

2020 No. 130

ELECTRICITY

**The Electricity Supplier Obligations (Excluded Electricity)
(Amendment) Regulations 2020**

Made - - - - *10th February 2020*

Coming into force in accordance with regulation 2

The Secretary of State makes the following Regulations in exercise of the powers conferred by sections 6(1) and (6), 9(1) and (2) and 19 of the Energy Act 2013^(a).

Before making these Regulations, the Secretary of State—

- (a) consulted the persons mentioned in section 24(1)(a) to (g) of that Act and such other persons as the Secretary of State considered it appropriate to consult; and
- (b) had regard to the matters in section 5(2) of that Act.

In accordance with section 6(8) of that Act, a draft of this instrument was laid before Parliament and approved by a resolution of each House of Parliament.

Citation

1. These Regulations may be cited as the Electricity Supplier Obligations (Excluded Electricity) (Amendment) Regulations 2020.

Commencement

2.—(1) Subject to paragraph (2), these Regulations come into force on the 21st day (the “commencement date”) after the day on which they are made.

(2) Regulation 14 comes into force on the later of 1st April 2020 and the commencement date.

Electricity Supplier Obligations (Amendment & Excluded Electricity) Regulations 2015 amended

3. The Electricity Supplier Obligations (Amendment & Excluded Electricity) Regulations 2015^(b) are amended in accordance with regulations 4 to 14.

Regulation 2 amended (interpretation)

4.—(1) Regulation 2 is amended as follows.

(a) 2013 c.32.

(b) S.I. 2015/721, amended by S.I. 2017/1051; there are other amending instruments, but none is relevant.

- (2) In paragraph (1) after the definition of “CFD period contribution” insert—
““continuing change” (and “commence” in relation to a continuing change) must be construed in accordance with regulation 2A;”.
- (3) In paragraph (4)(f) for “11(3)” substitute “12A(7)”.
- (4) After paragraph (4) insert—
“(5) A reference in these Regulations to a notice issued under regulation 12A includes a reference to a notice issued under regulation 11(3) (before its substitution by the Electricity Supplier Obligations (Excluded Electricity) (Amendment) Regulations 2020).”.

New regulation 2A inserted

5. After regulation 2 insert—

“Meaning of continuing change etc.

2A.—(1) This regulation applies where a person—

- (a) makes an EII application for an EII certificate in respect of an electricity meter that measures the supply of electricity used for a specified activity; or
- (b) sends a report under regulation 12(4) in respect of such an EII certificate.

(2) For the purposes of these Regulations, there is a continuing change in relation to the meter at the relevant date (that is to say, the date of the application or the report) if any of paragraphs (3) to (6) applies.

(3) This paragraph applies if electricity measured by the meter—

- (a) begins at any time after the start date to be shared with a person with whom it is not being shared; and
- (b) at the relevant date—
 - (i) has been shared with that person for at least 3 months; and
 - (ii) continues to be shared with that person.

(4) This paragraph applies if electricity measured by the meter—

- (a) ceases at any time after the start date to be shared with a person with whom it is being shared; and
- (b) at the relevant date—
 - (i) has not been shared with that person for at least 3 months; and
 - (ii) continues not to be shared with that person.

(5) This paragraph applies if electricity measured by the meter—

- (a) begins at any time after the start date to be used (other than by a person with whom the electricity is shared) for a non-specified activity for which it is not being used; and
- (b) at the relevant date—
 - (i) has been used for that activity for at least 3 months; and
 - (ii) continues to be used for that activity.

(6) This paragraph applies if electricity measured by the meter—

- (a) ceases at any time after the start date to be used (other than by a person with whom the electricity is shared) for a non-specified activity for which it is being used; and
- (b) at the relevant date—
 - (i) has not been used for that activity for at least 3 months; and
 - (ii) continues not to be used for that activity.

(7) In paragraphs (3) to (6), a reference to electricity beginning or ceasing to be shared or used includes a reference to electricity beginning or ceasing to be shared or used before as well as after this regulation comes into force.

