

**EXPLANATORY MEMORANDUM TO**  
**THE GREENHOUSE GAS EMISSIONS TRADING SCHEME AND NATIONAL**  
**EMISSIONS INVENTORY (AMENDMENT) REGULATIONS 2013**

**2013 No. 3135**

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 These Regulations amend the Greenhouse Gas Emissions Trading Scheme Regulations 2012, the Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005, the Environment Act 1995, the Environment (Northern Ireland) Order 2002 and the Greenhouse Gas Emissions Trading Scheme Charging Scheme Regulations (Northern Ireland) 2010 so as to harmonise and improve enforcement regimes, update provisions relating to the registries of emissions allowances and of project credits under the Kyoto Protocol and correct the drafting of a number of provisions to improve clarity and ensure consistency.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 These Regulations are made in exercise of the powers conferred by both section 2(2) of the European Communities Act 1972 and section 2 of the Pollution Prevention and Control Act 1999. A combination of these powers is needed as section 2 of the 1999 Act is the appropriate domestic power, but it does not extend to Northern Ireland. It is, therefore, necessary to exercise the powers in section 2(2) of the 1972 Act as well as those in section 2 of the 1999 Act.

3.2 These Regulations (regulation 13) amend section 41A of the Environment Act 1995. Section 2(8) of the 1999 Act would have required a draft of these Regulations to be laid before, and approved by a resolution of, each House of Parliament. It is the view of this Department that there is nothing in these Regulations with a wide enough policy choice to demand the affirmative procedure including in particular the amendment of the 1995 Act. Regulation 13 is, therefore, made in reliance on section 2(2) of the 1972 Act and subject to the negative procedure. The application of the negative resolution procedure is considered to be justified by:

- the purely consequential nature of the amendment of the 1995 Act; and
- the fact that the provision being amended, though in primary legislation, was inserted purely by secondary legislation which was itself made in exercise of the

powers conferred by section 2(2) of the 1972 Act and which was subject to the negative resolution procedure<sup>1</sup>.

The amendment replaces the previous references to the 2010<sup>2</sup> and 2011<sup>3</sup> Registries Regulations, with a reference to the 2013 Registries Regulation<sup>4</sup>, which revoked and replaced them.

3.3 The Department has also taken into account the Judgment in *R (oao Orange Personal Communications Ltd) v Secretary of State for Trade and Industry*<sup>5</sup> in which the Court was not in favour of the achievement of legal consequences by the inclusion of material in text that is regarded as inert. The Department has also had regard to *Vibixa Ltd v Komori UK and others*<sup>6</sup> and has sought to make clear the enabling power relied on. Consequently, the instrument contains a recital in the preamble which states the enabling powers used in relation to this particular amendment.

#### 4. Legislative Context

4.1 The Greenhouse Gas Emissions Trading Scheme Regulations 2012 (S.I. 2012/3038) (“the 2012 Regulations”), which came into force on 1st January 2013, implement Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emissions allowance trading within the Community (“the EU ETS Directive”), as amended most recently by Directive 2009/29/EC (“the Revised Directive”). Those Regulations, which replaced the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (S.I. 2005/925) (“the 2005 Regulations”) and the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (S.I. 2010/1996) (“the Aviation Regulations”), introduced a number of modifications to the UK’s implementation of the European Union Emission Trading System, applicable to Phase III of the System beginning in 2013. Those modifications include the introduction of a more flexible and proportionate enforcement regime based on civil penalties only, and greater discretion for the regulators in applying those penalties.

4.2 The Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 (“the Inventory Regulations”) make provision for the collection of data for the purpose of preparing a national emissions inventory under Decision 280/2004/EC (the “Monitoring Mechanism Decision”). As a Party to the UN Framework Convention on Climate Change (UNFCCC), the United Kingdom is required to develop and update national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol. Article 4(4) of the Monitoring Mechanism Decision requires EU Member

---

<sup>1</sup>The Greenhouse Gas Emissions Trading Scheme (Amendment) (Charging Schemes) Regulations 2012 (S.I. 2012/2788).

<sup>2</sup>Commission Regulation (EU) No 920/2010 for a standardised and secured system of registries pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council.

<sup>3</sup>Commission Regulation (EU) No 1193/2011 establishing a Union Registry for the trading period commencing on 1 January 2013, and subsequent trading periods, of the Union emissions trading scheme pursuant to Directive 2003/87/EC of the European Parliament and of the Council and Decision No 280/2004/EC of the European Parliament and of the Council.

<sup>4</sup>Commission Regulation (EU) No 389/2013 establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council and repealing Commission Regulations (EU) No 920/2010 and No 1193/2011.

<sup>5</sup>[2001] 3 CMLR 36

<sup>6</sup>[2006] 4 All ER 294.

