

# ClientEarth's responses to consultations on the ESD and LULUCF within the 2030 climate and energy framework

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## Introduction

On 26 March, 2015 the European Commission launched two consultations:

1. Consultation on the preparation of a legislative proposal on the effort of Member States to reduce their greenhouse gas emissions to meet the European Union's greenhouse gas emission reduction commitment in a 2030 perspective; and
2. Consultation on addressing greenhouse gas emissions from agriculture and LULUCF in the context of the 2030 EU climate and energy framework.

Both consultations are highly relevant as further steps toward are taken towards deciding the specifics of EU and Member State ambition on climate and energy for 2030. With legislative reform on the horizon, there are opportunities to strengthen EU and Member State action within both the ESD and LULUCF and agriculture. However, as proposals come forward and the debate progresses there are also many challenges and risks for watering down ambition.

ClientEarth calls for an effective 2030 climate and energy policy framework based on the rule of law and good governance. We see scope for reforming the climate and energy acquis in a way that will assist the EU in achieving its stated 2030 climate and energy objectives in a way that is compatible with long-term decarbonisation needs. With this in mind, please find our responses below.

## **ClientEarth's response to Consultation on the preparation of a legislative proposal on the effort of Member States to reduce their greenhouse gas emissions to meet the European Union's greenhouse gas emission reduction commitment in a 2030 perspective**

### ***1. How can the availability and use of the two existing internal flexibility instruments under the ESD be enhanced to ensure cost-effectiveness of the collective EU-effort in 2021-2030: (a) For banking and borrowing; and (b) For AEA transfers among Member States, respectively?***

There are a number of existing internal flexibilities under the ESD for the period 2013-2020. These existing mechanisms should not be expanded for the period 2021-2030, as the current rules already provide wide scope for flexibility.

Today, most Member States (MS) are already on track to meet their 2020 targets under the ESD. This is mainly due to generous targets and the recession. Based on 2014 data produced by the European Environment Agency (EEA), the EU as a whole is expected to exceed its 2020 target, achieving between 11 and 15% GHG emission reductions below 2005 levels. Only four MS are expected to need to purchase annual emission allocations (AEAs) from other MS.

The 2030 EU target for the non-ETS sectors has increased substantially. It is critical that MS step up domestic actions in the sectors covered by the ESD during this period; otherwise meeting future targets will be both harder and more expensive. Combined with the permission to carry forward AEAs (up to 5% from the following year) and transfer AEAs between MS, there are a number of flexibilities that will represent a wide array of alternatives to substantial domestic reductions.

There must be no carry-over of surplus AEAs from the 2013-2020 period into the 2021-2030 period. The AEA surplus, which will most certainly accumulate until the end of 2020, must be cancelled. Otherwise it would water down and weaken the 2030 target. Likewise, any surplus that exists by the end of 2030 should be cancelled.

The only area where existing flexibility mechanisms should be allowed to expand is the ability to generate internal offsets from Community-level projects issued pursuant to what is in principle Article 24a of the ETS Directive. A more proactive use of this or a similar type of flexibility could help to drive both investments in the green economy and facilitate action in MS and sectors where efforts are more cost-effective and needed most.

***With respect to the latter, is there need for more transparency in how Member States engage in AEA transfers? Could the current rules be further enhanced through more transparent reporting, the use of trading platforms, project-based mechanisms,***

***auctioning, or through other means? Are there examples from other areas that could provide useful experience in designing a post-2020 transfer system?***

### **Project-based mechanism**

A revised ESD should tap unrealised potential for MS eligibility to use credits from Community-level projects issued without a quantitative limit. In theory, this is already an option under the ESD. However, the initiative to develop implementing measures lies with the Commission, where it has stalled due to lack of priority. For now, Community-level projects represent a missed opportunity.

An active Community-level offset mechanism under the ESD could help deliver economy-wide emission reductions in a cost-effective manner. If designed properly, such a mechanism could help catalyse investment and local implementation of measures, for instance in buildings renovations, transport and smart grids, driving change where it is least expensive and needed most. More developed MS could be provided with opportunities to generate AEAs through private sector-developed projects that contribute to ESD requirements. Furthermore, projects could be actively enabled by linking to modernization funds.

