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DRAFT STATUTORY INSTRUMENTS

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**2020 No.**

**The Greenhouse Gas Emissions Trading Scheme Order 2020**

**PART 7**

Enforcement

**CHAPTER 2**

Civil penalties

**Carbon price**

**46.**—(1) This article applies for the purpose of determining the price (the “carbon price”) per tonne of carbon dioxide equivalent for a scheme year.

(2) The carbon price for the 2021 scheme year is the sum of the relevant amount for each auction of allowances held in the period beginning on 1st January 2021 and ending on 11th November 2021 under regulations made by the Treasury under the Finance Act 2020 divided by the sum of the allowances sold at all those auctions.

(3) In paragraph (2), the relevant amount for an auction is the auction clearing price (that is to say, the price per allowance that, in accordance with the auction rules, each successful bidder must pay, irrespective of the original bid) multiplied by the number of allowances sold at the auction.

(4) The carbon price for the 2022 scheme year or any subsequent scheme year (the “relevant scheme year”) is the average end of day settlement price, calculated over the relevant period, of the December futures contract for the relevant scheme year, as traded on the relevant carbon market exchange.

(5) For the purposes of paragraph (4), the “average” end of day settlement price is calculated by dividing the sum of the end of day settlement price for each day in the relevant period for which an end of day settlement price is published by the number of days in the relevant period for which an end of day settlement price is published.

(6) In paragraphs (4) and (5)—

“end of day settlement price”, in relation to a futures contract, means the end of day settlement price per tonne of carbon dioxide equivalent published by the carbon market exchange on which the futures contract is traded;

“futures contract” means a futures contract for allowances;

“relevant carbon market exchange”, in relation to a relevant scheme year, means the largest carbon market exchange as determined by volume of sales in the relevant period of the December futures contract for the relevant scheme year traded on the exchange;

“relevant period” means—

(a) in relation to the carbon price for the 2022 scheme year, the period beginning on 1st January 2021 and ending on 11th November 2021;

- (b) in relation to the carbon price for the 2023 scheme year and any subsequent scheme year, the 12-month period ending on 11th November in the year preceding the relevant scheme year.

(7) The UK ETS authority must publish the carbon price for the 2021 scheme year on or before 30th November 2021.

(8) The UK ETS authority must publish the carbon price for subsequent scheme years on or before 30th November in the year preceding the scheme year.

### **Penalty notices**

47.—(1) Where the regulator considers that a person is liable to a civil penalty under any of articles 50 to 68 the regulator may impose a civil penalty on the person.

(2) But where the regulator considers that a person is liable to a civil penalty under any of the following, the regulator must impose a civil penalty on the person—

- (a) article 52 (failure to surrender allowances), but only if the person is liable to the excess emissions penalty referred to in article 52(2);
- (b) article 54 (hospitals and small emitters: exceeding emissions target), except where paragraph (3) of that article applies;
- (c) article 59 (ultra-small emitters: reportable emissions exceeding maximum amount).

(3) A civil penalty is imposed on a person by giving a notice (a “penalty notice”) to the person.

(4) Where the civil penalty to which the person is liable consists of a non-escalating penalty only (or where the civil penalty consists of both a non-escalating penalty and a daily penalty, but the regulator decides not to impose a daily penalty), the penalty notice must set out—

- (a) the grounds for liability;
- (b) the amount of the non-escalating penalty (and, where relevant, how the amount is calculated);
- (c) the date by which the non-escalating penalty must be paid (the “due date”), which must not be less than 28 days after the day on which the notice is given;
- (d) the person to whom payment must be made (which must be either the regulator or the appropriate national authority);
- (e) how payment may be made;
- (f) information about rights of appeal.

(5) Where the civil penalty to which the person is liable consists of both a non-escalating penalty and a daily penalty and the regulator considers that the regulator may wish to impose a daily penalty, the regulator must, before giving a penalty notice to the person, first give a notice (an “initial notice”) to the person.

(6) The initial notice must set out—

- (a) the grounds for liability;
- (b) the maximum amount of the non-escalating penalty that may be imposed;
- (c) that the daily penalty that may be imposed begins to accrue on the day on which the initial notice is given;
- (d) the maximum daily rate of the daily penalty and the maximum amount of the daily penalty that may be imposed.

(7) Where, after an initial notice is given to a person, the regulator considers that the total amount of the daily penalty to which the person is liable can be calculated (including where the daily penalty reaches its maximum amount), the regulator may give a penalty notice to the person.