States to establish national inventory systems under the Kyoto Protocol for the estimation of anthropogenic emissions of greenhouse gases by sources and removals of carbon dioxide by sinks. In addition, Part 3 of the Inventory Regulations implement Directive 2004/101/EC amending Directive 2003/87/EC in respect of the Kyoto Protocol's project mechanisms, by laying down a procedure for the approval of project activities.

4.3 On 2 May 2013, the Commission adopted Commission Regulation (EU) No 389/2013 ("the new Registries Regulation") establishing a Union Registry pursuant to Directive 2003/87/EC of the European Parliament and of the Council, Decisions No 280/2004/EC and No 406/2009/EC of the European Parliament and of the Council. That Regulation also repealed previous Commission Regulations (EU) No 920/2010 and No 1193/2011 on registries.

4.4 The present instrument amends both the 2012 Regulations and the Inventory Regulations. In the case of the 2012 Regulations, the amendments make adjustments to the penalty for operating an installation without a permit, in order to give the regulator greater flexibility in setting the level of the penalty; they also amend the transitional provisions of those Regulations, aligning the remaining penalties arising under Phase II (2008-2012) with the approach already taken in relation to Phase III. The amendments to the registries provisions of the 2012 Regulations are required in order to reflect the changes made by the new Registries Regulation, which consolidates and replaces the earlier Commission Regulations of 2010 and 2011. In the case of the Inventory Regulations, the amendments remove a power of entry to premises for the purpose of obtaining or verifying information for the preparation of a national inventory, along with the associated criminal offences, and replace a number of criminal offences relating to the provision of information for the inventory with a system of civil penalties modelled on those in the 2012 Regulations.

4.5 The instrument also amends the Environment Act 1995, the Environment Act 1995, the Environment (Northern Ireland) Order 2002 and the Greenhouse Gas Emissions Trading Scheme Charging Scheme Regulations (Northern Ireland) 2010. The amendments update definitions and references to the Commission Regulations (EU) No 920/2010 and No 1193/2011 on registries, which have been revoked and replaced by the new Registries Regulation.

## **5. Territorial Extent and Application**

5.1 This instrument applies to the United Kingdom.

## **6. European Convention on Human Rights**

6.1 The Minister for Energy and Climate Change Gregory Barker has made the following statement regarding Human Rights:

"In my view the provisions of the Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013 are compatible with the Convention rights."

## 7. Policy background

- *What and why?*

7.1 The EU Emissions Trading System (EU ETS) is an EU-wide scheme which caps the emissions of greenhouse gases. Regulated operators are required to surrender allowances equivalent to the amount of greenhouse gas emissions produced each year. The scheme works on a cap and trade basis enabling businesses to meet their obligations through direct reduction of emissions or through purchase of emission trading allowances.

7.2 The EU ETS was introduced in 2005 by the EU ETS Directive, and was amended a number of times during Phases I and II (2005-2012). We are currently in Phase III, which run from 2013 to 2020.

7.3 The EU ETS Directive was amended in 2004 by Directive 2004/101/EC to ensure project credits generated by the flexibility mechanisms established under the Kyoto Protocol could be used for ETS compliance in Phase I and Phase II. The Directive was subsequently amended by Directive 2008/101/EC so as to include aviation emissions into the scheme from 2012.

7.4 In 2008 the European Parliament and the European Council adopted a number of legislative measures to fight climate change and promote renewable energy (climate-energy package), including further amendments to the EU ETS Directive (made by Directive 2009/29/EC) so as to extend and improve the emission trading scheme in Phase III (2013-2020). The Revised Directive introduced significant modifications to the scheme including a centralised, EU-wide cap on emissions with an annually declining trajectory which will deliver an overall reduction of 21% below 2005 emissions by 2020, provisions for the introduction of new sectors and gases, and harmonised rules on free allocation with a move toward greater auctioning of allowances.

7.5 Under the United Nations Framework Convention on Climate Change (UNFCCC), which was approved on behalf of the European Community by Council Decision No 94/69/EC2 of 15 December 1993, the Community and Member States have the obligation to monitor and report anthropogenic emissions of greenhouse gases. In 2002 the Kyoto Protocol was ratified anticipating the introduction of binding targets for reducing or limiting greenhouse gas emissions from 2005. In response to these obligations, the European Parliament and the Council adopted Decision No 280/2004/EC in 2004 to establish a mechanism for monitoring all anthropogenic emissions of greenhouse gases not covered by the Montreal Protocol.

