed design of the UK ETS was first set out in the May 2019 consultation document [**CL1/11**] with a key objective being that:

> *"As set out in the Clean Growth Strategy, our future approach will be at least as ambitious as the current EU Emissions Trading System (EU ETS) and will provide a smooth transition for relevant sectors."*

Establishing an effective UK ETS

78. As outlined in section B, for the UK ETS to achieve its overall purpose of in reducing emissions and therefore tackling climate change it needs to function effectively as a market. The design takes into account a range of factors to address risks to the market presented by carbon leakage, reduced liquidity or price extremes. Such factors include the need to maintain UK business competitiveness and to provide a smooth transition.

79. A smooth transition for scheme participants from an established, large, and stable market to a new and much smaller alternative was rightly prioritised. This is because, set out above at paragraph 70, no other economy has done this. There is therefore no precedent that the Government and the Devolved Administrations could use to predict market behaviours in the new UK ETS in January 2021.

80. As a new market the UK ETS is especially susceptible to spikes and volatility in allowance prices at the start, which would risk undermining the effectiveness of the UK ETS in reducing emissions. Annex A to the May 2019 consultation document [**CL1/11/822-837**] explained that the UK represented only around 10% of EU emissions and that there was an issue as to whether the UK market would be

[45] NB: electricity generators in Northern Ireland will remain in the EU ETS by virtue of the Northern Ireland Protocol.

sufficiently large to be effective as a standalone system. To allow for effective delivery of the policy, consideration was given to the need for a sufficient volume of trading for the system, recognising that market power would be more concentrated and with fewer individual participants.

81. The consultation document explained that ensuring a smooth transition between the EU and UK systems could mean providing for increased availability of allowances in the first years of the scheme, but then fewer in later years, so that the effects of the tighter cap materialise over the course of the phase (2021-2030) rather than just at the beginning]:

> *"Ensuring a "smooth transition" between the EU and UK systems could mean setting a steeper trajectory to facilitate the availability of more allowances in the first year or years of the phase, and fewer in later years, so that the effects of a tighter cap materialise over the course of a phase rather than at the beginning"* [**CL1/11/746, para 17**].

Legislative basis for emissions trading schemes

82. As I explain above at paragraphs 16 and 17, the CCA gives powers to the relevant national authorities (the Government and the Devolved Administrations) to legislate for trading schemes relating to GHG emissions. In this case, to ensure the UK ETS covers the UK, the Government and the Devolved Administrations jointly legislated for the scheme using these powers.

83. The Greenhouse Gas Emissions Trading Scheme Order 2020 No. 1265 ("the Order") was made in November 2020 [**CL1/35**] and establishes the UK ETS. The Order was subsequently amended by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 No. 1557, which amends the Order and provides the legislative framework for the free allocation and the registry. The Amendment Order was made on 16 December 2020. The Order explains that:

> "*the basic proposition of the scheme is that, for each year, participants have to surrender 'allowances' equivalent to their greenhouse gas emissions within the scope of the scheme*".

84. The position on the cap on allowances is explained in overview at 7.6 of the Explanatory Memorandum published with the Order as follows:

> "*The cap on allowances that are created under the UK ETS each year will initially be set at 5% below the UK's expected notional share of the EU ETS cap for Phase IV of the EU ETS. Based on the proposed design scope, this equates to roughly 156 million allowances in 2021. The initial cap will be reduced annually by a little over 4.2 million allowances, meaning that the UK ETS cap will remain 5% below where we would have expected the UK's notional share of the Phase IV EU ETS cap to be year on year. These cap figures include the aviation scope. As set out in the Government Response, it is the Government's intention that this is a temporary cap. The Government will consult on an appropriate trajectory for the UK ETS cap for the remainder of the first phase within nine months of the Committee on Climate Change publishing its advice on the Sixth Carbon Budget. We aim to appropriately align the cap with a Net Zero trajectory by January 2023, and no later than January 2024, while aiming to give the industry at least one year's notice to provide the market with appropriate forewarning"* [**CL1/36/1517**].

Deciding the cap and trajectory

85. This section outlines how the decision on setting the cap for the UK ETS was made.

86. In summary, the final policy decision on the cap is that:

- the UK ETS cap will **initially be set 5% below the UK's notional share of the EU ETS cap** for Phase IV of the EU ETS. Based on the proposed scope – i.e. the sectors and activities included in the UK ETS which will be obliged to surrender allowances, which includes aviation – this equates to around 156 million allowances in 2021.
- HMG and the DAs are committed to exploring the best possible options to ensure that the new UK ETS is fully in line with the UK's climate ambitions, and particularly the transition to net zero emissions by the year 2050. The initial cap will therefore be only temporary in nature due to the original need in the very short-term to introduce, at pace, a UK ETS in a very rapid timescale. The government has committed to **reviewing and amending this initial cap to make it consistent with the UK's net zero pledge by no later than January 2024**, **but aiming to do so by January 2023**.

Governance of policy decisions

87. The policy development process which led to the final design of the UK ETS, including the cap, took place from 2018 through to 2020.

88. BEIS officials worked up the proposals at "policy design groups" (referred to as "PDGs"). There were also cross-government working groups including HM Treasury, and the Devolved Administrations at ("joint working group" or "JWG") to consider various aspects of the proposals. Official-level policy decisions were formally made at the Joint Emissions Trading Scheme Board ("JETS"), which included respective Senior Reporting Officers from interested departments in the Government and the Devolved Administrations. Advice on policy design was submitted to Ministers at key points, and Ministers for Government and the Devolved Administrations ultimately made the decisions on the UK ETS jointly.

Considerations for setting the cap and the 2019 consultation

89. As explained above in section B, a cap is not equal to the projected or actual emissions in a market. The purpose of the cap is to impact behaviour and future expectations in the market which in turn, drive behavioural change and investment in emissions reduction. The cap does not directly reduce the number of actual emissions in the market but, together with market expectations about whether the cap will be tightened, does send a signal to market participants that they should reduce their emissions or face a higher price for continuing to emit greenhouse gases.

90. The cap alone cannot itself be determinative of the level of emissions reductions achievable under a UK ETS, as the total emissions reductions will not be directly proportional to the number of total emissions allowances created in any scheme year. Emissions will reduce due to the market signal represented by the cap being lowered year-on-year. As such, the cap should not be viewed strictly as a year-by-year limit, but as a cap on the whole of Phase I of the proposed UK ETS with a reducing trajectory.

91. Market certainty is one of the key conditions that encourages emission reductions in sectors covered by the UK ETS, such that operators feel empowered to make the

necessary investments required to decarbonise and reduce overall emissions. High emitters will need to judge the market conditions over a consistent period so that their decarbonisation strategy and investments in emissions reductions can be carefully planned out, and can be implemented with confidence that the policy will not change arbitrarily.

92. I understand the 2019 consultation on the future of UK carbon pricing culminated from the work and engagement of the groups mentioned above. The consultation did not include a proposed cap and trajectory for a standalone UK ETS. Instead, it outlined a number of key considerations for setting the cap and the implications of these in Annex A:

"46. In a standalone UK ETS there is a question over where the level of the cap on emissions should be set to meet our policy objectives in the context of a smaller market.

47. One approach to setting the cap in a standalone UK ETS could be to take the UK's notional share of the EU ETS Phase IV cap. However, there is a possibility that the level of business as usual emissions (BAU) fall under this cap level in some or all years of a standalone UK ETS, which may result in limited demand for allowances.

48. An oversupply of allowances relative to UK participant demand for those allowances could result in low carbon prices and therefore reduced incentives for participants to invest in abatement technologies and permanently reduce their emissions. This could also result in lower UK emissions reductions in a standalone UK ETS compared to what would be delivered in the UK in the counterfactual.

49. To be at least as ambitious in a standalone UK ETS as with UK participation in the EU ETS over Phase IV, it may be desirable to set a cap that is tighter than our notional share of the EU ETS Phase IV cap.

50. To the extent that a tighter cap results in significantly more abatement effort required by participants in the standalone UK ETS (determined by the level of business as usual emissions relative to this cap), we might expect greater emissions reductions achieved in the UK relative to the counterfactual.

51. There are also other implications associated with setting a tighter cap on emissions that need to be considered. In particular, the tighter the cap (all else constant) the greater the scarcity of allowances in the ETS and the higher the resulting carbon price. Very high carbon prices may impose significantly higher carbon costs to UK participants (who continue to purchase allowances rather than invest in abatement) compared to the counterfactual and may impact their competitiveness in the primary markets in which they participate (described in more detail later in this annex).

52. The extent to which such an outcome may materialise depends on a number of factors such as wider economic conditions, other policies in effect, technological developments and strategic market behaviour by system participants (e.g. banking and borrowing of allowances).

53. Proposals for a rules-based Supply Adjustment Mechanism (SAM), an Auction Reserve Price (ARP) and a Cost Containment Mechanism (CCM) are intended to provide stability to the market by alleviating the outcomes driven by extreme price movements or allowance supply issues, as well as ensure a smooth transition for businesses moving from the EU ETS to a UK system" [**CL1/11/830**].

93. Annex A to the consultation also added that there would be a cost to society in achieving emissions reductions [**CL1/11/835 at para 95**]. There were judgements to be made about how far to go in seeking emission reductions, and where to set the cap to facilitate an effectively functioning market.

Objectives for setting the cap

94. As explained above, for the UK ETS to be effective in reducing emissions, the UK ETS system, including the market, needs to function effectively. Therefore, when setting the policy for the cap, we had to take into account a range of factors to effectively deliver the underlying objective of reducing GHG emissions and tackling the impacts of climate change. This includes the need to maintain UK business competitiveness and to provide a smooth transition. For the purposes of aiding policy design in line with this range of factors, several objectives were developed jointly by the Government and the Devolved Administrations within the governance structure which manages the UK ETS. These objectives guided the policy development of the UK ETS.

95. Proposals for these objectives were developed firstly by BEIS at PDG meetings and then through discussions with the Devolved Administrations and HM Treasury at JWG. Senior level agreement of the objectives by the Government and the Devolved Administrations was reached in a JETS meeting on 15 October 2019 [**CL1/15/882, slide 5**]**.**

96. These objectives were:
    a. *Establish a viable market*
        i. *Minimise government intervention*
        ii. *Reduce risk of prices undermining confidence in the market*
        iii. *Policy should avoid a step change in prices on day one – this should apply to both increases and decreases in price.*
    b. *Support carbon budget and net zero commitments*
        i. *Allow us to meet carbon budgets 4 and 5 – for currently legislated budgets this means emissions in the traded sector needs to be below the level of the notional cap as a minimum*
        ii. *Support a transition to net zero*
    c. *Appropriately mitigate competitiveness issues*
        i. *The design should not cause any significant distortions to competitiveness with business outside of the UK*
    d. *Support a smooth transition*
        i. *Minimise disruption to business in the transition from the EU ETS or a CET to a UK ETS*
    e. *Minimise significant changes in compliance and operation for market participants*

97. As regards consideration of the Paris Agreement, it is clear from the multiple references to the Paris Agreement in the 2019 consultation [**CL1/11,** for example, at paras 14 (introduction), page 16 (ETS description), and at paras 18, 81, 85a, 85c, 97, 114 and 170] and the June consultation response [**CB/38**, for example, at paras 10, 150, 196 and 244] that it was considered. In particular, the UK ETS review points were chosen to align with the Global Stocktakes under Paris as a means of making sure that the UK ETS remains aligned with the UK's global climate change ambitions.

98. It is also clear from letters to the CCC from the Government and the Devolved Administrations dated 2 May 2019 [**CB/28, paras 6 & 7**] and 1 June 2020 [**CB/37, para 7**] that international climate obligations in mind when considering the design of the UK ETS.

99. I accept that neither the Paris Agreement nor Article 2 or Article 4(1) on which the Claimant rests her case were directly referred to in the objectives which guided the policy development on the cap. However, this did not mean that the Paris Agreement was not in the minds of decision makers in BEIS both at an official and Ministerial level.

100. In conjunction with the Directors responsible for the UK ETS project within BEIS, Stefanie Murphy and Paro Konnar-Thakkar, I was one of the key decision makers regarding the UK ETS design at a BEIS official level. Stefanie, Paro and I (hereinafter "we") were also part of the forum where official level decisions were made with the Devolved Administrations, namely the JETS Board (chaired by Stefanie and Paro). I have spoken to Stefanie and Paro in putting together the summary below regarding the way in which consideration of the Paris Agreement factored into our decision making and what is set out below is our collective reflections.

101. We were all aware of the content of Article 2 and 4(1) of the Paris Agreement at the time the decisions on the cap were made. In particular, we were aware of the well below 2°C and 1.5°C targets, the aim of reaching a global peaking of emissions as soon as possible and of the concept of the common but differentiated responsibilities of developed and developing countries.