- (8) The penalty notice must set out—
- (a) the grounds for liability;
  - (b) the amount of the civil penalty (including how the amount is calculated), which may include—
    - (i) a non-escalating penalty; and
    - (ii) a daily penalty;
  - (c) the date by which the civil penalty must be paid (the “due date”), which must not be less than 28 days after the day on which the notice is given;
  - (d) the person to whom payment must be made (which must be either the regulator or the appropriate national authority);
  - (e) how payment may be made;
  - (f) information about rights of appeal.
- (9) The person to whom a penalty notice is given must pay the civil penalty set out in the notice to the person set out in the notice on or before the due date.
- (10) A civil penalty imposed by a penalty notice is recoverable by the regulator as a civil debt.
- (11) The regulator must, as soon as reasonably practicable—
- (a) inform the appropriate national authority of a penalty notice given by the regulator;
  - (b) pay all sums received or recovered under a penalty notice to the appropriate national authority.
- (12) In this article and article 48—
- “appropriate national authority” means—
- (a) in the case of a penalty notice given by the chief inspector, the Department of Agriculture, Environment and Rural Affairs;
  - (b) in the case of a penalty notice given by SEPA, the Scottish Ministers;
  - (c) in the case of a penalty notice given by NRW, the Welsh Ministers;
  - (d) in any other case, the Secretary of State;
- “daily penalty” means a daily penalty set out in articles 51(3)(b), 55(2)(b), 61(2)(b), 62(2)(b), 63(2)(b), 64(2)(b), 65(2)(b) or 66(2)(b);
- “non-escalating penalty” means a civil penalty under articles 50 to 68 that is not a daily penalty.
- (13) This article is subject to article 48.

### **Penalty notices: supplementary**

- 48.**—(1) Subject to paragraph (3), a penalty notice imposing a civil penalty under any of articles 50 to 68 (the “relevant provision”) may set out—
- (a) a non-escalating penalty of an amount lower than the amount referred to in the relevant provision;
  - (b) where the civil penalty consists of both a non-escalating penalty and a daily penalty—
    - (i) a daily penalty based on a daily rate of an amount lower than the amount referred to in the relevant provision; or
    - (ii) no daily penalty.
- (2) Subject to paragraphs (3) and (4), the regulator may, by giving notice to the person to whom a penalty notice is given—
- (a) extend the due date for payment set out in the penalty notice;

- (b) amend the penalty notice by substituting a lower non-escalating penalty or a daily penalty based on a lower daily rate;
  - (c) withdraw the penalty notice.
- (3) Paragraphs (1) and (2) do not apply to—
- (a) a penalty notice imposing the excess emissions penalty referred to in article 52;
  - (b) a penalty notice imposing a civil penalty under article 54, except where paragraph (3) of that article applies;
  - (c) a penalty notice imposing a civil penalty under article 59.
- (4) But the regulator may withdraw a penalty notice referred to in paragraph (3) if there is an error in the notice (including an error in the basis on which the civil penalty imposed by the notice is calculated).

### **Regulator must publish names of persons subject to civil penalty under article 52**

- 49.—(1) The regulator must publish the name of every person on whom the excess emissions penalty referred to in article 52 is imposed as soon as reasonably practicable after—
- (a) the expiry of the period for bringing an appeal against the penalty notice imposing the penalty; or
  - (b) if an appeal is brought, the determination or withdrawal of the appeal.
- (2) But paragraph (1) does not apply if, following an appeal, the person is found not to be liable to a civil penalty.

### **Installations: carrying out regulated activity without permit contrary to article 26**

- 50.—(1) Where a regulated activity that is not authorised by a permit is carried out at an installation in a scheme year, contrary to article 26, the operator of the installation is (after the end of the scheme year) liable to a civil penalty.
- (2) Subject to paragraph (3), the civil penalty is  $CA + (RE \times CP)$ , where—
- CA is an estimate of the costs avoided by the operator in the scheme year as a result of carrying out the regulated activity without the authorisation of a permit;
  - RE is an estimate of the installation's reportable emissions in the part of the scheme year during which a regulated activity that was not authorised by a permit was carried out;
  - CP is the carbon price for the scheme year.
- (3) When setting the amount of the civil penalty to be imposed, the regulator may increase the amount calculated under paragraph (2) by a factor designed to ensure that the amount of the civil penalty exceeds the value of any economic benefit that the operator has obtained as a result of failing to comply with article 26.
- (4) The regulator must—
- (a) estimate CA and RE under paragraph (2); and
  - (b) exercise the regulator's functions under paragraph (3),
- in accordance with a direction given by the relevant national authority under section 52 of CCA 2008.
- (5) This article is subject to paragraph 7(6)(b) of Schedule 8.