Projects would benefit the MS where the project takes place and contribute towards the achievement of ESD and related objectives such as energy savings. Certain projects that contribute towards compliance with relevant complementary legislation (eg Energy Efficiency Directive, Energy Performance of Buildings Directive, and Ambient Air Quality/National Emissions Ceilings Directives) could also help some MS comply with their obligations, representing a win-win opportunity for MS.

Proper criteria for the selection of projects and the calculation of AEAs should be established in order to ensure transparency, additionality and environmental integrity. First, a mechanism should be supported by a platform or register that is accessible to the public. In order to avoid double counting, the MS hosting the project would need to be required to cancel an AEA for each offset issued. Furthermore, the mechanism should only be eligible if both MS are otherwise in compliance with their ESD emissions reduction requirements.

Some NGOs suggest that a discount rate also be applied to an internal flexibility mechanism. A complementary approach could see a higher discount rate (eg 3:1 or 4:1) for projects that have lower impact, and provide a lower - or no - discount rate to projects that have 'high improvement potential' (eg in the buildings sector, where there is a high potential for deep renovations), are in sectors that are further behind (eg transport), or achieve complementary goals (eg air quality).

### **LULUCF**

To remain credible, the EU must rule out offsetting between reductions and removals made in the LULUCF sector and GHG emissions from sectors currently covered by the ESD or the ETS.

The inherent characteristics of GHG emissions and removals from LULUCF activities (eg non-permanence, uncertainty, and inter-annual variability) differ fundamentally from fossil emissions. Annual reporting is not a solid basis for accounting in the LULUCF sector, because the collection of carbon data for forest inventories is gathered over a longer time scale (every 5-10 years). Annual results are also of limited relevance due to significant inter-annual fluctuations of

emissions and removals. Long lead-time of LULUCF mitigation measures also means that annual accounting cannot be meaningful because most management changes require several years or longer to take effect.

Furthermore, the LULUCF sector is currently a net carbon sink. Therefore, its inclusion in the ESD for the period 2021-2030 will displace mitigation in other sectors, especially in sectors with a mid to high cost range of mitigation potential (>25 EUR/tCO<sub>2</sub>e), which is estimated at about 185 MtCO<sub>2</sub>e.

Overall, use of offsets from the LULUCF sector in the ESD risk undermining the credibility of the EU's GHG reduction commitment of 40% by 2030. We provide more views on how the EU should properly integrate LULUCF into the EU's 2030 climate ambition in a separate LULUCF response.

***2. On the basis for experience with the present set of rules on reporting, monitoring and corrective actions, which aspects should be maintained and which should be changed after 2020? (explain reasoning)***

- ***Keep as it is?***
- ***Annual reporting with biennial compliance checks with existing corrective action?***
- ***Biennial reporting with biennial compliance checks and enhanced corrective action (explain possible additional corrective action); or***
- ***Other (explain)***

**Other**

There is an opportunity to enhance the value of reporting, monitoring and compliance under a new ESD. However, a robust approach to governance is needed including clearly formatted, transparent and accountable rules for development and reporting of national plans for competitive, secure and sustainable energy.

MS are currently required to report annual GHG emissions and projected progress towards meeting ESD obligations through the Monitoring Mechanism Regulation (MMR) including information on national policies/measures and national projections, and information on planned additional national policies/measures envisioned beyond ESD commitments. The MMR represents a model for ensuring timeliness and quality control for MS reporting. Criteria for reporting structure, format and regular submission are established by the Commission via implementing acts. The Commission must assess MS reports on compliance with ESD obligations and account each year to the European Parliament/Council summarising conclusions of its assessment. Furthermore, the EEA assists the Commission, compiling information on MS policies/measures and projections; performing quality assurance/control procedures on the information reported by MS on projections and policies/measures; and disseminating information.