(8) For the purposes of these Regulations, the continuing change “commences” when electricity measured by the meter—

- (a) begins to be shared or used as mentioned in paragraph (3)(a) or (5)(a); or
- (b) ceases to be shared or used as mentioned in paragraph (4)(a) or (6)(a).

(9) In this regulation—

“non-specified activity” means the manufacture, production or processing of any product or substance, except where the manufacture, production or processing of the product or substance is a specified activity;

“start date” means—

- (a) if the meter measured the supply of electricity used for a specified activity during the entire calendar year (the “previous year”) immediately preceding the calendar year in which the EII application for the EII certificate mentioned in paragraph (1) is made, the beginning of the previous year;
- (b) if the meter did not measure the supply of electricity used for a specified activity during the entire previous year, the date on which the supply of electricity began.”.

Regulation 6 amended (determination of EII excluded electricity)

6.—(1) Regulation 6 is amended as follows.

(2) In paragraph (2)—

- (a) in sub-paragraph (a) for “11(3)” substitute “12A”;
- (b) in sub-paragraph (b) for “11(3)” substitute “12A”.

Regulation 8 amended (EII certificates)

7.—(1) Regulation 8 is amended as follows.

(2) In paragraph (1)—

- (a) at the end of sub-paragraph (a)(ii) omit “and”;
- (b) at the end of sub-paragraph (b)(ii) insert “; and”;
- (c) after sub-paragraph (b) insert—

“(c) the EII application contains evidence under regulation 10(2)(h) of the proportion of electricity measured by the meter that was used for a specified activity in the course of the person’s business in a period that is at least 3 months in length.”.

(3) For paragraph (2) substitute—

“(2) The test in this paragraph is met in relation to a person’s business if—

- (a) the electricity cost impact of the business in the relevant period is equal to, or greater than, 0.2; and
- (b) paragraph (9) applies to the person.”.

(4) In paragraph (7)—

- (a) at the end of sub-paragraph (a) omit “and”;
- (b) at the end of sub-paragraph (b) insert “; and”;
- (c) after sub-paragraph (b) insert—

“(c) paragraph (9) applies to that person.”.

(5) After paragraph (8) insert—

“(9) This paragraph applies to a person if—

- (a) the person is not in difficulty; and
- (b) the person is not subject to an outstanding recovery order made by virtue of Article 108(2) of the Treaty on the Functioning of the European Union (Commission decision declaring aid illegal and incompatible with the common market).

(10) For the purposes of these Regulations, a person is “not in difficulty” if it is reasonable to assume that the person would not be regarded as an undertaking in difficulty for the purposes of the European Commission’s Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (2014/C 249/01)(a).”.

Regulation 10 amended (applications for EII certificates)

8.—(1) Regulation 10 is amended as follows.

(2) In paragraph (2)—

(a) for sub-paragraph (f)(ii) substitute—

“(ii) identifying any person with whom that electricity is shared;”;

(b) for sub-paragraph (h) substitute—

“(h) evidence of the proportion of the electricity measured by that meter that was used for a specified activity in the course of the person’s business—

(i) where at the date of the EII application there is a continuing change in relation to that meter, in the period—

(aa) beginning on the date (the “commencement date”) on which the last-commencing continuing change commenced; and

(bb) ending on the earlier of 12 months after the commencement date and the last date for which (at the date of the application) the person has such evidence:

Provided that this paragraph does not apply unless that period is at least 3 months in length;

(ii) where paragraph (i) does not apply—

(aa) if that meter measured the supply of such electricity during the entire previous year, in the previous year; or

(bb) if that meter did not measure the supply of such electricity during the entire previous year, in the period beginning on the date (the “start date”) on which the supply of such electricity began and ending on the earlier of 12 months after the start date and the last date for which (at the date of the EII application) the person has such evidence;

(ha) where at the date of the EII application there is a continuing change in relation to that meter, a statement setting out the date on which the last-commencing continuing change commenced;”;

(c) omit sub-paragraph (i);

(d) at the end of sub-paragraph (n) omit “and”;

(e) at the end of sub-paragraph (o) insert “; and”;

(f) after sub-paragraph (o) insert—

“(p) a statement that the person is not in difficulty (see regulation 8(10)).”.