102. Our awareness of the Paris Agreement stems from extensive time working in the energy and climate space; including the fact that we all worked in the Department for Energy and Climate Change (DECC) (one of the precursors to BEIS) at the time the UK signed the Paris Agreement in April 2016. As the most significant international climate agreement since the Kyoto Protocol, the signing of the Paris Agreement was a momentous occasion and there were multiple internal references to the Paris Agreement within BEIS (and DECC before that) ranging from updates on the internal intranet to internal events where the Paris Agreement was discussed including internal events at DECC referred to as 'DECC-school'. More recently, the focus on the Paris Agreement within BEIS remains especially in light of the UK's Presidency of the Conference of Parties ("COP") 26, the 26th United Nations Climate Change Conference.

103. The term 'Paris' and other terms which encompass a reference to it (such as the UK's 'international climate obligations') are therefore part of the language of working in BEIS.

104. At the time the decisions were being made on the UK ETS cap, we were also all aware of the link between the UK's net zero commitment and the Paris Agreement. Put simply, we were aware that the UK's decision to legislate for net zero flowed from the IPCC report (referred to above at paragraph 27) and the UK's consideration of whether it was doing enough to meet the Paris goals.

105. Our team's awareness of this link is reflected in the letter dated 4 March 2019 [**CB/33**] to the CCC requesting advice on the UK ETS cap where one of the principles we asked the CCC to take account of when advising on the UK ETS and the cap specifically was that the UK ETS must:

"maintain industrial competitiveness whilst supporting delivery of the UK's and DA's domestic and international climate change commitments and targets - noting that UK, Scottish and Welsh Ministers have also recently jointly sought the CCC's advice on long term emissions reduction targets in light of the Paris Agreement and recent IPCC Special Report;"

106. In effect what was being noted here is our recognition that the UK ETS contributes towards the UK's share of a global effort to tackle climate change in the framework provided by the Paris Agreement. The CCC advice which was referred to here was the CCC's net zero advice dated 2 May 2019 [**CB/10**] which we stated was sought in light of the Paris Agreement and the IPCC Special Report.

107. My team have conducted an extensive search of the documents which directly related to the decisions on the cap specifically. As I say above, I accept that neither the Paris Agreement nor Articles 2 or Article 4(1) thereof are referred to explicitly in the objectives referred to in paragraph 96 above. Nor have we found reference to these terms in the documents regarding the setting of the cap. Instead in the objectives we referred to the climate ambition of the UK ETS (tackling climate change of course being the objective of the whole exercise) in the context of supporting carbon budget and net zero commitments. However, this does not mean that the Paris Agreement and the essence of the elements referred to at Article 4(1) did not factor in the minds of decision makers.

108. The Paris Agreement and the UK's role in helping to meet its goals provided a backdrop to everything we were doing in the UK ETS space. The impact of the overall global goals of Paris as reflected in Article 2 and Article 4(1) cascade down first into the UK's own NDCs (see section A above) and then into net zero and the UK's carbon budgets. Given this cascading effect, the influence of one thing on another, the focus of the objectives for developing the cap was net zero but the Paris Agreement goals at Articles 2 and 4(1) were implicitly reflected.

109. On a practical policy level the distillation of both the net zero and Paris Agreement context that fed into that, in terms of the early years ambition of the scheme, was that we were acutely conscious of the need that even in committing to a (world leading) net zero by 2050 cap process as soon as we could, we also needed immediate progress on the cap on day 1 to be more ambitious than we would have been under the EU ETS. The fact that the UK was contemplating a net zero by 2050 cap process at this stage together with an earlier tightening reflects an understanding that as a developed economy we were aiming to be world leading and take immediate action to reduce emissions.

110. Stefanie, Paro and I distinctly remember discussing the imperative of action more than the status quo EU ETS notional share position from day one.

111. As I further describe below, our focus on ensuring that we were as ambitious as we could be whilst guarding against the risks associated with setting up a new, smaller scheme that is viable in the long term (more detail in section B and below), resulted in a prolonged series of policy development meetings on the cap which reflected a testing of early years ambition through the governance process. This scrutiny reflected our overall focus on considering ambition explicitly with reference to net zero and implicitly in the context of the Paris Agreement.

Decision making process

112. It was important to proceed with the design of the UK ETS to ensure that it was ready for 1 January 2021 to secure continuity of carbon pricing at the end of the transition period following the UK's exit from the EU. A key constraint was that the UK ETS had to be delivered before January 2021 but the CCC advice on a net zero trajectory was not due until late 2020, meaning it would be impossible to set up the UK ETS based on the CCC's net zero trajectory advice (more detail is given on this point in the section "The temporary nature of the cap", below).

113. Given the commitment in the Clean Growth Strategy that the future carbon pricing regime would be at least as ambitious as the EU ETS, the starting point for concrete policy proposals on the cap was to look at the notional cap the UK would have had if it were to remain a part of the EU ETS. The EU ETS cap had been set for Phase IV to be in line with the EU wider target of achieving 40% reduction in emissions by 2030 (from 2005 levels), which was the EU's commitment under the Paris Agreement at the time. Given that the EU ETS cap was set in line with the EU's commitment under the Paris Agreement, there was sound rationale for considering the cap for the UK ETS being set based only on the notional share of the EU ETS cap for 2021 (the 'notional cap').

114. However, as per paragraph 109 above, the Government and the Devolved Administrations judged that the UK should consider how the UK ETS could be more ambitious than the notional share of the EU ETS cap, given the then recently announced Government's net zero commitment.

115. As required by the CCA, advice had been sought from the CCC. Following the receipt of the advice from the CCC in August 2019 [**CB/25**], consideration was given to the CCC's recommendation that:

> *"We recommend that the cap of the linked UK ETS be set based on the cost-effective path to the UK's new net-zero target. We will provide that trajectory in our advice on the sixth carbon budget (covering 2033-2037), which is due in 2020. Following this advice, the level of the cap should be adjusted as soon as possible to align to the carbon budgets.*"

116. Between August and November 2019, the Government assessed different options for the cap level, based on considerations captured in the design objectives set out above, to find the cap level that would achieve the highest proportion of climate objectives while also addressing the potential risk of competitiveness and liquidity issues. This assessment was conducted through discussions at PDG, JWG, and JETS. It is worth repeating here that it is vital that the system works effectively to deliver the emissions reductions that the UK ETS aims to deliver. The emissions reductions that the UK ETS aims to achieve are those through the investment and take-up of more carbon efficient processes, as opposed to emissions reductions through emitters simply decreasing or ceasing activity altogether due to excessively high carbon prices undermining competitiveness in the UK, without any way to reduce emissions in the short term. Investing in and delivering projects to reduce emissions takes time.

117. The full list of cap options the Government considered was:
    a. Notional cap
    b. Notional cap minus 5%
    c. Notional cap minus 6.5% (NB: this was an additional option considered after the CCC's March 2020 advice, explained below)

d. Notional cap minus 10%
e. Notional cap minus 20%

118. Based on analysis it was judged that both the -5% and -10% caps would risk prices higher than the EU ETS price in the first year of the new system. Between 2021 and 2023 this risk was driven by our assumptions about hedging in early years.

119. The Government concluded that, in relation to the analysis on the -5%, -10 and -20% cap, it was unlikely that significant levels of abatement can be achieved in the sectors covered by an emissions trading scheme in early years, no matter where we set the cap in a UK ETS. In the UK many readily deployable abatement options (e.g. coal to gas fuel switch) have already been exhausted. There is a lead-in time of a number of years for investment in other low carbon technologies (e.g. wind power), and the kind of technologies needed for industrial decarbonisation, such as CCUS and hydrogen, are not readily available nor are they proven at scale. Abatement was estimated as possible under the notional -5% or tighter caps. However, abatement with caps tighter than -5% would materialise only if carbon prices become very high. This could, in turn, happen only if scheme participants did not change established behaviours (like hedging) in response to the tighter cap. Analysis also indicated that if these behaviours changed, this could have social consequences – such as on the price of energy – and would lead to no abatement. In other words, meaningful abatement at the required level has significant lead-in time and was projected to be very expensive in early years (relative to later years).

120. Therefore, if existing market behaviours remain, even if carbon prices rise it would be unrealistic to expect significant abatement in early years due to practical barriers mentioned above. It was judged that prematurely tightening the cap would only affect businesses' competitiveness and undermine the smooth transition from EU ETS without any additional abatement, and could significantly reduce emitters' capacity to invest in abatement technologies and processes that would allow them to decarbonise effectively.

121. On the basis of these conclusions, the initial cap at 5% below the UK's notional share of the EU ETS in Phase IV was judged as the most appropriate option for the start of the UK ETS – with a commitment to align the cap to net zero pathway at a later stage – to ensure an increase in climate ambition without undermining business competitiveness and reducing the risk of high and volatile prices in the early years. Government took into account the cost to business only in so far as to ensure the effective functioning of the UK ETS from the start, which then enables us to deliver on the emissions reduction ambition.

122. This decision on the cap was made at official level at JETS on 14 November 2019 [**CL1/18 & 19]**. Conclusions from policy discussions at PDG level and analysis, outlined above, was presented at this JETS meeting. This was the culmination of a lengthy and time-consuming policy exercise in which we extensively tested how far we could take the climate ambition of the early years whilst guarding against the risks I have outlined above to the effective functioning of the market.

123. These proposals were put to Ministers in January 2020 [**CL1/21**] together with the recommendation to seek advice from the CCC on them before making the final decision.

124. The letter setting out the proposals and seeking advice on the cap was sent to the CCC on 4 March 2020 [**CB/33**]. The letter outlined the lead option and explained the proposal on the cap for the standalone UK ETS and the rationale behind it, in headline terms. It said:

> "*We acknowledge your recommendation that the cap of a linked UK ETS be set based on the cost-effective path to the UK's net zero target, which you are providing as part of your advice on the sixth carbon budget (CB) later in 2020. However, in order to implement a UK ETS for January 2021, we will need to lay legislation before receiving this advice. Having analysed a number of scenarios, we intend to set the cap on the total number of allowances at 95% of the UK's expected notional share of the EU ETS Phase IV cap. The cap will then be reduced annually, in line with the EU ETS Phase IV trajectory. The rationale for setting the cap at this level is that we believe it provides the right balance between climate ambition and business competitiveness in the early years of a UK ETS by signalling our ambition in cutting carbon emissions, whilst minimising the risk of high and volatile prices which could destabilise a new market which could occur if the cap is tightened beyond 95%. We will make it clear in the government response to the consultation that this will be the cap for the initial years of the system, and make a commitment to reconsult on the level of the cap in 2021 following receipt of your advice later this year on Carbon Budget 6 and a net zero consistent cap. We will make an announcement on the cap and trajectory for the remainder of the phase following the consultation, and ensure the implementation of any change provides a reasonable notice period for participants. We acknowledge your advice that the Government should ensure a tighter cap does not lead to carbon leakage*".

125. The CCC responded on 20 March 2020 [**CB/36**]. The letter commended the Government's intention to align the scheme to their forthcoming advice on the Sixth Carbon Budget, but questioned that the initial, interim cap chosen by the Government and the Devolved Administrations was not tight enough. The letter advised that the cap should be aligned with the UK's net zero target, but conceded that:

> '*In theory there may be arguments for creating some initial 'headroom' in the scheme by issuing permits above the level of expected emissions in early years. That would allow participants to buy additional permits beyond their immediate needs in the initial years of the scheme as a hedge against future price increases, and reduce the risk of high prices resulting from the cap being set too tight, which could lead to negative competitiveness effects and carbon leakage. However, given the world's current economic position and uncertainty around Covid-19, in practice the need for 'headroom' is likely to be limited* '.

126. The letter also reiterated a point previously made by the CCC:

> "*In our August 2019 advice we noted that carbon pricing alone will not deliver sufficient decarbonisation for the UK's net zero objectives, and will need to be complemented by specific policies at the sector level. We will offer further advice on these policy requirements, and carbon pricing, in our September advice on the Sixth Carbon Budget, and look forward to seeing how the Treasury's Net-Zero review is considering these issues*."

127. In response to the CCC's letter, consideration was given to the CCC's advice on aligning the cap and trajectory to the CCC's pathway to the net zero target.

128. The PDG considered the CCC's concerns, and several different options were examined against the scheme-wide objectives, as set out earlier in this document. Analysis of different cap options and supporting mechanisms for managing price volatility were revisited and re-examined, including through several discussions at PDG level. An additional option of notional -6.5% was also considered. Analysis showed that uncertainty regarding initial demand for allowances meant that even a relatively small tightening of the cap could result in a wide range of carbon prices faced by the market participants. In other words, there was a risk of high price volatility in the market, and that given our objective was a long-term viable carbon market, setting a cap too tight initially risks undermining the scheme by giving too high a price and putting industry out of business.