Under a revised ESD, the GHG emissions reduction target will increase compared to 2020 and be legally binding on both MS and the EU. 2030/Energy Union governance will have profound

implications for existing planning and reporting across climate and energy policy, including the ESD. Nevertheless, any reform of planning and reporting must conform with good governance principles. Specifically, plans should be binding, rooted in rule of law and compliant with the Aarhus Convention. MS and the EU must be held accountable for progress through regular transparent monitoring, assessment of MS and EU progress, and compliance to ensure effective progress towards ESD requirements and complementary objectives (eg the 2030 targets), through course correction if necessary.

Specifically:

- Given the binding nature of the 2030 GHG emissions reduction target, the Commission should be required to scrutinise national plans before approval
- The ESD should continue to require annual reporting on GHG inventories and biannual reporting of MS and EU-level progress towards the 2030 GHG target via the MMR. The latter could provide a basis for synchronising other climate and energy reporting cycles
- The ESD's role as an overarching coordination instrument of economy-wide GHG reductions should be enhanced through new provisions to facilitate development of additional measures in sectors where progress is found by the Commission to be lagging
- The Commission should be required to monitor and assess additional policies/measures that complement ESD objectives consistent with European Council language calling for building on existing building blocks, which we interpret to mean not replacing existing reporting obligations but instead improving upon them
- As the renewable energy target will be binding on the EU, the ESD should facilitate course correction if the 2030 target is not likely to be met
- Monitoring/reporting must ensure progress in energy savings as both EU and MS energy efficiency targets are indicative
- The EEA or another independent expert body such as an Energy and Climate Security Observatory should have a stronger role in assessing and communicating MS and EU-level progress towards the 2030 targets and be able to provide recommendations
- Reporting under the ESD should facilitate regular assessment of EU level progress towards a long-term objective of reducing GHG emissions by 80-95% by 2050 compared to 1990 levels

***3. How can cost-effectiveness be reflected in a fair and balanced manner in adjusting individual ESD targets for Member States with a GDP per capita above the EU average? What can be the role of the one-time reduction through a limited amount of ETS allowances in achieving these Member States' ESD targets, while preserving predictability and environmental integrity?***

Outside the potential to generate offsets from Community-level projects, the list of existing flexibilities under the ESD should not be expanded.

In its October 2014 Conclusions, the European Council agreed that MS with a GDP per capita above the EU average would be relatively adjusted to reflect cost-effectiveness in a fair and balanced manner. In particular, MS with national reduction targets significantly above both the

EU average and their cost effective reduction potential, as well as MS that did not have free allocation for industrial installations in 2013 will be allowed a “limited, one-off, reduction of their ETS allowances.”

We would not advocate such an approach, and we feel that the ETS should be effectively separated from the ESD from the period 2021-2030. There is already a surplus of ETS allowances, which studies suggest will not be gone until almost 2030. To allow these units to be used in the ESD would in effect allow a transfer of weakness from the ETS to the ESD. This would represent an overall watering down of the EU's 2030 target of reducing domestic GHG emissions by 40%.

If a new flexibility must be created, the rules for eligibility to participate in these mechanisms must be necessarily restrictive. In particular, “A limited, one-off, reduction” must be interpreted very narrowly. In line with this language, the following limitations should apply:

- A threshold should be imposed to ‘limit’ the transferability of ETS allowances over to the ESD, for instance 5% of its AEAs for that year. This limitation is necessary for two reasons. First, MS commitments under the current 2020 ESD are already watered down due to the excessive amount of AEAs and the potential to use international offsets to meet compliance. This has resulted in a lack of progress by MS towards implementation of measures under the ESD. While it was not envisioned that MS would be able to bank unused AEAs from 2013-2020 compliance period for use in the period 2021-2030 allowing an excessive amount of ETS allowances to enter the ESD would have the same impact. This risk is also high because, even though a Market Stability Reserve may very well come into effect before 2020, there is still likely to be an excessive amount of ETS allowances in existence for some time (potentially until 2030). In effect, MS would be able to transfer the problems currently experienced in the ETS over to the ESD. This cannot be allowed to occur.
- MS should only be allowed to transfer ETS allowance over to the ESD ‘once’ during the period 2020-2030. To allow more would be disingenuous to the European Council’s October 2014 conclusions. ‘One-off’ is an unambiguous term referring to a single time occasion or instance. The MS concerned should be required to “use or lose” the flexibility before 2025 in order to sustain investor certainty in non-ETS sectors.
- Use of this flexibility should come at a cost. A discount factor (eg 4:1 or 3:1) should be applied to the transfer of ETS allowances, meaning that in order to generate one AEA, a higher number of EUAs would need to be cancelled. This would ensure that MS strongly consider implementing additional measures in non-ETS sectors before reaching to trigger the flexibility. Using a discount factor could also help limit the inflation of AEAs under the ESD due to the transfer of EUAs from the ETS, as described in point (1) above. Furthermore, it could also have the overall effect of helping the MMR to reduce the surplus of EUAs from the ETS.
- The process must be transparent in order allow for public understanding and scrutiny (eg the number of EUAs transferred must be made public).

Despite the above, we reiterate that we are against any new flexibility that would allow ETS allowances to come into the ESD.

**5. Is the current scope of EU-wide action and legislation OTHER than the ESD to support Member States' emission reductions in ESD sectors sufficient, or should it be enhanced?**

For the EU to effectively meet its long-term policy objective of reducing GHG emissions by 80-95% by 2050 compared to 1990 levels, the ESD and other sector-specific instruments must be enhanced. The ESD is an important overarching instrument, translating the economy wide GHG target into national binding targets, which do not exist anywhere in law apart from the ESD and the ETS. From a governance perspective, the ESD is positioned to provide a framework to promote policy coherency, covering all 6 GHGs from the built environment, transport, small industries, agriculture and waste sectors.

A holistic instrument is needed because sectoral measures by themselves leave many gaps. However, complementary instruments are still needed for specific areas (eg energy sector, circular economy, waste, agriculture and air quality) to achieve ESD goals, because the ESD does not mandate MS action on specific GHGs/sectors, offering MS flexibility to choose where to reduce emissions.

The current ESD has helped trigger the development of additional EU measures when needed. Specifically, the Energy Efficiency Directive (EED) resulted from a requirement under the ESD for the Commission to assess, report progress, and if appropriate propose strengthened or new measures to accelerate energy efficiency improvements to help MS meet GHG reduction commitments. An energy savings target enshrined in legislation has contributed to the pursuit of ESD objectives and goals set out in the Roadmap for moving to a competitive low carbon economy in 2050 (eg reduce GHG emissions from the energy sector and achieve zero emission electricity production by 2050).

The EED needs to be amended to address post-2020 climate and energy goals. An amended EED should embed an ambitious EU 2030 target, reinforce energy savings obligation provisions, set stricter standards for buildings renovations and strengthen sustainable public procurement. Other relevant energy efficiency legislation (ie Ecodesign and Energy Labelling Directives) should also be enhanced to contribute towards achievement of ESD goals. To realise the full potential of energy efficiency, the energy efficiency first principle should be integrated into all relevant EU legislation. End-use consumption through demand response and storage must also be addressed in both the EED and internal energy market legislation, which currently do not place emphasis on such measures.

The Commission should enhance the ESD's role as a coordinating instrument to ensure the achievement of economy-wide GHG emissions reductions and sufficient progress by MS across non-ETS sectors. A post-2020 ESD could also provide an opportunity for stronger measures for renewable energy if, upon assessment, Union level renewable energy or climate objectives for 2030 are not being delivered. The ESD could also provide a trigger for improving sectoral instruments (eg transport or buildings) if necessary.

The EU should also enhance coherence between measures that both reduce GHG emissions and improve air quality. A revised National Emissions Ceilings (NEC) Directive must contain sufficiently ambitious and binding emission reduction commitments for methane for 2020, 2025 and 2030. The ESD should accompany a revised NEC Directive by requiring that MS measures complement, and not interfere with, efforts to achieve and maintain relevant ambient air quality standards and reduce toxic air contaminant emissions to meet NEC commitments – and vice versa.