(3) In paragraph (3) for “evidence described in paragraphs (2)(a) and (b)” substitute “evidence mentioned in paragraph (2)(a) and (b) or the statement mentioned in paragraph (2)(p)”.

(4) After paragraph (4) insert—

(a) O.J. C 249, 31.7.2014, p.1.

“(4A) Where the EII application is required under paragraph (2)(p) to contain a statement that the person making the application is not in difficulty, the Secretary of State may request the person to provide such information or evidence as the Secretary of State thinks necessary to satisfy the Secretary of State that the person is not in difficulty.”.

(5) Omit paragraphs (5) and (6).

(6) In paragraph (7) after “paragraph (2)” insert “or provided pursuant to a request under paragraph (4A)”.

(7) After paragraph (9) insert—

“(10) In this regulation, “previous year”, in relation to an EII application, means the calendar year immediately preceding the calendar year in which the EII application is made.”.

Regulation 11 substituted

9. For regulation 11 substitute—

“Proportion to be specified in an EII certificate

11.—(1) An EII certificate issued in respect of an electricity meter must specify—

- (a) the proportion of electricity measured by the meter that constitutes EII excluded electricity, rounded to the nearest one-hundredth with 0.005 being rounded upwards; and
- (b) the start and end dates of the period by reference to which the proportion is determined.

(2) The proportion to be specified in an EII certificate under paragraph (1)(a) is 0.85 multiplied by the proportion of relevant electricity measured by the meter in the certificate period.

(3) The certificate period is—

- (a) where at the date of the application for the EII certificate there is a continuing change in relation to the meter, the period (beginning on the date on which the last-commencing continuing change commenced and not exceeding 12 months) for which evidence of the proportion of relevant electricity measured by the meter is contained in the application:

Provided that this sub-paragraph does not apply unless that period is at least 3 months in length;

- (b) where sub-paragraph (a) does not apply—
 - (i) if the meter measured the supply of relevant electricity during the entire previous year, the previous year; or
 - (ii) if the meter did not measure the supply of relevant electricity during the entire previous year, the period (beginning on the date on which the supply of relevant electricity began and not exceeding 12 months) for which evidence of the proportion of relevant electricity measured by the meter is contained in the application.

(4) In this regulation—

“previous year” has the meaning given in regulation 10(10);

“relevant electricity” means electricity used for a specified activity in the course of the business of the person applying for the EII certificate.”.

Regulation 12 amended (notifications and reports)

10.—(1) Regulation 12 is amended as follows.