129. It was judged by officials that any benefits in climate terms from tightening the cap would be outweighed by the significant risks that this could pose to the functioning of the new UK ETS market. A prematurely tight cap could result in unacceptably high prices in the early 2020s, depending on participants' behaviour, and jeopardise the objectives of delivering a smooth transition for participants while safeguarding the competitiveness of industry and protecting against the risk of carbon leakage. The analysis showed that the initial cap proposed offered the best starting point for a standalone UK ETS, with commitment to tighten the cap after the start of the scheme. The analysis showed that it would be possible to tighten the cap mid-phase, to increase the ambition and reduce the risk of extremely high prices which could occur if the cap was tightened substantially from day one of the new standalone UK ETS.

130. The emerging unprecedented circumstances of a global pandemic were also taken into account. The CCC advice was based on consideration given to the position by the CCC on 13 March 2020, before the escalation of COVID-19. The advice from CCC was provided before the full extent of the implications of COVID-19 on the UK economy became apparent. It was considered by officials that the economic impacts of COVID-19 meant that a more cautious approach to setting the temporary initial cap was potentially even more appropriate. It was judged that the additional uncertainty around emissions and business recovery caused by COVID-19 strengthened the arguments against introducing a tighter cap for January 2021.

131. Therefore, after discussions at PDG and JWG, officials concluded that there were good reasons to retain the existing policy design (including deliverability considerations in the short-term) and that the chosen options did go some way to acknowledging and addressing the CCC's advice. Their chosen options were:
    - to commit to consult by a specific date on how to align the cap with a net zero trajectory
    - to commit to implementing the cap in line with net zero trajectory by a specific date (by no later than 2024) and earlier than originally planned (in 2026)

132. This decision to publicly commit to tighten the cap would send a signal to market participants that they should reduce their emissions or face a higher future price for continuing to emit GHGs. This is because, as explained above, the cap does not directly reduce the number of actual emissions in the market – the purpose of the cap is to impact behaviour and future expectations in the market which, in turn, drive behavioural change and investment in emissions reductions. The expectation of rising prices over time, as a result of a signal of a tightening cap, incentivises

participants to make investment decisions now to reduce future emissions, helping them to avoid paying a higher price to emit carbon in the future.

133. These options were discussed at JETS on 16 April 2020 [**CL1/23**]. JETS agreed with the recommendations and the proposal that no immediate changes should be made to the UK ETS cap. Following the JETS decision, a submission was sent to Ministers [**CL1/24-26**] with the draft Response and policy proposals in response to the CCC's most recent advice.

134. It was noted in the submission that

> "*on substance, we agree with the CCC's advice but judge that it is better to implement changes to the cap to a different timescale than they advised*".

135. Annex C of the submission [**CL1/24/1211**] details that 'the need for a smooth transition' was part of the decision-making rationale along with the fact that:

> *'we will tighten the cap (i.e. reduce the number of allowances created) in the near term to align with a net zero consistent trajectory'*.

136. The BEIS Secretary of State requested additional briefing on the rationale for these proposals. This took place on 28 April 2020 and was attended by policy and analyst officials. The Secretary of State was content to approve the decision that the cap should remain at 5% in the initial stages, given the proposed swift work on re-adjusting the cap in line with the net zero target as soon as possible [**CL1/30**]. In approving this cap, the BEIS Secretary of State made it clear that one of the elements on which his decision was predicated was that:

> *"The intention would be to announce our proposal on tightening the cap following consideration of the CCC's Net Zero advice (Dec 2020), and ahead of the rescheduled COP26, in 2021 to demonstrate the UK's continued leadership in developing and legislating its plans to delivery Net Zero by 2050."*

137. The discussion regarding COP26 in this context shows that we and the BEIS Secretary of State were mindful in making decisions on the UK ETS cap of the need for ambition and the wider context of the Paris Agreement.

138. I have no doubt that given their areas of Ministerial responsibility both the Secretary of State and Minister Kwarteng are very familiar with both the Paris Agreement and of the content of Articles 2 and 4(1) thereof. As well as being the Secretary of State responsible for tackling climate change, in February 2020 Alok Sharma MP was appointed as Minister for COP 26, the 26th United Nations Climate Change Conference. Similarly, as Minister for Business, Energy and Clean Growth, Minister Kwarteng's responsibilities include, amongst other things, carbon budgets, and tackling climate change is therefore front and centre of his role. Between 27 and 28 April 2020, which was the time he was making a decision on the UK ETS cap, the Secretary of State was attending the Petersberg Climate Dialogue which the UK co-hosted with Germany. In his opening speech on 27 April 2020, the Secretary of State focussed on efforts in the transport and power sector and reflected on the need to take urgent action arising out of the Paris Agreement, the importance of global cooperation and the need for developed countries to lead the way [**CL1/27**]. The following are excerpts from this speech:

> *"To meet the goals of the Paris Agreement, we need to decarbonise the global economy about three to five times faster over the next decade than we did over the last two decades….*

And it is right that we should come together as we have done today - international organisations, governments, business, civil society - to discuss how we meet that challenge together.

And we live in a globally connected economy, and the options available to each country depend greatly on the actions that we take together and the actions that are taken by others.

And I do think that if we work together on this we can progress a lot faster." It's clear that developed countries should lead the way, and the UK is committed to achieving zero coal power by 2024."

139. The decision on the cap was agreed between BEIS, HM Treasury, and the DA ministers at a call on 30 April 2020 [**CL1/31**].

140. Collective agreement across Whitehall departments (known as write round clearance) of the policy for establishing the UK ETS was then sought in May 2020 [**CL1/32**] before publishing the Government and the devolved administrations' response to the consultation on the future of UK carbon pricing, which articulated this policy intention ahead of legislating.

141. A letter was also sent to the CCC at the same time to respond to their advice. The judgement involved in setting the initial cap was explained clearly in the letter to the CCC from Government and the Devolved Administrations of 1 June 2020 [**CB/37/353**]. The letter explained:

"for the launch of the UK ETS, it is important to put in place a policy which provides a pragmatic and feasible approach to meeting net zero through the ETS. Our approach, as set out below, provides the necessary flexibility to raise ambition in the near future and supports the traded sector to decarbonise, while appropriately mitigating the risks of carbon leakage.

Ensuring we have a fully functioning UK market from January 2021, which gives industry certainty and continues to deliver significant emission reductions in line with current carbon budgets, is key. This task is further complicated by an unprecedented pandemic and associated economic emergencies, whose full, long term impact on traded emissions cannot be assessed at present, making it difficult to accurately adjust the cap or set an auction reserve price (ARP) in advance.

As such, we are proposing a two-stage approach. The first stage is intended to be purely temporary in nature. We will continue to demonstrate clear climate ambition by cutting the cap by 5% compared to the notional cap the UK would have had if we remained in the EU ETS. Our analysis suggests that this starting point cap, combined with a transitional ARP of £15 and temporary market stability mechanisms, would also minimise the risks associated with transition from the EU ETS. This provides a balance between a tightening of the cap on emissions and stability and competitiveness for business…

We hope the above adequately illustrates the rationale for our policy position as demonstrating clear environmental ambition and commitment while maintaining protections for businesses' competitiveness in a hugely uncertain economic context."

142. The initial cap for the launch of the new standalone UK ETS was set, in the context of great economic uncertainty, to ensure a pragmatic and feasible approach to the UK ETS, mitigating the risks associated with the transition from the EU ETS into a new standalone UK ETS, ensuring a fully functioning UK ETS market, achieving emissions reductions against the counter-factual, and mitigating the risks of competitiveness and carbon leakage which would occur if the cap was set too tight.

143. The standalone UK ETS would achieve a reduction against GHG emissions when compared to the situation of coming out of the EU ETS on 1 January 2021 and not having any ETS system applying to the UK, and against the situation of the UK remaining in the EU ETS Phase IV.

144. The June 2020 Response document set out the rationale of the Government and the Devolved Administrations in more detail. It explained a number of points including the following:

a. The UK ETS would show greater climate ambition from the start by setting the initial cap at 5% below the UK's share of the EU ETS Phase IV cap, which was the counter-factual comparator [**CB/38/359, para 4**].

b. Placing a price on carbon creates the incentive for emissions to be reduced in a cost effective and technology-neutral way, while mobilising the private sector to invest in emissions reduction technologies and measures [**CB/38/361, para 16**].

c. The UK ETS cap was set to signal the UK's long-term climate commitments while ensuring the UK economy remains competitive [**CB/38/362, para 25**].

d. UK industry competes in a global market and could be put at a competitive disadvantage compared to their counterparts in other countries if the cap was too tight, leading to carbon leakage, i.e. relocating activities and associated emissions abroad [**CB/38/362, para 27**].

e. There is a need to pursue climate ambition but whilst maintaining UK business competitiveness [**CB/36/363, para 34**].

145. It is clear from the lengthy decision-making process detailed above and undertaken through the multiple policy governance bodies, and the government response, that the Government and the Devolved Administrations gave due consideration to taking immediate action through further tightening the initial cap in the early years of the scheme.

146. For clarity, I provide a summary of the rationale behind the decisions outlined above, as follows:

147. The BEIS modelling showed that a larger than -5% reduction from the notional cap risked large impacts to the carbon price. Officials considered that a headroom of allowances was necessary as demand for allowances in the early years of a standalone UK ETS was expected to come not just from installations' annual compliance obligations, but also from participants' banking allowances for future years or purchasing additional allowances as a hedge against future price increases. A healthy surplus of allowances is required for market liquidity and a surplus of allowances at the start of an ETS is beneficial to allow for banking and hedging behaviour.

148. Officials concluded that the initial cap proposed enabled a smooth transition for businesses from the EU ETS to the new UK ETS and protected competitiveness, with the -5% acting as a “down-payment” on a future, more ambitious cap. The cap was judged to provide acceptable allowance price risks for a new, very uncertain UK ETS carbon market, while still demonstrating climate ambition.

149. Officials considered that the objective was to establish a viable long-term market and that this meant taking account of the smaller size of the UK ETS and associated higher uncertainty. A cap in this context tighter than the notional cap -5% was judged to risk too high prices, market instability, and issues with market liquidity. This would prevent a smooth transition and compromise the ability to secure a viable long-term UK ETS which would deliver emissions reductions. Overall, it was judged better to set a temporary cap with clear climate ambition in the -5% level and to manage the risk of setting up a new UK ETS, and then implement changes to the cap and trajectory after the initial period.

150. The proposed approach was considered to allow a smooth transition to a new and uncertain standalone UK ETS market, give sufficient policy certainty and stability, and strike a balance between reducing the negative shorter-term effects for the economy/industry, which would undermine the effectiveness and viability of the scheme, and sending the right message to the market participants on future climate ambition.

The temporary nature of the cap

151. This section explains in more detail why a two-stage approach to setting the cap – i.e. an initial cap for the start of the UK ETS, which is then tightened to be aligned to net zero consistent pathway – was decided upon.

152. A key constraint was that the UK ETS had to be delivered before January 2021 but the CCC advice on a net zero trajectory was not due until late 2020, meaning it would be impossible to set up and legislate for the UK ETS based on the CCC’s net zero trajectory advice. The initial cap would have to be set recognising that it was not in line with net zero and was only an interim cap. The JETS paper of 14 November 2019 [**CL1/18**] set out a draft timetable which stated the intention to have a -5% cap in January 2021 followed by a subsequent review. A JETS paper of 16 April 2020 [**CL1/23**] then reiterated this proposal. The plan was to move to a net zero aligned cap but that the CCC’s advice on the Sixth Carbon Budget was required to do that properly.

153. January 2023 is the earliest the UK ETS cap can be revised. This is firstly because changes to the cap can be made only through further legislation which must be laid in all the devolved legislatures. Before making such changes, s.48 of the CCA legally requires the Government and the Devolved Administrations to first seek advice from the CCC and to consult such persons likely to be affected by the regulations as the authority considers appropriate. Making the UK ETS cap consistent with the UK’s net zero target will have significant impact on scheme participants and a public consultation should therefore be pursued.

154. Furthermore, changes to the cap can only happen at the start of each calendar year since this is when allowances are created, and so any change to the number of allowances that can be created – i.e. changing the cap – would need to be in force by the start of the calendar year. The market will need appropriate forewarning ahead of changes coming into force in order to make preparations and facilitate the continued

validity of the market. In a similar example, the EU Commission provided their scheme participants with three years' notice when reforming rules for Phase IV of the EU ETS. The Government judged that at least one year's forewarning was appropriate in the new UK ETS, as stated in the Response. Given these considerations and the time needed to consult and legislate, implementing a new, net zero consistent cap by 2023 is already ambitious.