The EU should also establish an EU target and specific measures to deliver shipping reductions within its 2030 GHG reduction commitments. Furthermore, international shipping emissions generated in EU journeys (ie from ships that depart from and call at EU ports) should be covered by the revised ESD. Shipping is one of the few sectors not contributing to the EU emissions reductions despite a deadline of 2011 for all sectors of the EU economy to contribute to achieving emission reductions.

***6. Is there a need for additional EU action in terms of capacity building and similar support targeted at the regional and local level to facilitate national policies and measures under the ESD after 2020?***

There is a genuine need to further support regional and local level actions across different climate and energy policies, especially the ESD. More broadly, there is a need to communicate the importance and usefulness of measures under the ESD as an overarching instrument to drive implementation of economy-wide emissions reductions, as well as the positive economic opportunities of local investment in low carbon technologies.

Many public authorities from municipalities and cities, community-initiatives and individual consumers are eager to participate in the low-carbon transition. However, they must be empowered both through the regulatory framework and initiatives that help to build capacity (eg information and financial support). Despite an existing desire to act at the local level, there are clear gaps in support at EU level for certain sectors (eg the built environment and transport). For example, there is a need for additional financial support, information campaigns and capacity building at local level in order to reap the benefit of provisions under the Energy Performance of Buildings Directive (EPBD).

The Energy Union and the 2030 governance process represent opportunities to enhance participation of local actors and facilitate capacity building for implementation in non-ETS Sectors. Through the development of national plans for competitive, secure and sustainable energy, as well as regional cooperative arrangements, MS should provide local authorities and other stakeholders with the opportunity to express their needs and challenges and get high level support. However, support must not end with the planning process. The legal framework must empower local actors to prioritise local implementation of climate and energy objectives, as well as support local decision-makers to have more of a say and responsibility in areas of local energy policy. Regarding the latter, there is scope for sharing of best practice between national governments.

Additional informational and financial assistance should come both from national governments and the EU, for instance through the Covenant of Mayors. There is also a need for enhanced coordination between different sources of funding between the ESD other sector-specific instruments such as the EPBD, the EED and a revised Renewable Energy Directive. Best practice across MS and their local authorities should be promoted and shared on how public procurement can be used as a tool to leverage investment and private sector action in the local green economy and promote objectives of the ESD.

Lastly, there is a need to better communicate the ESD as an opportunity to support economic growth along with decarbonisation. The importance of the current ESD is currently under-emphasised, particularly when compared to the ETS. The ESD should have a more prominent

role as a pillar of the EU's climate and energy policy. If enhancement of the ESD's prominence among climate and energy policy requires it to evolve as a legal instrument, the Commission should explore different options about how to go about this.

## **ClientEarth's response to consultation addressing greenhouse gas emissions from agriculture and LULUCF in the context of the 2030 EU climate and energy framework**

### **Questions 1 - 4.**

ClientEarth did not address these questions.

### **5. What are the main obstacles and barriers to the implementation of emission reduction measures in agriculture, forestry and other land use?**

There is a lack of effective regulation of emissions levels for methane. While the Effort Sharing Decision (ESD) covers non-CO2 emission from agriculture along with six other GHGs and several other sectors, Member States (MS) have substantial flexibility where they take action. This helps reduce GHG emissions but it does not guarantee that agriculture or methane (which also has air quality impacts) is prioritised. Weak targets and availability of flexibilities under the current ESD have also freed MS from addressing non-CO2 emissions from agriculture, which are covered by the ESD.

Second, the agriculture sector is currently provided with perverse incentives to continue unsustainable practices, particularly under the Common Agricultural Policy (CAP). Furthermore, EU renewable energy policy encourages unsustainable production and consumption of biomass/biofuels, which displaces other crops and is often co-fired with coal.

