

EXPLANATORY MEMORANDUM TO
THE FLUORINATED GREENHOUSE GASES (AMENDMENT) REGULATIONS
2018

2018 No. 98

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Environment, Food and Rural Affairs and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 The instrument amends the Fluorinated Greenhouse Gases Regulations 2015 No. 310 (“2015 Regulations”). These domestic regulations enforce the provisions of the EU Fluorinated Greenhouse Gases Regulation 517/2014 (“the EU Regulation”) in Great Britain. They also provide for the enforcement of the EU Regulation in Northern Ireland, but only in respect of import and export controls and trade with any place outside the United Kingdom. The EU Regulation is intended to reduce emissions of fluorinated greenhouse gases (“F Gases”). The EU Regulation places a duty on EU Member States to “lay down the rules on penalties applicable to infringements of this Regulation and take all measures necessary to ensure that they are implemented”.
- 2.2 The instrument will update the 2015 Regulations to provide for the enforcement of five new EU Commission Implementing Regulations which were introduced to support the main EU F gas Regulation. The instrument will also introduce civil penalties for infringements of the EU Regulation from April 2018 in England, Scotland and in relation to offshore installations in marine areas. Other substantive changes are a provision to enable HMRC to share F-gas imports data with the relevant regulators in order to improve enforcement of F-gas quota limits, and a power for the Secretary of State to appoint the bodies which undertake certification, evaluation and attestation of F-gas handlers. Further miscellaneous amendments are made to update names and definitions and to make clarifications.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The 2015 Regulations were included in the Committee’s Fourth Report of Session 2015-16 for defective drafting. The Committee identified that some of the organisations mentioned in the Regulations were referred to by title only, without the addition of company registration numbers or any other form of unique identifier.
- 3.2 The Department undertook to include such references when the Regulations were next amended.
- 3.3 The amendments made by this instrument address a wider point about the appointment of certification, evaluation and attestation bodies. Instead of specifying who has been appointed as these bodies in the Regulations themselves, the

amendments provide for the Secretary of State to make the appointments and publish details of those appointed. This avoids the need to amend the Regulations each time an appointment is made or changed. It also reduces the risk of a gap opening up between the corporate status of an appointed person and their appointment as a certification, evaluation or attestation body.

- 3.4 The issue reported by the Committee should therefore no longer arise as regards the Regulations, and the information that must be published about an appointed person includes a company number, where relevant.

Other matters of interest to the House of Commons

- 3.5 As this instrument is subject to negative resolution procedure and has not been prayed against, consideration as to whether there are other matters of interest to the House of Commons does not arise at this stage.

4. Legislative Context

- 4.1 The Fluorinated Greenhouse Gases (Amendment) Regulations 2018 will amend the 2015 Regulations. The 2015 Regulations will continue to enforce the EU Fluorinated Greenhouse Gases Regulation 517/2014 but will also now enable enforcement of five subsequent Commission Implementing Regulations: 2015/2065, 2015/2066, 2015/2067, 2015/2068 and 2016/879.

- 4.2 In addition, the amendments to the Regulations will:

- Replace all but one of the existing thirteen criminal sanctions with civil penalties in England, Scotland and offshore. A criminal offence will be retained for the intentional release of fluorinated greenhouse gases into the atmosphere (where the release is not technically necessary for the intended use) as part of the implementation of the Environmental Crime Directive (2008/99/EC).
- Enable the Secretary of State to appoint the bodies which undertake certification, evaluation and attestation of F-gas handlers, without having to specify the names of the certification, evaluation and attestation bodies in the Regulations themselves. This will make it quicker to appoint new bodies, reducing delays for new applicants and minimising the length of any gaps in certification provision if existing providers leave the market. It will also enable the Secretary of State to recover the costs of approving new certification bodies from the applicants.
- Clarify how the Regulations apply in certain cases and the specific powers of certain enforcement authorities. Specifically these include how the Regulations apply to offshore installations, such as those that are engaged in hydrocarbon-related activities or which are between contracts, and clarification of the scope of Customs Officers' powers in relation to placing on the market.
- Update some names and definitions. This includes those associated with the introduction of civil penalties, including definition of a civil penalty, enforcement cost recovery notice and relevant enforcing authorities. Other changes reflect departmental changes in Northern Ireland and provide clarification on enforcement duties in Scotland.

- Enable HMRC to share customs data with the relevant enforcement bodies in order to check for unlawful imports of F-gases. This data sharing agreement will include applying an existing criminal offence for unlawful sharing of the HMRC data, where this amounts to personal information, to the staff of the relevant enforcement bodies. This is in order to protect this HMRC data from being inappropriately used.
- 4.3 These measures are considered necessary for compliance with the EU Regulation by ensuring UK enforcement bodies can enforce the requirements fully and effectively. They do not extend the substance of the EU Regulation in any way.

5. Extent and Territorial Application

- 5.1 The extent of the instrument is England, Wales and Scotland. It also extends to Northern Ireland but only insofar as it deals with import and export controls and trade with any place outside the United Kingdom, which are reserved matters. Provisions relating to the introduction of civil sanctions and the sharing of customs data by HMRC do not extend to Northern Ireland.
- 5.2 The territorial application of this instrument is England, Wales and Scotland, as well as Northern Ireland. Provisions relating to the introduction of civil sanctions do not apply in Wales or Northern Ireland.
- 5.3 Similar regulations for Northern Ireland will amend the Fluorinated Greenhouse Gases Regulations (Northern Ireland) 2015 (S.R. 2015 No. 425).