7.6 To implement the EU ETS Directive and the Monitoring Mechanism Decision, in 2010 the European Commission adopted Commission Regulation (EU) No 920/2010 requiring Member State to establish national registries in order to ensure the accurate accounting of the issue, holding, transfer, cancellation and withdrawal of EU ETS allowances and Kyoto Protocol credits. In 2011 the EU Commission adopted Commission Regulation No 1193/2011 to implement the Revised Directive and introduce a new EU ETS registry for the whole Community in Phase III. In May, the

Commission adopted Commission Regulation (EU) No 389/2013 to update and repeal these regulations.

- ***Excess penalty for underreported emissions prior to 2013***

7.7 During the implementation of Phase III, penalties had been identified as an area for potential deregulation and the opportunity was taken to introduce, from 2013, a flexible and more proportionate penalty regime based on civil penalties only and that accords Regulators greater discretionary powers in relation to the domestic penalties imposed pursuant to Article 16(1) of the EU ETS Directive. In addition, a different view was taken of the scope of the penalty fixed at €100/tCO<sub>2</sub> that arises under Article 16(3) of the Directive. It was now considered that strict liability to the penalty for non-surrender of allowances by the deadline of 30th April should in principle arise only in respect of those emissions that were reported in the verified emissions report required to be submitted by 31st March. Although (in order that the objectives of the Directive can be fulfilled) the number of allowances surrendered must still match actual (rather than merely reported) emissions, there was now no longer an automatic €100/tCO<sub>2</sub> penalty for missing the 30th April surrender deadline in respect of under-reported emissions.

7.8 This instrument amends the transitional provision of the 2012 Regulations to extend that more flexible regime to any outstanding penalties that may still arise under Phase II. This will apply to both static installations and aircraft operators, and will provide a harmonised penalty system in line with the more deregulatory approach followed for Phase III.

- ***Penalty for carrying out an unauthorised activity***

7.9 The 2012 Regulations set out a penalty for carrying out a regulated activity without a permit (a “regulated activity” is an activity included in EU ETS that is carried out at an installation). The penalty is calculated in accordance with a formula designed to cover the maximum economic benefit of avoiding compliance, and the regulator’s discretion to reduce the penalty is constrained by the requirement that the penalty exceeds the actual economic benefit so obtained. The amendment made by this instrument gives the regulator greater scope to either increase or decrease the penalty, depending upon the individual circumstances. Thus the penalty can now be increased so as to ensure that it is more advantageous for the operator to come into compliance rather than to remain outside the system, or reduced to take into account a speedy return to compliance or other mitigating factors.

- ***Penalty for breaching the 2005 and Aviation Regulations***

7.10 The instrument amends the transitional provisions of the 2012 Regulations to make it clear that the regulators’ power to waive or reduce penalties, currently applicable to the penalties arising in Phase III, is also applicable in the case of the remaining penalties arising in respect of Phase II (under the 2005 Regulations or the Aviation Regulations). Thus the extent of regulatory discretion is the same in respect of all the civil sanctions that can be imposed.

- ***Registries Regulations***

7.11 The instrument updates a number of provisions on the Union Registry of EU emissions trading allowances and the UK Registry of project credits issued under the Kyoto Protocol, to ensure that the 2012 Regulations reflect the new Registries Regulation. That Regulation is directly applicable in the UK. However, adjustments are required to ensure that competent authorities are designated for the purposes of the appropriate provisions, and options arising under relevant provisions are exercised.

- ***Powers of Entry and Inspection***

7.12 As part of the Government's commitment to deregulation and simplification ("the Red Tape Challenge"), the instrument amends the Inventory Regulations to reduce the powers the Secretary of State can exercise for the purpose of preparing a national emissions inventory. Powers of entry and inspection are removed, while the Secretary of State maintains the power to require a person to supply inventory information, in line with the obligation under article 4(4) of the EC Monitoring Mechanism Decision 280/2004/EC and the reporting obligation under the UNFCCC.

- ***Criminal Offences***

7.13 As the Government believes civil sanctions represent a more effective and proportionate way to ensure compliance with environmental regulation, the instrument replaces a number of offences relating to the provision of information for the preparation of emissions inventories set out in the Inventory Regulations with a system of civil penalties that applies in cases where a person fails to comply with an information request or when the information provided is false or misleading. These provisions are consistent with the 2012 Regulations and give Regulators the power to waive or reduce the penalty if circumstances warrant it. A corresponding right to appeal to the First-tier tribunal is also introduced.

## **8. Consultation outcome**

8.1 The consultation period run from 7 August 2013 to 19 September 2013. 31 responses were received from a mixture of stationary and aircraft operators, consultants, industry associations and large power companies.