155. Furthermore, in their Sixth Carbon Budget advice [**CL1/39/1583**], published on the 9 December 2020, the CCC noted that

> *"should the UK set up its own ETS to follow on from the EU ETS, the Government has committed to setting the cap from 2023, following the Committee's advice on a suitable trajectory"*[46].

156. The CCC's report did not call for an earlier revision to the cap, instead recommending a basis for a UK emissions trading scheme cap from 2023 to 2030 (p.437):

> *"On this basis, we recommend the level of traded sector emissions consistent with our Balanced Pathway is used as the basis for a UK emissions trading system cap from 2023 to 2030…"*

157. Policy and analytical work are already underway to align the UK ETS cap with this advice, as per the commitment made in the government response to align the cap with a net zero trajectory by 2023 if possible and no later than January 2024.

Responding to specific areas of the Claimant's reply

The initial cap helps to establish a viable market

158. With regards to Paragraph 16 of the Claimant's Reply to the Summary Grounds of Resistance, the Claimant argues that

> *"The Defendants cannot credibly contend that the cap chosen was necessary for the functioning of the UK ETS market, still less that it will be effective at reducing emissions in light of the CCC's advice"*[47].

159. As explained above, for the UK ETS to be effective in reducing emissions, the UK ETS system, including the market, needs to function effectively. Failure to do so may risk carbon leakage, reduced liquidity or price extremes. The UK ETS will be both a new system and one which is much smaller than the existing EU ETS market, both in terms of the number of participants and the market size. It is therefore uncertain how the UK ETS market will behave, especially in the early years; headroom above business-as-usual emissions levels at the start of the new system is appropriate to ensure that the system would be stable in light of anticipated early years market behaviour.

160. I would note that the analysis which lay behind the Government's judgements on the level of the initial cap was explained in detail in the June 2020 Impact Assessment [**CB/39/423**], which assessed the design of the UK ETS in its initial years (2021 to 2024). It was compared to the counterfactual of remaining in the EU ETS for Phase IV, rather than a counterfactual of there being no ETS or other carbon pricing

[46] https://www.theccc.org.uk/wp-content/uploads/2020/12/The-Sixth-Carbon-Budget-The-UKs-path-to-Net-Zero.pdf

[47] Claimant's Reply to the SGD, paragraph 16, p. 6.

mechanism.

161. The Impact Assessment set out the importance of ensuring a smooth transition from the EU ETS to the UK ETS and emission reductions were achieved cost effectively and avoiding carbon leakage [**CB/39/426, paras 7-8**].

162. The Impact Assessment said [**CB/39/429**]:

> *"23. In 2021 this notional minus 5% cap level equates to around 156 MtCO2e (based on the assumed scope of the policy set out earlier). This is higher than our BAU emissions projections in that year (ranging from around 126 to 131 MtCO2e). However, there is significant uncertainty over these projections and market participant behaviour in this initial period could lead to significant demand for allowances above BAU emissions. This in turn means there is uncertainty over the level of demand for allowances in these years relative to supply, and therefore risk of extreme high or low prices.*
>
> *24. Given these uncertainties we therefore believe it is appropriate to maintain sufficient headroom of allowances for a time-limited period at the start of the new system. However we believe that initially tightening the cap by 5% provides an appropriate balance between climate ambition in the context of the UK's net zero commitment and businesses competitiveness, which may be at risk due to early years' market behaviour (see 'behavioural assumptions' section below). This cap level alongside other temporary measures (see 'market stability mechanisms' section) seeks to provide appropriate mitigation of extreme high or low price risks, in the initial years of the UK ETS market."*

163. This explained that although the cap was higher than business as usual projected emissions, there were risks at the initial period of the UK ETS of significant demand for allowances above business as usual emissions levels, which could lead to extreme prices at the start of the UK ETS. It was judged therefore that it was necessary to have headroom above business-as-usual emissions levels just for a time at the start of the new system, to ensure that the system would be stable in light of anticipated early years market behaviour.

164. The key reason why there was likely to be demand for allowances above business as usual emissions levels was explained in the behavioural assumptions section of the Impact Assessment [**CB/39/436-437**]. This was hedging, where market participants buy allowances above the volume they need for the current year, especially where they expect carbon prices to increase in the future, as they are designed to do under the standalone UK ETS [**CB/39/436, para 51B**]. This behaviour increases the scarcity of allowances and leads to higher carbon prices. This behaviour was expected at the start of the UK ETS because market participants will start with no accrued allowances and will have to accumulate hedging positions from scratch by buying at the start of the new UK ETS more allowances than they needed [**CB/39/451, para 126**].

165. It was known that the power sector had built-up established hedged positions in the EU ETS already [**CB/39/437, para 55**]. It is reasonable to expect that these would be rebuilt in the new UK ETS which would generate considerable additional demand for allowances in the early years.

166. It was also recognised that the power sector was at risk of carbon leakage because it was able to export electricity generation overseas using interconnectors to import electricity into the UK, avoiding higher prices in a UK ETS [**CB/39/445, para 91**]. Another factor was that there would be limited low-cost abatement opportunities in the early years of a new standalone UK ETS, compared to the EU ETS where coal to gas switching remained an inexpensive option.

167. The new UK ETS market was expected to have a higher level of uncertainty in the initial period because it was a new and smaller market and would be more susceptible to quicker change than the established EU ETS [**CB/39/437, para 54**; **CB/39/439, para 64**].

168. These matters all reinforced the need for sufficient headroom of allowances to ensure a stable market and a smooth transition to the UK ETS. Without sufficient headroom the expected behaviour of market participants would risk high prices in the initial period, undermining the effectiveness of the UK ETS and risking carbon leakage.

169. The Impact Assessment recognised that if there were very high allowance prices in the UK ETS then emissions intensive businesses would have their competitiveness affected and this could result in a higher risk of carbon leakage [**CB/39/446, para 94**]. This could lead to emissions being exported from the UK and not a global reduction of emissions. Likewise, in the UK many readily deployable abatement options (e.g. coal to gas fuel switch) have already been exhausted. There is a lead-in time of a number of years for investment in other low carbon technologies. The UK ETS would only be effective in reducing emissions if it was able to drive emissions down by incentivising investment and take-up of more carbon efficient processes, as opposed to emissions reductions through emitters simply decreasing or ceasing activity altogether due to excessively high carbon prices without any way to reduce emissions in the short term. The UK Government took into account the cost to business only in so far as to ensure the effective functioning of the UK ETS from the start, which then enables us to deliver on the emissions reduction ambition.

Effectiveness of the cap in reducing emissions

170. To answer the Claimant's second point – i.e. effectiveness of the chosen cap at reducing emissions – there is a wealth of evidence from emissions trading systems around the world that proves that an ETS cap set above BAU emissions can successfully deliver significant emissions reductions. A cap is not equal to the projected or actual emissions in a market. The purpose of the cap is to impact behaviour and future expectations in the market which in turn, drive behavioural change and industrial decarbonisation strategy and investment across targeted 'energy-intensive' sectors. The cap does not directly reduce the number of actual emissions in the market, but it does send a signal to market participants that they should reduce their emissions or face a higher price for continuing to emit greenhouse gases.

171. For example, the EU ETS's cap was affected in Phase II (2008-2012) by unrestricted usage of international credits. This resulted in a very large surplus of allowances compared to BAU emissions and in a prolonged period of low carbon prices of around €5. Although the EU ETS cap was tightened in 2013, the current number of allowances in circulation in the EU ETS today still exceeds BAU emissions by c. 87% (due to allowances banked from previous periods). Despite this,

> *"emissions from installations covered by the ETS declined by about 35% between 2005 and 2019"[1]. In 2019 alone, GHG emissions from all operators covered by the EU ETS reduced overall by 8.7% compared to 2018 levels[2]*."

172. Due to how data on emissions reductions is collected in the EU ETS, it is difficult to report emissions reduction in individual countries, such as the UK, in that time. However, between 1990 and 2018, UK territorial emissions from all sources reduced by 43% or 342 $MtCO_2e$ [48]. The UK's membership of a trading system has played a significant role in this reduction. From 1 January 2021 the cap in the UK ETS is already tighter than that of the EU ETS. The UK ETS will also include additional mechanisms to ensure the carbon price does not fall below £15.

173. The decision where to set the initial cap for the UK ETS was informed by quantitative analysis based on modelling of carbon values and abatement and projections of 'business as usual' emissions and marginal abatement. The analysis which is reported in the Impact Assessment found that with the adopted design of the standalone UK ETS, including the initial cap, there would be greater emissions reductions under the UK ETS compared to the counterfactual [**CB/39/424**].

174. I would highlight that, even without the expected increased demand from the assumed hedging behaviour, with the initial cap set where it was above business-as usual emissions, the modelling showed that the UK ETS would lead to emissions abatement of at least 4 $MtCO_2e$. This would be 3 $MtCO_2e$ higher than the counterfactual of staying in the EU ETS for Phase IV. It would be 4 $MtCO_2e$ higher than if there was no ETS.

175. The Impact Assessment was clear that, at both the low and high end of the range, the analysis suggested that the UK ETS delivers a higher carbon benefit to society relative to the counterfactual [**CB/39/440, para 69**]. The modelling found that the UK ETS would lead to additional abatement in its initial years [**CB/39/450, para 123**].

176. In light of this, the argument that an ETS cap above BAU emissions would not incentivise emissions reductions is unsubstantiated and wrong.

Purpose of the UK ETS

177. With regards to Paragraph 17 of the Claimant's Reply to Summary Grounds of Resistance, the Claimant argues that

> *"even if the cap could have been set at 150 $MtCO_2e$ as a bona fide way of ensuring liquidity in the market, that was not the actual purpose for which the Defendants acted*"[49].

178. As explained above, a significant component to deliver the emissions reductions that the UK ETS aims to deliver is that the system works effectively. Poor liquidity in a new and uncertain market on emissions risks creating unreasonably high prices on carbon overnight. A sudden, significant price spike would not be conducive to sustainably lowering emissions sectors under the UK ETS; it would undermine confidence in the long-term viability of the scheme, could force many of the emitters

[48] BEIS, *Updated energy and emissions projections: 2019* (2020): https://www.gov.uk/government/publications/updated-energy-and-emissions-projections-2019

[49] Claimant's Response to SGD – paragraph 17, p. 7.

out of the UK and into countries with less stringent climate measures, creating carbon leakage issues (as previously explained). This would in turn contradict our climate ambition both within the UK and in partnership with other countries that signed the Paris Agreement. As outlined above and in [**CL1/23**] this was a key consideration when deciding what the initial cap for the UK ETS should be.

179. Furthermore, many readily deployable abatement options in the UK have already been exhausted (e.g. coal to gas fuel switch), there is a lead-in time of a number of years for investment in other low carbon technologies, and many such technologies are not yet proven at scale nor are readily available in the market – hence the work the Government is doing to incentivise, create the market conditions, and demonstrate CCUS and hydrogen. Therefore, significantly high prices early on would not lead to greater emissions reductions but could actually undermine businesses' ability to invest in the low carbon technologies.

180. The Government took into account the cost to business in so far as to ensure the effective functioning of the UK ETS from the start, which then enables us to deliver on the emissions reduction ambition.

The commitment to review UK ETS scope

181. As outlined by the Government and the Devolved Administrations' response to carbon pricing in June 2020, the UK is committed to the implementation of carbon pricing as an integral part of its action to tackle climate change, in light of the Paris Agreement. As set out in the Clean Growth Strategy, the guiding principle for the UK ETS at launch was to be at least as ambitious as the EU ETS. A smooth transition for scheme participants from an established, large, and stable market to a new and much smaller alternative was rightly prioritised. No other economy has done this. Instead, regional pilots usually transition into larger nation-wide schemes, or national ETSs have joined with others to form international schemes. There is therefore no precedent that the Government could use to predict market behaviours in the new UK ETS in January 2021.

182. The approach for the launch of the UK ETS provides the necessary flexibility to raise ambition in the near future, once the new market is established and matures, and supports our traded sector to decarbonise domestically, while mitigating the risks of carbon leakage.

183. Given these considerations, the Government and the Devolved Administrations judged that the first day of the new UK ETS was not the right time for increasing the scope the scheme. The question was examined at length in response to the CCC's advice, as outlined in their 20 March 2020 letter, to include other sectors in the UK ETS from 2026. However, the CCC had not advised to specifically consider inclusion of municipal waste incinerators in the UK ETS from launch. At the time, the CCC advocated expanding the scope of the scheme to agriculture and land use in the second half of in the scheme's first ten-year phase. In their most recent report, from 9 December 2020, the CCC advocated adding greenhouse gas removals to the UK ETS scope from 2027 [**CL1/437**].