(2) In paragraph (1)—

- (a) in sub-paragraph (a) for “a specified activity” substitute “every specified activity”;
 - (b) in sub-paragraph (b) for “8(2)” substitute “8(2)(a)”;
 - (c) omit sub-paragraph (d).
- (3) Omit paragraph (3).
- (4) For paragraph (4) substitute—
- “(4) Subject to paragraph (4A), where an EII certificate issued in respect of an electricity meter is in force on the first day of a quarter, the person who applied for the certificate or, where a notice under paragraph (7)(a) has been issued in respect of the certificate, the person identified in the notice must send a report (the “quarterly report”) in respect of the certificate to the Secretary of State during the quarter.
- (4A) Paragraph (4) does not apply if the EII certificate ceases to be valid before the last day of the quarter.
- (4B) The quarterly report must set out—
- (a) whether or not the electricity measured by the meter is still being used in the course of the person’s business for the specified activity set out in the EII application under regulation 10(2)(d);
 - (b) any other specified activity for which the electricity is being used in the course of the person’s business.
- (4C) This paragraph applies where the proportion of electricity constituting EII excluded electricity specified in the EII certificate mentioned in paragraph (4) or, if a notice under regulation 12A has effect in relation to the certificate, in the notice is determined by reference to—
- (a) a period of less than 12 months in length; or
 - (b) where at the date of the quarterly report there is a continuing change in relation to the meter (whether commencing before or after the date of the EII application), a period that does not begin on the date on which the last-commencing continuing change commenced.
- (4D) Subject to paragraph (4F), the quarterly report must include—
- (a) where paragraph (4C)(a) or (b) applies, the evidence mentioned in regulation 10(2)(h)(i) or, as the case may be, regulation 10(2)(h)(ii)(bb);
 - (b) where paragraph (4C)(b) applies—
 - (i) the date on which the last-commencing continuing change commenced;
 - (ii) where the last-commencing continuing change is a continuing change by virtue of regulation 2A(3), the identity of the person mentioned in that paragraph with whom electricity measured by the meter continues to be shared.
- (4E) For the purposes of paragraph (4D)(a)—
- (a) where a notice under paragraph (7)(a) has been issued in respect of the certificate, the reference in regulation 10(2)(h) to the business of the person applying for an EII certificate includes a reference to the business of the person identified in the notice;
 - (b) references in regulation 10(2)(h)(i) and (ii)(bb) to the date of the EII application must be treated as references to the date of the quarterly report.
- (4F) Paragraph (4D) does not require evidence or information to be included in the quarterly report if it was contained in the EII application for the certificate or included in a previous report under paragraph (4) in respect of the certificate.”
- (5) After paragraph (8) insert—
- “(9) In this regulation, “quarter” means a period of 3 months beginning on 1st January, 1st April, 1st July or 1st October.”

New regulation 12A inserted

11. After regulation 12 insert—

“Notices correcting and updating EII certificates

12A.—(1) Subject to paragraph (5), where at any time after issuing an EII certificate the Secretary of State is satisfied that—

- (a) the proportion of electricity constituting EII excluded electricity specified in the certificate or, if a notice under this regulation has effect in relation to the certificate, in the notice; or
- (b) the start or end date of the period specified in the certificate or notice by reference to which the proportion is determined,

is incorrect, the Secretary of State must give a notice in relation to the certificate to the persons mentioned in paragraph (7) specifying the correct proportion or, as the case may be, the correct start or end date of the period.

(2) Subject to paragraph (5), where the Secretary of State receives a report under regulation 12(4) (a “quarterly report”) in respect of an EII certificate that includes evidence under regulation 12(4D)(a), the Secretary of State must give a notice in relation to the certificate to the persons mentioned in paragraph (7) specifying—

- (a) the updated proportion; and
- (b) the start and end dates of the period by reference to which the updated proportion is determined.

(3) The updated proportion is the proportion of electricity constituting EII excluded electricity mentioned in regulation 11(1)(a) determined in accordance with regulation 11 as if the application for the certificate had been made at the date of the quarterly report.

(4) For the purposes of paragraph (3)—

- (a) the evidence included under regulation 12(4D)(a) in the quarterly report (and any evidence included under that sub-paragraph in any previous report under regulation 12(4) in respect of the certificate) must be treated as having been contained in the application;
- (b) the reference in regulation 11(3)(a) to the date of the application must be treated as a reference to the date of the quarterly report;
- (c) where a notice under regulation 12(7)(a) has been issued in respect of the certificate, the reference in regulation 11(4) to the business of the person applying for an EII certificate includes a reference to the business of the person identified in the notice.

(5) Paragraphs (1) and (2) do not apply if the notice would take effect only after the EII certificate ceases to be valid.

(6) A notice under paragraph (1) or (2)—

- (a) has effect from the 6th working day after it is given; and
- (b) ceases to have effect if a subsequent notice is given and has effect.