6. European Convention on Human Rights

- 6.1 The Parliamentary Under Secretary of State for the Environment, Thérèse Coffey MP has made the following statement regarding Human Rights:
- “I have considered and the Fluorinated Greenhouse Gases Regulations are compatible with the European Convention on Human Rights.”

7. Policy background

- 7.1 Fluorinated gases (F-gases) are powerful greenhouse gases. They are used in refrigeration, air-conditioning, insulation foams, electrical equipment, aerosol sprays, medical inhalers, solvents, fire extinguishers and other industrial applications. The EU Fluorinated Greenhouse Gases Regulation 517/2014 will lead to a 79% cut in their usage across the EU by 2030 in order to help address climate change. It is achieving this by phasing down the amount of F-gases that can be placed on the market through gradually reducing quotas for F-gas producers and importers. It also bans certain F-gases in some applications and strengthens obligations on leak checks, repairs, recovery and training. This phasedown is also the main mechanism by which the UK will meet its international obligations under the recently ratified Kigali Amendment to the UN Montreal Protocol, which comes into force from 2019 and requires a global phase down of hydrofluorocarbons (HFCs).
- 7.2 The provisions of the EU Regulation and accompanying Commission Implementing Regulations are directly applicable in the UK but Member States are required to provide for enforcement and penalties for breaches, as well as designating the bodies which provide F-gas technicians with certification and training. This is currently provided by the Fluorinated Greenhouse Gases Regulations 2015 no.310. However, since the 2015 Regulations were made, the European Commission has introduced new

Implementing Regulations which require the domestic enforcement powers to be updated. In addition, based on the experience of UK enforcement bodies and discussions with stakeholders, the Government has identified ways to improve the effectiveness of enforcement. The amendments to the 2015 Regulations made by this instrument, therefore, provide updates that the Government considers necessary for the UK to continue to meet its enforcement obligations.

- 7.3 The EU Regulation requires Member States to implement penalties for infringements that are “effective, proportionate and dissuasive”. Business and environmental stakeholders have voiced concerns about whether the current criminal penalties provide sufficient deterrent against non-compliance. In particular, the current enforcement notice which an enforcement body can issue in cases of infringement, carries no financial penalty and if the recipient then complies, no further action is usually taken, although the option of pursuing a criminal sanction was available in these circumstances. While criminal prosecutions can carry substantial penalties, they are used relatively infrequently, in part because they can be resource-intensive and costly to pursue. Some may feel, therefore, that there is little risk from not complying. The proposed civil penalties are designed to address these issues. They will enhance deterrence by being simpler to apply and increasing the likelihood of a financial penalty for infringements of the EU F-Gas Regulation.
- 7.4 The five new Commission Implementing Regulations which support the main EU Regulation prescribe the format for the labels which must be put on products containing F-gases, set out specific requirements for the certification of F-gas handlers, determine the format for Member States to notify the Commission of certification provisions and set out the details of the declaration of conformity for importers of products containing F-gases.

Consolidation

- 7.5 This is the first substantial amendment to the instrument since it was made in 2015. We will consider consolidating the instrument should further substantive changes be made in the future, such as the review of the 2015 Regulation scheduled for 2020.

8. Consultation outcome

- 8.1 The Government ran a public, four-week consultation between 26 October 2017 and 24 November 2017 seeking views on the proposed introduction of civil penalties. The consultation received twenty-seven responses from a mixture of industry, non-governmental organisations, trade associations, public sector organisations and private individuals. The other updates to the regulation were also explained in the consultation paper but received no comments.
- 8.2 Nineteen respondents agreed with the proposal to replace the existing criminal sanctions with civil penalties and three were opposed to civil penalties. The reasons given for opposing civil penalties were concerns that companies should not be subject to different enforcement regimes depending on where they are in the UK, a perceived lack of clarity about how the sanctions will be applied and belief that current sanctions are sufficient and there is no evidence of widespread non-compliance. In the consultation response, we explain that the decision to introduce civil penalties is a devolved matter so harmonised regulation is not always possible. With regard to how sanctions will be applied, we directed respondents to the Environment Agency’s parallel consultation setting out the detail of their sanctions and enforcement policy,

where respondents have the opportunity to comment. With regard to non-compliance, we believe from our discussions with industry and other stakeholders that civil penalties would provide a worthwhile additional level of deterrence.

9. Guidance

- 9.1 The Government has published guidance to help businesses comply with the EU Regulation. This is available at: <https://www.gov.uk/government/collections/eu-f-gas-regulation-guidance-for-users-producers-and-traders>

10. Impact

- 10.1 Civil penalties will not impose any costs on compliant businesses. Costs will be faced by non-compliant businesses in respect of the civil penalty itself and any associated cost recovery notice as well as related administration and legal costs. The Commission Implementing Regulations are already directly applicable in the UK so these Regulations will not impose additional costs in respect of those. There is no specific additional impact upon charities or voluntary bodies.
- 10.2 The impact on the public sector is negligible. There may be some reduction in burden on the courts by replacing criminal sanctions with civil penalties.
- 10.3 As is usual for low cost measures, an impact assessment has not been prepared for this instrument.

11. Regulating small business

- 11.1 The legislation applies to activities that are undertaken by small businesses. Compliant businesses will not face any change with respect to the introduction of civil penalties. Therefore, no specific action is needed to minimise regulatory burdens. Civil Penalties are applied proportionately and size of the businesses is one factor that enforcement bodies may take into account when determining an appropriate level of penalty.

12. Monitoring & review

- 12.1 The 2015 Regulations include a review provision, thereby ensuring that they will be reviewed on a regular basis. The first review must take place before the end of 2020.

13. Contact

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