8.2 There was overwhelming support for proposals to clarify and harmonise EU ETS enforcement regimes, remove the Secretary of State powers of entry and inspection for the collection of inventory data, replace criminal penalties with civil penalties in relation to the provision of inventory information, and move to an appeals system where the First-tier Tribunal is the appeal body appointed to hear appeal against penalty notices issued by the Secretary of State in relation to the provision of inventory information. A number of issues raised during consultation, including interpretation of particular elements of the Directive, interpretation of the 2012 regulations, specific issues related to the inventory legislation, have been addressed through the Government summary of consultation responses. This has been published on the DECC website

[https://www.gov.uk/government/publications?publication\\_filter\\_option=consultations](https://www.gov.uk/government/publications?publication_filter_option=consultations)

## **9. Guidance**

9.1 The regulator has prepared a compliance manual to assist operators in complying with the EU ETS, and has guidance available on its website to assist in the permit application process. DECC and the regulator has as far as possible notified stakeholders of the new procedures that will be introduced by these Regulations through emailed newsletters, stakeholder workshops and updating respective websites where appropriate.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is predominantly limited to operators who are regulated under the EU ETS and other entities that hold information relevant for the preparation of a national emissions inventory.

10.2 The impact on the public sector is predominantly limited to operators who are regulated under the EU ETS, to regulators in so far as powers enable the issuance of penalties and to the Secretary of State in so far as powers enable the collection of data for the preparation of a national emissions inventory.

10.3 A separate Impact Assessment has not been prepared for this Statutory Instrument as it updates and simplifies existing powers. The impacts of these measures are not expected to be significant. A full assessment was prepared to accompany the 2012 and Inventory Regulations.

## **11. Regulating small business**

11.1 The instrument does not apply to small business directly but it provides for EU ETS Regulators and the Secretary of State to issue penalties to small businesses when they fall under the scope of the EU ETS or hold information relevant for the preparation of a national emissions inventory.

11.2 The approach taken to simplify the 2012 and Inventory Regulations reduces significantly the burdens for small businesses. Benefits derive from the removal of criminal offences, the reduction of the Secretary of State's powers relating to the preparation of national emissions inventories, and measures to ensure penalties for non-compliance with these Regulations are proportionate. Under this approach, sanctions are flexible and comprise of civil penalties only. EU ETS Regulators and the Secretary of State are given the powers to waive or reduce penalties if circumstances warrant it.

## **12. Monitoring & review**

12.1 The instrument ensures that the Inventory Regulations include provisions requiring the Secretary of State to review the operation and effect of those Regulations and set out the conclusions of the review in a published report within 5 years of them coming into force, and within every 5 years after that. The 2012 Regulations already include such review provisions.

### **13. Contact**

Michele Zarri at the Department of Energy and Climate Change Tel: 0300 068 6197 or email: [michele.zarri@decc.gsi.gov.uk](mailto:michele.zarri@decc.gsi.gov.uk) can answer any queries regarding the instrument.



## TRANSPOSITION NOTE

### The Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (amendment) Regulations 2013

This note describes, in table form, how the previous transposition of Articles of the EU ETS Directive has been reviewed via the Greenhouse Gas Emissions Trading Scheme and National Emissions Inventories (amendment) Regulations 2013.

Article	Copy out (yes/no)	If no – justification	Previous National Provision	New National Provision
<p>Article 16 (1) – requires Member States to establish effective and proportionate penalties to ensure compliance with the obligations set out in the Directive 2003/87/EC.</p>	<p>No</p>	<p>Article 16 (1) sets out the obligation to establish an enforcement regime but accords Member States the required level of discretion over the types of sanction to be introduced.</p>	<p>Regulation 86 (15) (savings and transitional provisions for the 2005 Regulations) in the 2012 Regulations</p>	<p>Regulation 4 (2) (a) amends regulation 86 (15) to make it clear that the regulator’s discretion to reduce or waive civil penalties applies to penalties issued in respect of breaches of the 2005 Regulations</p>
			<p>Regulation 87(8) in the 2012 Regulations (savings and transitional provisions for the Aviation Regulations)</p>	<p>Regulation 4 (4) adds paragraph (8A) to regulation 87 in the 2012 Regulations to give the regulator a discretion to reduce or waive civil penalties issued in respect of breaches of the Aviation Regulations</p>
<p>Article 16 (3) - sets out a €100 tCO<sub>2</sub> excess penalty for failure to surrender allowances by the 30<sup>th</sup> of April each year over which Member States have no discretion.</p>	<p>Yes</p>	<p>-</p>	<p>Regulation 39 in the 2005 Regulations and regulation 38 in the Aviation Regulations</p>	<p>Regulation 4 (5) adds Regulation 87B to the saving and transitional provisions in the 2012 Regulations, giving a narrower interpretation to the scope of Article 16(3), and introducing a lesser domestic penalty under Article 16(1). That is the penalty of €20 per tCO<sub>2</sub> for failure to surrender allowances in respect of emissions in Phase II that were under-reported, provided that the operator has made a timely rectification of the error.</p>