184. As part of wider series of reports that make up the Sixth Carbon Budget advice, the CCC recommended that the:

"*Government policy could also focus on EfW [energy from waste] emissions, either through carbon taxation or inclusion in a UK ETS, and/or providing incentives for CCUS to be installed*"[50].

185. The CCC have not advised that pricing carbon from EfW is the only acceptable means of reducing EfW emissions in line with Net Zero and the Paris Agreement. They mentioned:

"r*enegotiation of waste management contracts, in order to prioritise prevention and recycling efforts*" as an alternative or complementary policy to this.

186. Neither have the CCC mentioned that the issue on EfW should be addressed by 1 January 2021. On the contrary, late 2020s onwards were recommended:

"*Existing [EfW] plants should start retrofitting CCS from late 2020s onwards, with 2050 a backstop date for full CCS coverage. This will require either use of GHG thresholds for generated power & heat (could be set as part of the UK's new Bioenergy Strategy), access to CCS incentives to lower the costs of capture (particularly for smaller facilities further from CCS clusters), and/or carbon taxation (either taxes or inclusion in a UK ETS). Regional retrofit timings should be aligned with BEIS' CCS infrastructure plans*."[51]

187. The Government and devolved administrations' response to the Consultation on Carbon Pricing [**CB/38, para. 55**] has committed to reviewing scope of the UK ETS:

We recognise that there is a case for expanding carbon pricing, especially in the context of a net zero emissions target, and will therefore consider the option of expanding the scope to the most appropriate additional sectors in the first ETS review as per the review process outlined below (see "Phases and Reviews") to enable implementation of any potential changes to scope by no later than 2026.

188. There are a range of policy tools available, including emissions trading, which could encourage decarbonisation in the non-traded sector. The Government and the Devolved Administrations would assess, on a case-by-case basis, whether including a specific industry in the scope of the ETS is the best way to reduce emissions in that sector, or whether other policy tools may be more effective. There are various relevant factors to consider when expanding the scope, for example available technology, the impact of scope expansion on abatement and environmental integrity, wider Government and Devolved Administrations' climate change policies, our commitment to net zero, carbon budgets, proportionality, impact on business, amongst others.

189. In practice, the scope expansion will be decided using the first of two legislated whole-system reviews during Phase I of the UK ETS. The first review, scheduled for 2023, will review the performance of the UK ETS in the first half of the phase (2021-25). Any agreed changes will be made by 2026. In 2028 the second whole-system review will be held and will examine the performance of the entirety of Phase I (2021-30). Any amendments to the features of the ETS will be implemented by the start of Phase II in 2031. This review will be in line with the EU ETS Phase IV reviews and

[50] page 188 of https://www.theccc.org.uk/wp-content/uploads/2020/12/Policies-for-the-Sixth-Carbon-Budget-and-Net-Zero.pdf

[51] page 32 https://www.theccc.org.uk/wp-content/uploads/2020/12/Sector-summary-Waste.pdf

the Paris Agreement Global Stocktake efforts. Any plans to expand the scope of the ETS in time for the 2023 whole system review will be published by 31 December 2023.

190. There will be a public consultation to allow members of the public to provide their thoughts on the scope of the ETS in 2023, but the form of that consultation is yet to be decided. To minimise the number of consultations and mitigate against business fatigue my officials are aiming to include any consultation on the scope of the UK ETS within a whole system review.

191. Once a consultation is complete, the Government and Devolved Administrations will respond and any necessary alterations to the ETS will be made, including legislative modifications.

Statement of truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Name: Charlie Lewis

Dated: 8 January 2021

Name: C A Preston
On behalf of: The First Defendant
Witness Statement No 1
Dated: 7 January 2021
Exhibit: CP1

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

CLAIM NO CO/3093/2020

B E T W E E N : -

R (on the application of)
GEORGIA ELLIOTT-SMITH

Claimant

AND

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

(2) DEPARTMENT OF AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND EXECUTIVE

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

WITNESS STATEMENT OF CHRISTOPHER PRESTON

I, **Christopher Allan Preston**, of the Department for Environment, Food, and Rural Affairs (**"Defra"**), 2 Marsham Street, London, SW1P 4DF, will say as follows:

1. I am the **Deputy Director for Resources and Waste.** In this role my responsibilities include oversight of policy development and delivery relating to the waste sector in England. This includes the role of energy from waste plants in managing residual municipal wastes.

2. I have been a permanent civil servant since February 1991 and have held my current role since January 2016.

3. I provide this Witness Statement on behalf of the First Defendant. This is in response to a claim for judicial review brought by the Claimant, regarding decisions by the Secretary of State and the devolved administrations on the appropriate design of a UK emissions trading scheme (UK ETS). These decisions were published on 1 June

2020 by way of the document entitled *'The future of UK carbon pricing: UK Government and devolved administrations' response'* ("the Response"). [**CB/38/355-422**]. In this statement I provide information about the policy regarding resources and waste, including Municipal Waste Incinerators ("MWI").

4. Save where it is stated otherwise, the contents of this statement are within my actual knowledge and are true. Where I refer to matters that are not within my actual knowledge, I believe those matters to be true and identify the source of my information or belief.

5. [I refer to additional documents, exhibited to this witness statement in an exhibit marked CP1, in the form [**CP1/tab/page**].

Introduction

6. I make this statement on the basis of information provided to me by my team: policy and evidence officials in the Resources and Waste division of Defra. The information in this statement that relates to the Environment Agency and their regulatory role has been provided or agreed by officials in the Environment Agency. The information on waste policies for other parts of the UK that is included in this statement has been provided or agreed by the devolved administration for that relevant part of the UK. As waste is largely a devolved matter, any references to the UK Government taking measures should be taken as measures applying to England only unless otherwise stated.

7. My officials have had no direct role in developing or designing the UK ETS, which falls under BEIS's remit. Rather, my officials are responsible for waste policy in England, including policy relating to municipal waste incinerators (MWI). Within Defra these are more commonly referred to as Energy from Waste (EfW) plants. My officials first became aware of BEIS's work on developing a UK ETS in April 2019. This was when the draft consultation document on Future UK Carbon Pricing [**CB/22/221-292**] was circulated across Whitehall departments ahead of BEIS formally launching the consultation. My officials noted that MWIs/EfW plants were not included in the proposed UK ETS but had no reason to raise any issues because MWIs were not included in the existing EU ETS that the UK ETS was being designed to replace. Also other measures, which I expand on below, were being taken or considered to reduce overall volumes of waste (waste prevention measures), to reduce levels of residual municipal waste (e.g. increased capture through reformed recycling interventions) needing to be landfilled or incinerated, and to reduce the environmental impacts of incinerating waste. These measures included potential fiscal levers (such as a tax on the incineration of waste and a tax on plastic packaging with less than 30% recycled content) as well as regulatory changes affecting both the volume and composition of residual waste that might be available for incineration and specific restrictions on the waste types that can be accepted by MWIs.

RESOURCES AND WASTE STRATEGY FOR ENGLAND

8. The current policy landscape with regard to resources and waste management is outlined in the Resources & Waste Strategy for England published in December 2018 ("RWS") and the associated Evidence Annex. A copy of these documents are exhibited to this witness statement at [**CP1/6/181-326**] and [**CP1/7/327-455**] respectively.

9. The RWS will contribute to the delivery of five strategic resource and waste management ambitions that run through to 2050.

10. These are:

    (i) To work towards all plastic packaging placed on the market being recyclable, reusable or compostable by 2025;

    (ii) To work towards eliminating food waste to landfill by 2030;

    (iii) To eliminate avoidable plastic waste over the lifetime of the 25 Year Environment Plan[1];

    (iv) To double resource productivity by 2050;

    (v) To eliminate avoidable waste of all kinds by 2050.

11. I highlight these strategic ambitions and, below, some of the underpinning policy detail that is in development, because collectively their overall effect will be to reduce the amount of residual waste – especially municipal residual waste - that will need to be landfilled or incinerated for energy recovery at MWIs. As noted on p77-78 of the RWS Evidence Annex (see [**CP1/7/402-403**]), "Without new policy, municipal residual waste arisings could be 30.1 million tonnes per annum in 2035, up from 27.8 million tonnes in 2016. Depending on how they are implemented, policies such as consistency of collections can significantly reduce the expected amount of residual waste generated through higher recycling (Figure 8)." Figure 8, on page 78, shows that Defra Evidence specialists projected that the policy measures on recycling consistency are expected to reduce residual municipal waste to around 20mtpa. It follows that the greenhouse gas (GHG) impacts of managing the total quantity of residual waste – whether it is landfilled or incinerated - will be lower than they would otherwise have been without these policy measures. Furthermore, Defra strategic ambitions to address plastics ending up in the residual waste stream will, along with other interventions, affect the composition of residual municipal waste stream and should mean less fossil plastic content, further reducing GHG impacts.

WASTE PREVENTION MEASURES

12. Through taking action on waste prevention, reducing problematic single use items (especially single use plastic items), and keeping products in use for longer such as

[1] UK Government, 25 Year Environment Plan: https://www.gov.uk/government/publications/25-year-environment-plan

through reuse, repair and remanufacture, Defra aims to reduce the burden of waste management on our economy, reduce greenhouse gas emissions, and reduce the impacts on our natural environment from extraction, processing, manufacture, and disposal including litter and fly-tipping. We are committed to do so through a series of policies that support (among other things): firstly, designing-out waste, using a mix of voluntary and regulatory measures and incentives like Extended Producer Responsibility (EPR); secondly, encouraging the provision of relevant facilities and services (such as storage for reusable items and repair shops) to enable people and businesses to manage waste they produce in a way that maximises reuse and recycling; and thirdly, data and information being made available to unlock the value of materials and enable informed consumer choices.

13. In terms of regulatory measures, UK Government is seeking powers through the Environment Bill that will enable it and the Devolved Administrations to set resource efficiency requirements and consumer information requirements to drive design for durability, reparability and recyclability of products, as well as establish EPR Schemes for specified products or materials. These will help drive the market towards products which are durable, repairable and recyclable. The UK Government will encourage industry to set voluntary standards, working with key sectors such textiles, construction, food and plastics to increase reuse and minimise waste. The producer responsibility powers in the Environment Bill will enable the UK Government and Devolved Administrations through regulations to place obligations on producers in respect of all levels of the waste hierarchy including preventing products from becoming waste and to encourage greater reuse and recycling; and for producers to pay the costs of managing their products at end of life including such as reuse, redistribution and recycling.

14. EPR will support the provision of better collection services and facilities to enable reuse and repair. The powers to make regulations requiring producers to pay the costs of dealing with the waste from products they place on the market include powers to vary the costs paid by producers according to factors such as the recyclability of a product. This will mean that producers are incentivised to produce fewer products that are difficult to recycle (and hence more likely to end up in the residual waste stream). Defra is also encouraging industry action through voluntary agreements such as the Sustainable Clothing Action Plan (SCAP), administered by the Waste and Resources Action Programme (WRAP). SCAP signatories have reduced their water footprint per tonne of clothing by 19.5%, and their carbon footprint per tonne by 15.9% between 2012 and 2019, exceeding the 15% reduction target (with 2012 as a baseline). WRAP are engaged with industry stakeholders to develop an ambitious new voluntary agreement for 2021-2030.

15. The UK Government has implemented measures to reduce levels of certain single-use plastic items in England. For example, the 5p carrier bag charge Government introduced has significantly reduced the use of single-use carrier bags by the main supermarket retailers by 95%. The UK Government has announced its plans to increase the minimum charge to 10p and to extend the charge to all retailers in 2021. The UK Government has also introduced restrictions on supply in England of certain single use plastic items (drinking straws, drink stirrers, and plastic-stemmed cotton

buds) through legislation that came into effect from October 2020 (the Environmental Protection (Plastic Straws, Cotton Buds and Stirrers) (England) Regulations 2020). These regulations will further reduce the plastic waste that ends up in the residual waste stream.

