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at Legal Services Agency Ltd.

Date: 27 October 2020
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The Rt Hon Alok Sharma MP
1 Victoria Street
London
SW1H 0ET
United Kingdom

Sent by email only to: enquiries@beis.gov.uk

Dear Mr Sharma,

Inclusion of Nitrogen Trifluoride (NF3) in the Climate Change Act 2008

This letter is written on behalf of the Scottish Climate Emergency Legal Network (SCELN). SCELN is an unincorporated association based in Scotland which is focussed on using the legal system to address the climate emergency.

We are writing with respect to the need to expand the definition of ‘greenhouse gases’ under the Climate Change Act 2008 (‘the 2008 Act’) to include Nitrogen Trifluoride (NF3).

NF3 is an extremely potent greenhouse gas which is released in some high-tech industries, including in the manufacture of electronics. The Committee on Climate Change (CCC) has noted that, “The IPCC Fourth Assessment Report (AR4) estimates that NF3 has a 100 year global warming potential of 17,200, and NF3 is in the list of Kyoto greenhouse gases for the second Kyoto commitment period, beginning 1 January 2013.”¹

A scientific briefing paper on NF3, its industrial applications and its significance vis-à-vis climate change has been prepared for us by Professor F.J. Martin-Torres, Chaired Professor in Planetary Sciences at the University of Aberdeen. We enclose a copy of Professor Martin-Torres’ briefing with this letter.

Absence of NF3 from the Climate Change Act 2008

As you will be aware, the 2008 Act imposes a number of legal duties on the UK Secretary of State to reduce greenhouse gas emissions. The greenhouse gases referred to in the Act are defined in Sections 24(1) and 92(1) and do not include NF3.

Tackling the unmet legal needs of those in disadvantage.

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This is in contrast with the Scottish regime, which obliges the Scottish Ministers to reduce emissions of NF3. The Scottish equivalent of the 2008 Act - the Climate Change (Scotland) Act 2009 - was amended by statutory instrument in 2015.ⁱⁱ As a result of that amendment, the definition of greenhouse gases in that Act now includes NF3.ⁱⁱⁱ The amendment was made following a recommendation made by the CCC to the relevant Scottish Minister that NF3 should be included.^{iv}

NF3 is not a defined greenhouse gas under the 2008 Act, despite its potency as a greenhouse gas. There are no duties on the UK Secretary of State to reduce emissions of NF3 under the 2008 Act.

There are significant legal implications which arise from the absence of NF3 in the 2008 Act.

NF3 under EU law

The UK has an annual greenhouse gas emissions cap under the EU Effort Sharing Decision. The Effort Sharing Regulation 2021 to 2030 (ESR) came into force in 2018 and updated the binding annual greenhouse gas emissions targets for Member States for the period 2021 to 2030.^v

Article 4 of the ESR requires that each Member State shall, in 2030, limit their greenhouse gas emissions at least by the percentage set for that Member State in relation to its emissions in 2005. The UK has a target of a 37% reduction from 2005 levels. The ESR included NF3 for the first time in the definition of greenhouse gases.^{vi}

The UK is therefore required by law to achieve a 37% reduction in NF3 emissions by 2030. However, the UK has not changed its national regime by updating the corresponding definitions of greenhouse gases in the 2008 Act.

In order to determine whether the NF3 reduction target has been met, emissions of NF3 must be measured. The UK will have to report on NF3 emissions to the European Commission to enable it to establish whether the UK has in fact met the target by 2030. It is difficult to see how the UK could ensure that it fully implements its obligations under the ESR when its primary national legislation fails to define NF3 as a greenhouse gas.

Our view is that the absence of NF3 from the list of greenhouse gases governed by the 2008 Act places the UK's primary legislative regime at odds with its EU obligations under the ESR, which expressly includes "nitrogen trifluoride" in the definition of greenhouse gases relating to the targets that the UK must abide by. This may constitute a failure by the UK to implement the ESR.

We enclose a legal briefing written by a number of legal experts for SCELN, which corroborates the main concerns above and sets them out in more detail.

Request for consultation with national authorities and the Committee on Climate Change

The 2008 Act provides the UK Secretary of State with powers to amend the definitions of greenhouse gases through the use of an order (Sections 24(1)(g) and 92(2)). Section 24(3) requires that before making an order under Section 24(1)(g), the Secretary of State must first consult the other national authorities (the Scottish Ministers, the Welsh Ministers and the relevant Northern Ireland department) and obtain, and take into account, the advice of the CCC.

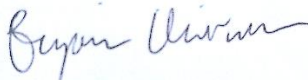
We request that you confirm **by no later than Friday 20 November 2020** that you will take steps before the end of this year to consult the other national authorities and obtain, and take into account, the advice of the CCC with a view to updating the definitions of greenhouse gases in the 2008 Act to include NF3.

Failing this, we will consider taking further legal action including but not restricted to raising a complaint with the European Commission regarding the failure to implement the ESR.

We look forward to hearing from you.

This letter is written wholly without prejudice to our rights and pleas and may not be founded upon in any future Court action without our express prior written consent.

Yours sincerely,



Ben Christman
Solicitor

ⁱ CCC, letter to Aileen McLeod MSP, 5 December 2014 (available at <https://www.theccc.org.uk/publication/letter-inclusion-of-nitrogen-trifluoride-in-the-climate-change-scotland-act-2009-targeted-gases/>).

ⁱⁱ The Climate Change (Additional Greenhouse Gas) (Scotland) Order 2015 (S.S.I. 2015/197).

ⁱⁱⁱ Section 10(1)(g).

^{iv} CCC, letter to Aileen McLeod MSP, 5 December 2014.

^v Regulation EU 2018/842.

^{vi} Article 3(1).