(7) The persons are all of the following (except for any person for whom the Secretary of State does not hold a proper address)—

- (a) the person who applied for the EII certificate or, where a notice under regulation 12(7)(a) has been issued in respect of the certificate, the person identified in the notice;
- (b) where a notice under regulation 12(7)(b) has been issued in respect of the certificate, the person identified in the notice;
- (c) where an EII certificate has been issued to a third party under regulation 10(9), the third party;

- (d) the BSCCo;
- (e) the CFD counterparty.”.

Regulation 13 amended (validity and revocation of EII certificates)

12.—(1) Regulation 13 is amended as follows.

(2) For paragraph (3)(b) substitute—

“(b) in the case of all other businesses, the end of June in the calendar year immediately following the calendar year in which the EII certificate comes into force.”.

(3) In paragraph (4)—

(a) at the end of sub-paragraph (a)(ii) omit “or”;

(b) after sub-paragraph (a)(ii) insert—

“(aa) any evidence or information included in a report under regulation 12(4) is not sufficient or not satisfactory; or”;

(c) in sub-paragraph (b)(ii) after “sub-paragraph (a)” insert “or the circumstances described in sub-paragraph (aa)”.

(4) In paragraph (7) for “11(3)” substitute “12A”.

New regulations 13ZA and 13ZB inserted

13. After regulation 13 insert—

“Extension of validity of certain EII certificates

13ZA.—(1) This regulation applies to an EII certificate that—

- (a) was issued before this regulation comes into force;
- (b) in accordance with provision made by regulation 13(3)(b) (before its substitution by the Electricity Supplier Obligations (Excluded Electricity) (Amendment) Regulations 2020), was at the time of issue valid until the end of the financial year beginning on 1st April 2019 (that is to say, until the end of March 2020); and
- (c) is valid on the date on which this regulation comes into force.

(2) An EII certificate to which this regulation applies is valid until the end of June 2020, unless revoked before then.

(3) If this regulation comes into force on or after 1st April 2020, this regulation has effect with the following modifications—

- (a) in paragraph (1)(b)—
 - (i) for “1st April 2019” substitute “1st April 2020”;
 - (ii) for “March 2020” substitute “March 2021”;
- (b) in paragraph (2) for “June 2020” substitute “June 2021”.

Modification of Regulations if State aid decisions cease to be relevant

13ZB.—(1) This regulation applies if all of the decisions of the European Commission mentioned in paragraph (2) cease to be relevant to any question of law in the United Kingdom that relates to whether EII certificates may be issued under this Chapter.

(2) The decisions are—

- (a) SA.43657 (2015/N) of 14th December 2015 (aid for indirect costs of renewable energy support in the UK)(a);

(a) O.J. C 354, 20.11.2017, p.2.

- (b) SA.45155 (2017/N) of 12th June 2017 (amendment to the decision providing aid to exempt energy intensive users from the indirect costs of renewable obligation)(a);
 - (c) SA.52615 (2019/N) of 26th March 2019 (modification of the support scheme providing aid for indirect costs of renewable energy support)(b).
- (3) These Regulations have effect as if the amendments made by regulations 7(3) to (5) and 8(2)(d) to (f), (3), (4) and (6) of the Electricity Supplier Obligations (Excluded Electricity) (Amendment) Regulations 2020 had not been made.”.

Schedule amended (specified activities)

14.—(1) The Schedule is amended as follows.

(2) In the table after the row whose first entry is “Processing and preserving of poultry meat” insert—

“Manufacture of grain mill products 10.61”.

10th February 2020

Nadhim Zahawi
Parliamentary Under Secretary
Department for Business, Energy and Industrial Strategy

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Electricity Supplier Obligations (Amendment & Excluded Electricity) Regulations 2015 (S.I. 2015/721) (the “ESO Regulations”).