16. Similar measures to these have been or are being taken forward by other UK nations. In Northern Ireland a province wide Carrier Bag Levy was introduced in April 2013 and includes all bags. The primary objective of the Northern Ireland Levy is to reduce the number of unnecessary bags in circulation and since it was introduced in excess of 1.5 billion bags have been removed from circulation. The Department of Agriculture, Environment and Rural Affairs in Northern Ireland is also actively considering ways to reduce bag usage further with a public consultation scheduled for launch in 2021. The Department will also introduce single-use plastic prohibitions in line with requirements under the Ireland/Northern Ireland Protocol. In Scotland, Scottish Government has already introduced regulations to ban the use of plastic-stemmed cotton buds (The Environmental Protection (Cotton Buds) (Scotland) Regulations 2019) and is currently consulting on proposals to go further to ban other problematic single-use plastic items, including single-use plastic cutlery, plates and balloon sticks. In Scotland a carrier bag charge has been in place since 2014 requiring all retailers (food and non-food) to charge for each new single-use carrier bag (including paper, those made from some plant-based materials and plastic), and work is underway to increase the charge to 10p in 2021. In addition, Scottish Parliament has passed legislation to implement a deposit return scheme for single-use bottles and cans from July 2022 which will help divert these materials from the residual waste stream. In Wales, a minimum 5p charge for single use carrier bags was introduced in 2011 and applies to all retailers. This resulted in an estimated 70% decline in the sales of single use carrier bags between 2011 and 2014, with a further 21% reduction estimated to 2018. Powers to extend the charge to all carrier bags were included in the Environment (Wales) Act 2016 and future policy options are currently being explored. In terms of single use plastic items, on 30 July 2020, Welsh Government published a consultation on plans to ban or restrict nine single use plastic items in Wales. These included drinking straws, cotton buds, stirrers, plates and cutlery, polystyrene food and drinks containers, balloon sticks and products made of oxo-degradable plastic. The consultation closed on 22 October 2020 and responses are being analysed.

17. The Environment Bill also includes powers that will enable the UK Government, Welsh Government and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland to set new charges on single-use plastic items (expanding powers currently used for carrier bags). Such charges will reduce demand for those products and reduce the amount of waste that is produced in the first place and in particular reduce the amount of plastic that ends up in the residual waste stream, some of which ends up at MWIs.

18. In 2018, Defra published statutory guidance on how to deal with food and drink surplus and waste[2] in England. Food waste prevention policies aim to minimise the environmental impact of food waste according to the food surplus and waste hierarchy. Preventing waste, followed by redistributing any surplus, sits at the top of that hierarchy. This is followed by sending to animal feed where appropriate, and then to treatment methods that are considered recycling: such as through Anaerobic Digestion (AD), then composting, then land spreading (where appropriate). Finally, to incineration with energy recovery, then incineration without energy recovery, and then to sewer or landfill, the least environmentally appropriate options.

19. Food waste prevention actions taken by the UK Government and Devolved Administrations include targeted consumer campaigns and working with industry on resource efficiency approaches, including supporting a collaborative UK-wide programme called Courtauld 2025 which aims for a 20% reduction in food waste by 2025 from a 2015 baseline. The programme also includes grant support in England for surplus food redistribution organisations, supporting them for instance with infrastructure such as fridges to enable them to redistribute more surplus food from retailers and manufacturers to those in need.

REDUCING RESIDUAL WASTE BY INCREASING RECYCLING

20. The UK Government has also consulted on measures for separate collection of recyclable materials including plastic, glass, metal, paper and card, and food waste from households and from businesses and public sector organisations that produce household-like waste, and also garden waste from households in England. These proposals were supported on consultation and a government response was published in July 2019. Duties to require separate collection of these waste streams have now been written into the Environment Bill which is currently progressing through Parliament. Separate collection of food waste will ensure that this waste can then be sent to be treated through anaerobic digestion or composting, rather than being sent to residual waste recovery or disposal options. This will support the UK Government's strategic ambition of working to eliminate food waste to landfill by 2030. Treatment through anaerobic digestion will also support the production of green energy in the form of biomethane that can be sent to the national grid and also a fertilizer like by product that can act as a soil improver reducing the need for inorganic fertilizers. In addition to this other measures in the Environment Bill to ensure that all householders and other producers of household-like waste are able to recycle a set range of materials, including plastics, that will help to drive up greater recycling of these materials and to eliminate avoidable plastic waste over the life of the 25 Year Environment Plan.[3] This (in addition to other measures noted in this witness statement) will ensure that more waste is recycled and less waste enters the residual waste stream in the first place. This means less waste will need to go to incineration (or landfill) in future.

[2] See https://www.gov.uk/government/publications/food-and-drink-waste-hierarchy-deal-with-surplus-and-waste/food-and-drink-waste-hierarchy-deal-with-surplus-and-waste
[3] UK Government, 25 Year Environment Plan: https://www.gov.uk/government/publications/25-year-environment-plan

21. Regulation 13 of the Waste (England and Wales) Regulations 2011 requires organisations in England and Wales collecting waste paper, metal, plastic or glass to do so by way of separate collection. Waste collection authorities making arrangements for the collection of such waste must ensure those arrangements are by way of separate collection. Once waste has been separately collected, regulation 14 requires organisations in England and Wales collecting, transporting or receiving waste to ensure that waste is not mixed with other material with different properties. This is to ensure that the waste is treated in accordance with the waste hierarchy and to facilitate preparing for re-use, recycling or recovery. These duties apply unless separately collecting the waste or keeping the waste separate does not deliver the best environmental outcome, is not technically feasible or entails disproportionate economic costs. Waste can be mixed or need not be collected separately if collecting waste together or mixing it results in output of comparable quality to what would be achieved by separate collection or keeping the waste separate. Together, these regulations should ensure that more waste is collected separately and then, after its separate collection, it is not mixed and remains suitable for recycling, increasing recycling and reducing the amount of residual waste that must be incinerated (or landfilled).

22. Other waste reforms currently in development and on which the UK Government and the Devolved Administrations have consulted, such as reform of the packaging producer responsibility regime and introduction of a deposit return scheme for drinks containers, will also make a significant contribution to reducing levels of plastic waste in residual municipal waste, meaning less waste to incineration (or landfill) in the future.

23. I set out the above to demonstrate that the RWS and Defra's continuing wider resources and waste policy agenda recognises the importance of moving towards a low carbon economy, promoting measures that reduce the GHG impacts of resource extraction and for the management of waste at end of life. That is also why the RWS explicitly states (at section 8.1.2 on page 136 (see [**CP1/6/316**]) that the UK Government will "Move away from weight-based towards impact-based targets and reporting, focusing initially on carbon and natural capital accounting." The policies detailed above and in the RWS will help prevent waste occurring in the first place, and, where waste does arise, help recycle more of that waste so that less of it needs to be incinerated (or landfilled).

ENVIRONMENTAL (INCLUDING GHG) IMPACT OF RESIDUAL WASTE

24. The environmental costs of managing residual waste are explicitly analysed in section 4.3 (page 76 on) of the RWS Evidence Annex (see [**CP1/7/401**]). I set out below an extract from this section:

"Residual waste is waste that has not been prevented, re-used or recycled. It is usually collected from households or businesses in a black bag or a wheelie bin, and is then sent for treatment to ultimately end up at an energy recovery plant or landfill. The waste composition of residual waste will determine how environmentally damaging it will be when it is sent for treatment. Policies are needed at the end of life

stage, but also at the production and consumption stages, to ensure residual waste is minimised.

Despite a significant 70% decline in greenhouse gas (GHG) emissions since 1990, the waste management sector[4] still accounts for 4.3% of UK GHG emissions, with landfill comprising over two-thirds of that. The main source of GHG emissions in landfill is the anaerobic decomposition of biodegradable waste into methane. Landfill accounts for 27% of all UK methane emissions and is the second biggest source after agriculture. Other than GHGs, biodegradable waste in landfill also produces leachate, a toxic liquid which can be difficult to extract and expensive to treat.

GHG emissions are also generated from the incineration of municipal waste. This is usually referred to as energy from waste (EfW) and accounts for 0.8% of UK GHG emissions. There are also associated emissions of air pollutants such as particulate matter or nitrous oxide, but these are tightly regulated and small. GHG emissions from EfW are generated when fossil-based waste is combusted, such as plastic. Latest Environment Agency data show 40 operating municipal and/or industrial & commercial waste incineration facilities in England. Existing plants are all enabled to use heat, but less than a quarter do so. Distributing the heat generated from combustion of waste, as well as the electricity produced, can increase the efficiency of incineration plants and reduce their environmental impact."

25. As can be seen from above extract together with strategic ambitions I refer to at paragraphs 9 and 10 above in this statement, tackling the levels of plastic that might end up in the residual waste stream is recognised as important from the perspective of reducing GHG emissions from managing residual waste, alongside removing food and other biodegradable wastes from landfill. The policies identified earlier in this witness statement will reduce the overall amount of plastic waste and food waste that is produced in the first place, as well as ensuring that more of the food and plastic waste that continues to be produced is treated higher up the waste hierarchy and not incinerated (or landfilled).

POLICIES TO INCREASE EFW EFFICIENCY AND REDUCE DIRECT GHG IMPACT

26. A further way to reduce the GHG impact of MWIs is to maximise the gains in terms of the energy they generate to reduce energy potentially needing to be generated by fossil fuel power generators. The RWS includes specific policies that aim to increase the resource value of waste treated by MWI/EfW plants including, at section 3.2.1 on page 77 (see [**CP1/6/257**]), driving greater efficiency of plants by encouraging the use of heat, which would mean greater energy value from the waste incinerated and therefore lead to GHG improvements by offsetting other energy use. Work is also underway to increase the number of plants recognised as achieving the efficiency threshold within the Waste Framework Directive. The RWS also recognises, at 3.2.2 on page 79 (see [**CP1/6/259**]), that driving down the level of residual waste limits the amount of residual waste infrastructure required in future, recognising both UK

[4] As defined in the National Atmospheric Emissions Inventory: landfill, waste-water handling, waste incineration, composting, anaerobic digestion and mechanical and biological treatment

Government targets of 65% recycling of municipal waste by 2035 and 10% or less municipal waste to landfill by 2035.

27. Defra officials are exploring with BEIS colleagues the potential for CCUS (carbon capture use and storage) to further reduce the carbon emissions from MWI/EfW plants. Defra Minister Pow said in a UK Parliament Westminster Hall debate on waste incineration facilities on 11 February 2020:

    "Every day that passes brings new advances in carbon capture, and I am pleased to report that the Government will invest £800 million in this technology to deploy the first carbon capture clusters by the mid-2020s.The technology could potentially be applied to energy-from-waste plants to capture the carbon emissions from incinerating waste, thereby reducing carbon dioxide emissions even further."[5]

28. Within the UK, England has the greatest number of MWIs. At the time of compiling the RWS there were 40 such plants operating. However, other parts of the UK also have MWIs (6 in Scotland, 2 in Wales,1 in Northern Ireland) and within their devolved powers develop their own specific policies that affect the level of residual waste, its composition and the restrictions on any specific types of waste that MWIs are permitted to accept.

OBLIGATION TO COMPLY WITH WASTE HIERARCHY IN MANAGING WASTE STREAMS

29. The Waste Framework Directive sets out the waste hierarchy in Article 4 of that Directive. The hierarchy is enshrined in legislation through regulation 12 of the Waste (England and Wales) Regulations 2011 in England and Wales. This legislation places a duty on establishments and undertakings importing, producing, collecting, transporting, recovering or disposing of waste or in control of waste, on the transfer of waste, to take all such measures as are reasonable in the circumstances to apply the priority order set out in the waste hierarchy. It is an important mechanism to reduce waste reaching the least favoured levels of the hierarchy, which are 'other recovery' (including incineration with energy recovery) and 'disposal'. There is therefore already a central requirement on all waste holders and those in control of waste, operating alongside the wider waste regulatory regime, to manage waste in a way that limits its impact on the environment. Defra has issued guidance on the application of the waste hierarchy so that businesses and organisations are clear on their obligations when handling or producing waste. A copy is exhibited to this witness statement at [**CP1/1/3-16**].

30. Where waste reaches the lower two levels of the hierarchy the two main options are either incineration with energy recovery or landfill. Both carry GHG impacts but evidence on which the hierarchy was established points to incineration with energy recovery being the more preferable for residual municipal waste, which is usually of mixed composition, from a GHG perspective. Therefore it is important to note that in terms of the waste hierarchy, incineration with energy recovery remains a more

[5] UK Parliament: https://hansard.parliament.uk/commons/2020-02-11/debates/D1799344-3D26-4DF0-94C1-3AEB397AF375/WasteIncinerationFacilities

favoured outcome than disposal to landfill. The waste hierarchy is also included in legislation in Scotland (section 34(2A) of the Environmental Protection Act 1990 as it has effect in Scotland and schedule 4 of the Waste Management Licensing (Scotland) Regulations 2011) and regulation 9(1) of the Waste (Northern Ireland) Regulations 2011.