### **6. On the basis of experience with the present set of rules on accounting, targets and flexibility, how could the present rules be improved, and which aspects could be maintained and which should be rejected in the future?**

Due to fundamental differences between fossil and terrestrial carbon stocks the EU should account for LULUCF and agriculture separately from fossil emissions under the ETS and ESD. To protect integrity of 2030 GHG commitments, the EU must also rule out offsetting between LULUCF and sectors covered by the ESD or ETS and make sure that LULUCF does not water down ambition in the agriculture sector.

Monitoring and reporting of LULUCF and agriculture should be enhanced, introducing benchmarks for performance and harmonised rules to improve comparability and verification.

MS should also be required to account for emissions and removals related to revegetation and wetland management, which is currently voluntary.

Coordinated planning, reporting and presentation of information between the LULUCF Accounting Decision (accommodating variability and long lead times for LULUCF emissions/removals) and the MMR could promote long term policy coherency between linked sectors (eg agriculture and waste).

***7. How could an element of flexibility in terms of using credits from LULUCF activities in the 2030 climate policy framework be introduced in a way that fully ensures the environmental integrity of the system?***

The EU must rule out offsetting between LULUCF activities and sectors currently covered under the ESD or the ETS. Otherwise the EU risks undermining the credibility of its domestic GHG reduction commitment of 40% by 2030.

GHG emissions/removals from LULUCF activities differ fundamentally from fossil emissions. Annual reporting is not a solid basis for accounting in the LULUCF sector due to longer time scales for collection of carbon data for forest inventories. Annual results are also of limited relevance due to inter-annual fluctuations of emissions/removals, uncertainty, and long lead times for most management changes to take effect.

Furthermore, the LULUCF sector is currently a net carbon sink. Therefore, its inclusion in the ESD for the period 2021-2030 could displace mitigation in other sectors, especially in sectors with a mid to high cost range of mitigation potential (>25 EUR/tCO<sub>2</sub>e), which is estimated at about 185 MtCO<sub>2</sub>e.

***8. What could be the main advantages of the three policy options outlined below [for future policy design of including LULUCF in the 2030 greenhouse gas mitigation framework], and which option(s) should be further developed or modified?***

Options for integrating LULUCF into the 2030 climate and energy framework:

LULUCF Pillar: Maintain non-CO<sub>2</sub> agriculture sector emissions in a potential future ESD, and develop a LULUCF sector policy approach separately

Land use sector pillar: Merging the LULUCF and agriculture sector non-CO<sub>2</sub> emissions into one new and independent pillar of the EU's climate policy

Effort Sharing: include LULUCF sector in a potential future ESD.

Option 1 would keep LULUCF separate from agriculture and fossil-based GHG emissions. This would ensure that LULUCF emissions/removals do not impact ambition to act in non-ETS sectors (eg agriculture).

Option 2 could provide opportunity for a more focused approach to agriculture. However, by removing the AFOLU pillar from the ESD, close links between the agriculture and waste sectors under the ESD could be lost, intensifying fragmentation. LULUCF could also prevent meaningful mitigation in the agriculture sector. In order for option 2 to be beneficial, therefore, links between ESD planning processes and a separate pillar would be needed. Also, the pillar would need to be constructed to differentiate LULUCF from agriculture so ambition in the latter does not get watered down.

There are no foreseen benefits of option 3. Non-permanence, uncertain measurement/accounting, inter-annual variability, and varying mitigation potential of LULUCF activities render them incompatible with the ESD.

### ***Which is your preferred option? Why?***

We prefer Option 1 but also see benefits of having a separate AFOLU pillar by itself. LULUCF and agriculture deal with different things and can be addressed by different policies. Simply bringing the two together will not promote coherence and doing so could actually prevent action in agriculture, where little action has occurred and further mitigation is needed.

Efforts should prioritise recognising and reducing uncertainty in accounting for agriculture and LULUCF through harmonisation of rules and establishment of performance baselines. There is also a need to look holistically at complementary options (eg changing the structure of subsidies under the CAP, biomass/biofuels policy and adoption of sufficiently ambitious binding emission reduction commitments for methane for 2020, 2025 and 2030 under a revised National Emissions Ceilings Directive). Ways to promote coherency between agriculture and waste sectors and circular economy policy should also be further explored.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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