The ESO Regulations enable users of electricity (“EII’s”) in electricity-intensive industries to apply to the Secretary of State for an “EII certificate” in respect of an electricity meter that measures electricity used by the EII to carry out certain industrial processes, referred to in the ESO Regulations as “specified activities”. Where “relevant arrangements” under regulation 7 apply in relation to the meter, the proportion of electricity set out in the EII certificate – which can be up to 85% of the electricity measured by the meter – does not count for the purpose of calculating the EII’s electricity supplier’s financial obligations under the Contracts for Difference, Renewables Obligation and Feed-in Tariffs schemes. The supplier is expected to pass the cost saving on to its customer to reduce the EII’s electricity bill.

The main changes made by these Regulations are as follows.

Eligibility for EII certificates

EIIs carrying out a new type of “specified activity”, the manufacture of grain mill products, will be able to apply for EII certificates: see the amendment to the Schedule to the ESO Regulations.

Eligible EIIs that begin to use a new meter no longer need to wait until after the end of the calendar year before applying for an EII certificate in respect of the meter, but will need to provide at least 3 months’ evidence of the proportion of electricity measured by the meter that was used for a specified activity: see new sub-paragraph (c) of regulation 8(1) and substituted regulation 11.

Two new eligibility criteria relating to State aid will apply where, as part of an application, the Secretary of State has to check an EII’s “electricity cost impact” (as defined in regulation 8(3)). In such cases, EII certificates will not be issued to EIIs that are undertakings in difficulty or subject to an outstanding recovery order made by virtue of Article 108(2) of the Treaty on the Functioning

(a) O.J. C 336, 6.10.2017, p.5.
(b) O.J. C 194, 7.6.2019, p.6.

of the European Union: see amendments to regulation 8. The new criteria will not apply if the existing State aid decisions relating to the issue of EII certificates cease to be relevant: see new regulation 13ZB.

Period for which EII certificates are valid

EII certificates issued to EIIs (other than a “new business” trading for four or fewer financial quarters) will be valid until 30th June in the year after the year in which the certificate comes into force, instead of until 31st March: see substituted sub-paragraph (b) of regulation 13(3) of the ESO Regulations.

Period on which proportion of electricity set out in EII certificates is based

The proportion of electricity set out in an EII certificate will be based on the following periods (set out in substituted regulation 11 of the ESO Regulations) for which evidence of the proportion of electricity measured by the meter and used for a specified activity is provided with the application:

- if there is a “continuing change” in meter use, the period of up to 12 months beginning on the date on which the last continuing change commenced for which such evidence is provided, as long as there is at least 3 months’ such evidence;
- in any other case, either the calendar year preceding the application or, if supply to the meter began after the start of that year, the period of up to 12 months beginning on the date on which supply began for which such evidence is provided.

A “continuing change” in meter use is a change in meter-sharing, or in the use of electricity for a non-specified activity, that commenced after the start of the calendar year preceding the application, has lasted at least 3 months and is still continuing: see new regulation 2A.

Date of quarterly reports

EIIs will be able to provide the quarterly report that must be sent to the Secretary of State while a certificate is valid on any day in a quarter, instead of on the last working day of the quarter: see substituted paragraph (4) of regulation 12 of the ESO Regulations.

Recalculating proportion of electricity set out in EII certificates

EIIs will have to include in the quarterly report more recent evidence, when available, of the proportion of electricity measured by the meter and used for a specified activity in the following circumstances (set out in new paragraph (4C) of regulation 12 of the ESO Regulations):

- if the proportion of electricity set out in the EII certificate is based on a period of less than 12 months;
- if there is a continuing change in meter use (including one that commenced after the date of the application for the certificate) and the proportion of electricity is not based on the period beginning on the date on which the last continuing change commenced. In such a case, recent evidence need be provided only if there is at least 3 months’ worth.

The evidence included in quarterly reports will be used to recalculate the proportion of electricity set out in the certificate, whilst it remains valid, in accordance with regulation 11 until the proportion is based on a period of 12 months: see new regulation 12A(2) to (4).

An explanatory memorandum is available alongside these Regulations on www.legislation.gov.uk.

An impact assessment of the effect that these Regulations will have on the costs of business and the voluntary sector is available alongside these Regulations on that website.

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