EVIDENCE UNDERPINNING THE WASTE HIERARCHY

31. The UK government 2011 publication 'Applying the waste hierarchy: Evidence Summary', for example, demonstrates some of the environmental factors that have been taken into account in arriving at the position of putting energy recovery higher in the waste hierarchy than disposal to landfill. A copy is exhibited to this witness statement at [**CP1/2/ 17-61**]. The factors include climate change. Factors that affect the calculation of GHG emissions include the composition of residual municipal waste (e.g. landfill would be a worse outcome for higher biogenic waste; EfW a worse outcome for waste with high fossil plastic content); the relative efficiency of the EfW technology used (including whether the operates in combined heat and power mode);and updated evidence around the GHG impacts of waste to landfill.

32. As stated above, Defra policy aims are set so as to improve resource use and waste prevention as well as greater re-use and recycling. The policy framework also recognises that residual waste will still arise and needs to be managed in a way that minimises environmental impacts but maximises its resource value. The two main methods of dealing with residual waste are landfill or incineration, with or without energy recovery. Evidence available at the time of preparing the RWS suggested that from a GHG perspective landfill is likely to be a worse outcome for mixed municipal waste than incineration with energy recovery. The Defra 2014 publication 'Energy from Waste: A guide to the debate'[6] remains extant. A copy is exhibited to this witness statement at [**CP1/3/62-135**]. Paragraph 45 of this states (underlining added) (see [**CP1/3/87**]):

"45. However, even when these factors are taken into consideration, in carbon terms, currently energy from waste is generally a better management route than landfill for residual waste. While it is important to remember this will always be case specific and may change over time, two rules apply: • the more efficient the energy from waste plant is at turning waste into energy, the greater the carbon offset from conventional power generation and the lower the net emissions from energy from waste; • the proportion and type of biogenic content of the waste is key – high biogenic content makes energy from waste inherently better and landfill inherently worse."

33. Paragraph 39 of the same publication provides an explanation of biogenic and fossil carbon (see [**CP1/3/86**]): "A typical black bag of residual waste will contain a mixture of different things, such as paper, food, plastic, clothes, glass and metal. Some of these wastes, e.g. food, will originally have come from biological sources, i.e. plants,

6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284612/pb14130-energy-waste-201402.pdf

and the carbon stored in them is known as biogenic carbon. Some of the waste materials, e.g. plastics, will have been made from fossil fuels such as oil and the carbon stored in them is known as 'fossil carbon'. Some of the wastes, e.g. clothes, will contain a mixture of biogenic and fossil carbon (e.g. cotton/polyester mixes) while other wastes will contain little or no actual carbon (e.g. metals). We need to understand if the carbon in the waste is biogenic or fossil in origin for two reasons: (i) they behave differently in landfill (plastic does not generally decompose) and (ii) biogenic and fossil carbon are counted differently in terms of how they are calculated to contribute to global warming. Of the waste in our typical black bag, currently somewhere between one half and two thirds will contain biogenic carbon."

34. As noted above, waste that is sent to MWIs is usually mixed municipal waste, with composition being varied and made up of both fossil and non-fossil carbons. There have been a small number of reports over the years that give us a high level indication of the composition of residual municipal waste. One such recent study by WRAP[7] (published in 2019) sets out the estimated composition by weight of municipal residual waste in England for 2017, at Table 3 of the report. A copy is exhibited to this witness statement at [**CP1/8/456-470**]. The contents were estimated as: food (27%); garden waste (2.7%); other organic (2.3%); paper (14.8%); card (6.3%); glass (2.6%); ferrous metals (2.4%); non-ferrous metals (1.1%); dense plastic (7.8%); plastic film (8.2%); textiles (5.5%); waste electricals (WEEE) (1.1%); hazardous (0.5%); wood (2.3%); miscellaneous combustible (9.3%); miscellaneous non-combustible (3.6%); fines (2.2%) and other waste (0.2%) In the Resources & Waste Strategy (see box on page 20 ([**CP1/6/200**]) Defra set out its intention to commission further composition analysis once the major waste reforms have been introduced. This is to gather evidence to determine whether additional policy measures are needed to reduce the carbon and wider environmental impacts of managing residual waste.

INSTANTANEOUS GHG EMISSIONS FROM MUNICIPAL WASTE INCINERATORS

35. As explained in paragraphs 38 to 46 of the Defra publication 'Energy from Waste: A Guide to the Debate' (see [**CP1/3/86-88**]), the instantaneous nature of GHG emissions released by MWI/EfW plants is recognised but it needs to be contrasted against the far greater impact of emissions from landfilling mixed municipal wastes even though emissions from landfill would occur over a much longer time period. Methane, a much more potent GHG than CO2 is generated in landfill conditions and although much is now captured for energy purposes, or flared to turn the methane into CO2, methane does still escape into the atmosphere from landfills and is therefore considered more problematic as it is a more powerful GHG than CO2. These considerations are accounted for in the decision to place landfill at the foot of the waste hierarchy. Furthermore, the latest IPCC Assessment Report (i.e. AR5) has

[7] WRAP Municipal Waste Composition – England 2017 (published January 2020) pages 8-9, Table 3.2 - https://wrap.org.uk/sites/files/wrap/National%20municipal%20waste%20composition_%20England%202017.pdf

updated the warming potential of methane from 25x CO2 to 28x CO2[8] . The medium and long term environmental impact of methane being produced by landfills (as well as GHG emissions released by MWI/EfW) should also be taken into account. Indeed increased landfilling and reduced waste incineration may actually be a worse overall environmental outcome in the medium to long term, even if in the short term GHG emissions released by MWI/EfW are instantaneous.

APPROACH TO REGULATION OF MUNICIPAL WASTE INCINERATORS IN ENGLAND AND WALES AND THE ENVIRONMENTAL PERMITTING REGIME

36. MWI operations in terms of treating waste are regulated in England and Wales primarily under the Environmental Permitting (England and Wales) Regulations 2016. The UK Government have amended these Regulations to prevent specific waste streams from being accepted for incineration. For example, separately collected waste plastic, metal, paper and glass must not be incinerated (or landfilled), unless that waste is treated. Waste resulting from that treatment may then only be incinerated (or landfilled) if that delivers the best environmental outcome for that waste. These changes became effective in England and Wales on 1 October 2020 as a result of regulation 21((5) and (6)(b) of The Waste (Circular Economy) (Amendment) Regulations 2020.

37. In other words, this measure means that waste incineration plants, small waste incineration plants or waste co-incineration plants (as defined in those Regulations) must not accept for incineration plastic waste that has been separately collected for preparing for re-use or recycling, or this would be a breach of a condition of their environmental permit. Breach of an environmental permit condition is a criminal offence under the Environmental Permitting (England and Wales) Regulations 2016. The regulator may also issue an enforcement notice if the regulator considers that an environmental permit condition is being breached. Failure to comply with the requirements of an enforcement notice is a criminal offence. By placing this statutory permit condition on waste incinerator permit holders, this will have the effect of reducing the incineration of waste that is separately collected for preparing for re-use or recycling, including plastic waste.

38. The Environment Agency (EA), an executive non-departmental public body sponsored by Defra, is responsible for regulating municipal waste incinerators in England in accordance with the terms of the Environmental Permitting Regulations (and other relevant legislation). It takes decisions around environmental permitting, ongoing regulation and enforcement, and issues appropriate guidance to the sector. Under the Environment Permitting process, the EA ensures that the global warming potential of the proposed incinerator will be minimised by the use of Best Available Techniques (BAT - including those set out in the European BAT reference notes) in order to maximise the energy efficiency of the plant and minimise nitrous oxide emissions from its de-NOx system. In this way the EA ensures that the emissions of

[8] https://www.ghgprotocol.org/sites/default/files/ghgp/Global-Warming-Potential-Values%20%28Feb%2016%202016%29_1.pdf

CO2 for unit of electricity (or heat) generated will be minimised, but does not place any limits on the actual amount of CO2 emitted by the plant. Whilst this approach is not currently set out in formal published guidance, it is evident from decision documents that the EA publish, for example Section 6.3 of the Riverside 2 Decision Document (Decision document, pp.92-93 (see [**CP1/9/486-491**])). Further examples include Rookery Pit (issued Jan 2018 (see [**CP1/9/471-475**])), Southmoor Energy Recovery Centre (issued October 2019 (see [**CP1/9/476-480**])), and Heysham Gateway Energy Recovery Facility (issued May 2020 (see [**CP1/9/481-485**])). In each case, the global warming potential assessment can be found in Section 6.3 of the relevant decision document. A copy of section 6.3 of these Decisions is exhibited to this witness statement at [**CP1/9/471-491**].

39. SEPA, an agency of the Scottish Government, is responsible for regulating municipal waste incineration in Scotland in accordance with the terms of the Pollution Prevention and Control (Scotland) Regulations 2012 (as amended). It takes decisions on permitting, regulation and enforcement and issues appropriate guidance to the sector. Regulation 29 of the PPC Regulations requires SEPA to ensure that any permit authorising the incineration or co-incineration of waste contains "conditions necessary to ensure the recovery of energy takes place with a high level of energy efficiency". While SEPA does not place limits on the amount of CO2 emitted by a plant, it does ensure energy recovery takes place with a high degree of efficiency through the application of its Thermal Treatment of Waste Guidelines 2014 which sets minimum efficiency targets. A copy is exhibited to this witness statement at [**CP1/4/136-174**]. A Heat and Power Plan should be submitted as part of the planning application so that SEPA can determine whether any application for a Permit could be granted, the suitability of the location and recommend any planning conditions regarding layout or design of the proposed facility considered necessary. SEPA advise in their responses to the planning authority whether the proposed plan will be sufficient to enable SEPA to consent the facility. SEPA also expects a heat and power plan to be submitted at the time an application is made for a PPC permit. Examples of Heat and Power Plan assessments can be found in recent decision documents such as for Earls Gate Energy Centre. A copy of page 41 of this Decision is exhibited to this witness statement at [**CP1/5/175-180**] .

40. The regulations in each devolved administration will mirror the England regulations broadly, but have their own key differences – examples include the following:

41. **The conditions on environmental permits for waste incineration in each of the DAs:**

42. **Northern Ireland:** The Waste (Circular Economy) (Amendment) Regulations (Northern Ireland) 2020 have amended the Pollution Prevention and Control (Industrial Emissions) Regulations (Northern Ireland) 2013 to include a condition in incineration permits that the operator of an incinerator must not accept—

    i. any waste paper, metal, plastic or glass for incineration if that waste has been separately collected for the purpose of preparing for re-use or recycling; and

ii. any waste for incineration that results from the treatment of waste referred to in paragraph (a), unless incineration of that waste delivers the best environmental outcome in accordance with regulation 17 of the Waste Regulations (Northern Ireland) 2011. (Note the treatment must not be treatment that contravenes sub-paragraph (a) or regulation 9A(2)(a) of the Landfill Regulations (Northern Ireland) 2003).

43. **Scotland:** Regulation 29(1)(a)(ii) of the Pollution Prevention and Control (Scotland) Regulations 2012 require that environmental permits ensure that no separately collected waste, including plastics, capable of being recycled is incinerated or co-incinerated. Moreover, these regulations require that all new incineration facilities (since January 2014) must ensure that metals and dense plastics have been removed from residual municipal waste prior to incineration.

44. **Wales:** Schedule 13 to the Environmental Permitting (England and Wales) Regulations 2016 consist of the same conditions on environmental permits in Wales as those in England. However, Small Waste Incineration Plants (SWIPS) in Wales have an additional requirement: they must also apply the provisions set out for Part B installations set out in Schedule 8 to the Environmental Permitting (England and Wales) Regulations 2016.

45. **The collection of certain waste streams, including plastic in each of the DAs:**

46. **Northern Ireland:** Regulations 18-20 of the Waste Regulations (Northern Ireland) 2011 , as amended by the Waste (Circular Economy) (Amendment) Regulations (Northern Ireland) 2020, set out requirements with respect to the separate collection of waste (including a duty in relation to ensuring that separately collected waste is not then mixed with other waste). These regulations require councils (and private operators), when collecting waste paper, metal, plastic, or glass, to take all such measures to ensure separate collection of that waste as are available to it. This duty applies where separate collection is necessary to ensure that waste undergoes preparing for re-use, recycling or other recovery operations in accordance with the waste hierarchy and the protection of human health and the environment and to facilitate or improve preparing for re-use, recycling or recovery and can only be deviated from if one of the following conditions is met—

i. collecting the waste paper, metal, plastic or glass together results in output from those operations which is of comparable quality to that achieved through separate collection;

ii. separate collection of the waste does not deliver the best environmental outcome when considering the overall environmental impacts of the management of the relevant waste streams;

iii. separate collection of the waste is not technically feasible taking into consideration good practices in waste collection; or

iv. separate collection of the waste would entail disproportionate economic costs taking into account the costs of adverse environmental and health impacts of

mixed waste collection and treatment, the potential for efficiency improvements in waste collection and treatment, revenues from sales of secondary raw materials as well as the application of the polluter-pays principle and extended producer responsibility.

47. Article 20A of the Waste and Contaminated Land (Northern Ireland) Order 1997 already requires councils to take steps to promote the separate collection of food waste in Northern Ireland. New requirements introduced by the Waste (Circular Economy) (Amendment) Regulations (Northern Ireland) 2020 also require that waste which has been separately collected for preparing for re-use and recycling is not incinerated or sent to landfill unless these options deliver the best environmental outcome, in accordance with the waste hierarchy. The above provisions will be updated by the Statutory Rule the NI devolved administration are currently working on to more closely reflect the updated wording in the Waste Framework Directive.

48. The Food Waste Regulations (Northern Ireland) 2015 amended the Waste and Contaminated Land (Northern Ireland) Order 1997 to provide for the separate collection of food waste. From 1 April 2016 food businesses producing in excess of 5kg of food waste per week have been required to present food waste for separate collection and from 1 April 2017 all businesses that produce food waste have been required to ensure food waste is not deposited in a lateral drain or sewer. From 1 April 2017 local authorities are required to provide receptacles for the separate collection of food waste from households. In addition, from 1 April 2015 those who transport food waste are required to collect and transport such waste separately from other waste and separately collected food waste shall not be accepted at a landfill in accordance with the Landfill Regulations (Northern Ireland) 2003 as amended.

49. **Scotland:** In Scotland, Local Authorities have a legal duty under the Environmental Protection Act 1990 (as amended by the Waste (Scotland) Regulations 2012) to provide a comprehensive recycling service for their householders, including separate collections for dry recycling, which includes plastics, and food waste. In addition, the 1990 Act as amended by the Waste (Scotland) Regulations 2012 include provisions that require all businesses, public sector and not-for-profit organisations to present metal, plastic, glass, paper and card (including cardboard), and food waste for separate collection.

50. **Wales:** The Welsh Government intend to introduce new Wales only regulations to increase recycling at non-domestic premises. Plastic waste is one of the key waste streams that will need to be separated at source, and separately collected for recycling. These will build on the measures that already apply in Wales that are explained at paragraph 21 of this witness statement.

POTENTIAL FOR AN INCINERATION TAX

51. Budget 2018[9] included the following statement on a potential incineration tax:

[9] See p48-49, para 3.58:

"The government recognises the important role incineration currently plays in waste management in the UK, and expects this to continue. However, in the long term the government wants to maximise the amount of waste sent to recycling instead of incineration and landfill. Should wider policies not deliver the government's waste ambitions in the future, it will consider the introduction of a tax on the incineration of waste, in conjunction with landfill tax, taking account of the possible impacts on local authorities."

52. This was repeated in the Resources & Waste Strategy published in December 2018 on page 79 (see [**CP1/6/259**]). My staff were aware that one option for such a tax would be basing it on carbon emissions rather than simply on each tonne of waste accepted by a MWI – the latter being the model used for existing landfill tax. Tax policy is of course a matter for HM Treasury and HM Revenue and Customs.

PLASTICS PACKAGING TAX

53. Government also recently published draft legislation and a policy paper on the introduction of a new plastic packaging tax, which will take effect from April 2022. This tax will provide a clear economic incentive for businesses to use recycled material in the production of plastic packaging, which will create greater demand for this material. In turn this will stimulate increased levels of recycling and separate collection of plastic waste, so that less plastic waste is incinerated or landfilled. As above, tax policy is a matter for HM Treasury and HM Revenue and Customs.

CONCLUSION

54. Given the regulations and current and future policies identified above to both prevent waste from occurring in the first place and to treat the waste that does arise higher up the waste hierarchy, it is not necessary to include MWIs in the UK ETS. This is because those other policies will help to ensure that the UK complies with its climate change commitments and obligations, without the inclusion of MWI in the UK ETS.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752202/Budget_2018_red_web.pdf

Statement of truth

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed:  .....

Name: Christopher Preston

Dated:.7 January 2021.....

CO/3093/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN
on the application of
GEORGIA ELLIOTT-SMITH

Claimant

- and -

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY, UK GOVERNMENT

(2) DEPARTMENT FOR AGRICULTURE, ENVIRONMENT AND RURAL AFFAIRS, NORTHERN IRELAND

(3) THE SCOTTISH MINISTERS

(4) MINISTER FOR ENVIRONMENT, ENERGY AND RURAL AFFAIRS, WELSH GOVERNMENT

Defendants

WITNESS STATEMENT OF JANEK VÄHK

I, Janek Vähk, of Avenue du Roi 168, 1190, Forest, Belgium, will say as follows:

Introduction

1. I am employed as Zero Waste Europe's Climate, Energy and Air Pollution Programme Coordinator since October 2018. I lead on climate and energy policy advocacy work towards EU institutions, this includes EU Emissions Trading System and Effort Sharing Regulation. Previously, I worked for the Friends of the Earth Europe and the Justice and Environment, where I provided leadership for the development of strategic partnerships. I have an MSc in Environmental Sciences and Policy from Central European University.

2. In so far as the facts in this statement are within my knowledge, they are true. In so far as the facts in this statement are not within my direct knowledge, they are true to the best of my knowledge and belief. The information contained in this statement was communicated to the Claimant's solicitors across a series of emails.

3. The purpose of this statement is to assist the Court with evidence that explains certain technical matters, an understanding of which will enable the Court to properly

evaluate the reasons relied on by the Defendants in reaching the decision under challenge, with those reasons having been elaborated on in the Defendants' evidence.

4. In this statement, I refer to the First Defendant's Detailed Grounds (**'SoS DGR'**). I also exhibit certain documents, using references expressed as: "[**Exhibit JV1/x**]", where "x" is the page number.

5. In line with my expertise in waste and emissions, the key points I would like to address relate to the Defendant's claims regarding the scope of the ETS [**SoS DGR para 139-141**] and methods for driving down emissions outside of the ETS [**SoS DGR para 117**].

Scope of the ETS

6. The Defendants' claim that, if Municipal Waste Incinerators ('MWIs') were included within the scope of the ETS, then the UK's ETS would not be aligned with the EU ETS [**SoS DGR para 140**].

7. This claim is weakened by the examples of other Member States who have voluntarily included MWIs in their respective schemes, namely Sweden and Denmark. According to the Swedish Energy Agency website, incineration plants with an installed capacity of more than 20 MW and smaller combustion plants connected to district hearing networks with a total capacity of more than 20MW are included in the third phase of their ETS **[JV1/7-8]**. This includes municipal incineration.[1] Sweden has also introduced a new definition named 'avfallsenergianläggning' (translates as waste energy plant) in the Swedish law (2014:1205) on ETS (also related to law 2015:544) in order to allow for municipal incinerators to continue to be included under ETS. In Denmark, nine of their thirty incinerators are included in the ETS where they meet the 20 MW input threshold required **[JV1/5]**. These examples demonstrate that it is possible to include MWIs within the scope of the ETS.

8. If the Defendants are further concerned that including MWIs would not be possible, because it would be difficult to ensure emissions are effectively monitored in a way that is not prohibitively expensive, I do not think this is an issue anymore. That is because there is an established methodology for monitoring, such as the radiocarbon method, which is quite widely used nowadays also in the UK. Further, we can look to other Member States to find successful examples of methodology for accounting this **[JV1/6]**.

9. To demonstrate this further, I note that commercial industrial incinerators are currently included in the UK and EU schemes, with no overwhelming difficulties. I do not see on what basis the operation of these plants, processing of the materials, environmental controls/regulations, and obligations with regards to calculating emissions would be prohibitively different from that of commercial incinerators.

[1] https://www.regeringskansliet.se/48f977/contentassets/396b53f0fe8146b7be13c05d5e792059/avfall-sverige.pdf

10. Moreover, I note that the Executive Vice-President Timmermans on behalf of the European Commission[2] has implicitly recognised the option of including MWIs in answer to a parliamentary question on 24 March 2020 **[JV1/9]**:

> *"The Commission recognises the importance of minimising the waste sector's contribution to climate change. Although waste incineration combined with energy recovery can replace the use of fossil fuels in the energy sector, growing emissions from the standalone municipal solid waste incineration are problematic. Advancing the circular economy is thus integral to the transition towards climate neutrality foreseen in the Green Deal. To that end, the Commission prioritises policies on sustainable products, reuse, recycling and improved waste management. Emissions from waste incineration are already included in the EU Emissions Trading System (ETS) Directive, except for municipal and hazardous waste. When a Member State classifies an installation as co-incinerator, it is also covered by the EU ETS. Member States may choose to opt in emissions from additional activities not covered by the EU ETS Directive."*

11. With regard to the Defendants' claim that they can drive down emissions from MWIs without including them in the ETS, through both recycling collection (which cannot be incinerated) and requiring applications for new MWIs to be designed based on the best available techniques [**SoS DGR para 80-85]**, in my experience such claims are overstated. A number of reports have highlighted the large portion of waste currently incinerated that could be either recycled or composted, as well the risk of lock-in effects of incineration e.g. Taxonomy Technical Report (2019)[3] and the European Commission report on the Integration of environmental concerns in Cohesion Policy Funds (ERDF, ESF, CF)[4]. A higher gate fee (thanks to applying the polluter pays principle) would encourage better sorting and recovery of materials from residuals, and incentivise waste providers to decrease the share of the fossil content in waste input, especially if the higher costs could be allocated towards them. This can eventually contribute to a lower impact of burning. Higher costs of incineration would also create an enabling policy framework for non-incineration alternatives. For example, material recovery and biological treatment (MRBT) sites **[JV1/16-18]** can minimise the climate impact of residuals treatment, while at the same time keep the waste management system adaptable to decreasing amount of residual waste, and increasing tonnages of clean materials from separate collection, which must be kept as the strategic priority of residuals treatment. MRBT types of installations are climate-friendly **[JV1/21-29]**, since through biological stabilisation they only degrade

[2] For information, the Commission is currently reviewing its rules on MWIs for which there is an ongoing consultation due to close on 4 February 2021 (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12660-Updating-the-EU-Emissions-Trading-System)

[3] https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190618-sustainable-finance-teg-report-taxonomy_en.pdf

[4] https://op.europa.eu/en/publication-detail/-/publication/73061c4e-7aaa-11e9-9f05-01aa75ed71a1

biogenic materials and recover fossil-based materials (or finally landfill them, sequestering carbon) whilst fossil-CO2 would get released through incineration and co-incineration (which burns RDF, a large part of which is made of plastics and other fossil-based materials as artificial textiles). This is of particular importance, given the ongoing decarbonisation of the EU economy and energy production, which implies the need to reduce GHG emissions progressively and steadily to achieve net zero by 2050.

12. Further, some European countries and regions have already set goals to reduce the amount of waste (especially plastics) incinerated due to the climate concerns. For example, in June 2020 the Danish Government issued a climate plan introducing the phasing out 30% of waste incineration capacity by 2030 **[JV1/10-13]**. [5] Also, on the same grounds, the governments of Flanders[6] and Walloon[7] in Belgium have set goals to reduce the amount of waste incinerated by 25% and 50% respectively.

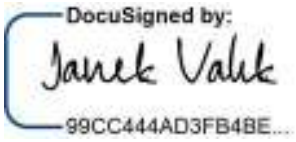
13. Lastly, the recent report of the EU parliament calls for strategies to deal with residual waste to avoid lock-in effect of incinerators. This report was adopted in plenary on 9 February 2021 and states:

> *"104. Recalls the EU waste targets and underlines that the EU and Member States must strengthen prevention and preparation for reuse, increase high-quality recycling and move away from landfilling waste, while minimising incineration, in line with the waste hierarchy; calls on the Commission to define a common EU-wide approach for the management of residual municipal waste that is non-recyclable to ensure its optimal treatment and* ***to avoid building overcapacity of waste incineration at the EU level that could cause lock-in effects and hamper the development of the circular economy****; considers that where incineration is used this should take place in the most advanced waste-to-energy facilities with a high energy efficiency and low emissions within the EU…"* **[JV1/33 para 104]**

[5] https://www.kl.dk/media/25939/kls-plan-for-at-tilpasse-kapacitet-for-affaldsenergi-frem-mod-2030.pdf
[6] https://beslissingenvlaamseregering.vlaanderen.be/document-view/5FDB24266B34EF0008000B54
[7] https://www.wallonie.be/sites/default/files/2019-09/declaration_politique_regionale_2019-2024.pdf

Statement of truth

14. I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed: 

Dated: 11 February 2021