### **Installations: failure to comply with conditions of permit, etc.**

- 51.—(1) The operator of an installation is liable to the civil penalty referred to in paragraph (3) where the operator fails to comply (or to comply on time) with—

- (a) a condition of a greenhouse gas emissions permit;
  - (b) a condition of a hospital or small emitter permit;
  - (c) a requirement of a surrender notice set out in paragraph 11(4)(b)(i) or (ii) of Schedule 6;
  - (d) a requirement of a revocation notice set out in paragraph 12(5)(b)(i) or (ii) of that Schedule.
- (2) But an operator is not liable to the civil penalty referred to in paragraph (3) where the failure to comply with a condition of a permit gives rise to liability for a civil penalty under—
- (a) article 52;
  - (b) article 56.
- (3) The civil penalty is—
- (a) £20,000; and
  - (b) a daily penalty at a daily rate of £500 for each day that the operator fails to comply with the condition or requirement, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

#### **Failure to surrender allowances**

**52.**—(1) Subject to paragraphs (4) to (9), the operator of an installation or an aircraft operator is liable to the civil penalty (the “excess emissions penalty”) referred to in paragraph (2) where—

- (a) in the case of the operator, the operator fails to surrender sufficient allowances, contrary to—
    - (i) article 27;
    - (ii) the requirement of a surrender notice set out in paragraph 11(4)(b)(iii) of Schedule 6;
    - (iii) the requirement of a revocation notice set out in paragraph 12(5)(b)(iii) of that Schedule;
  - (b) in the case of the aircraft operator, the aircraft operator fails to surrender sufficient allowances, contrary to article 34.
- (2) The excess emissions penalty is £100 multiplied by the inflation factor for each allowance that the operator or the aircraft operator fails to surrender.
- (3) For the purpose of calculating the excess emissions penalty—
- (a) under paragraph (1)(a)(i), a deemed increase in the installation’s reportable emissions under paragraph 4(4) of Schedule 6 must be disregarded;
  - (b) under paragraph (1)(b), a deemed increase in an aircraft operator’s aviation emissions under article 34(2) must be disregarded.
- (4) This paragraph applies where—
- (a) the regulator becomes aware that an installation’s reportable emissions (as determined by the regulator under article 45) in a scheme year exceed the installation’s verified reportable emissions for that year; and
  - (b) the operator of the installation failed to surrender allowances equal to the difference—
    - (i) on or before 30th April in the year following the scheme year referred to in sub-paragraph (a); or
    - (ii) where the end date set out in a surrender notice under paragraph 11 of Schedule 6 or a revocation notice under paragraph 12 of that Schedule falls in the scheme year referred to in sub-paragraph (a), on or before the date set out in the notice for the surrender of allowances.
- (5) In paragraph (4), “verified reportable emissions” means reportable emissions—

- (a) verified in accordance with a condition of a permit included under paragraph 4(2)(b) of Schedule 6 (including for the purpose of complying with the requirements of a surrender notice under paragraph 11, or a revocation notice under paragraph 12, of that Schedule); or
  - (b) previously determined by the regulator under article 45.
- (6) Where paragraph (4) applies, the operator is liable to the civil penalty referred to in paragraph (10) (and not the excess emissions penalty) in respect of the failure to surrender allowances referred to in paragraph (4)(b).
- (7) This paragraph applies where the regulator becomes aware that—
- (a) an aircraft operator’s aviation emissions (as determined by the regulator under article 45) in a scheme year exceed the aircraft operator’s verified aviation emissions for that year; and
  - (b) the aircraft operator failed to surrender allowances equal to the difference on or before 30th April in the year following the scheme year referred to in sub-paragraph (a).
- (8) In paragraph (7), “verified aviation emissions” means aviation emissions—
- (a) verified under article 33(1);
  - (b) considered verified under article 33(2); or
  - (c) previously determined by the regulator under article 45.
- (9) Where paragraph (7) applies, the aircraft operator is liable to the civil penalty referred to in paragraph (10) (and not the excess emissions penalty) in respect of the failure to surrender allowances referred to in paragraph (7)(b).
- (10) The civil penalty is £20 multiplied by the inflation factor for each allowance that the operator or the aircraft operator failed to surrender.
- (11) For the purposes of this article, the inflation factor is  $(CPI_2 - CPI_1) / CPI_1$  or 1, whichever is greater, where—
- CPI<sub>2</sub> is the consumer prices index for the most recent March for which the consumer prices index is published when the penalty notice is given;
  - CPI<sub>1</sub> is the consumer prices index for March 2021.
- (12) In paragraph (11), “consumer prices index” means—
- (a) the all items consumer prices index published by the Statistics Board<sup>(1)</sup>; or
  - (b) if that index is not published for a month, any substituted index or index figures published for that month by the Statistics Board.

**Installations: failure to transfer or surrender allowances where underreporting discovered after transfer**

- 53.—(1) A person is liable to a civil penalty where the person fails—
- (a) to effect a transfer (or to effect a transfer on time) of allowances, contrary to paragraph 10(3) of Schedule 6 (transfer of permits: underreporting discovered after transfer);
  - (b) to surrender (or to surrender on time) allowances, contrary to paragraph 10(4) of that Schedule.
- (2) The civil penalty is £20 multiplied by the inflation factor for each allowance that the person failed to transfer or surrender.
- (3) In this article, “inflation factor” has the meaning given in article 52(11).

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(1) The Statistics Board was established by section 1 of the Statistics and Registration Service Act 2007 (c. 18).

### **Hospitals and small emitters: exceeding emissions target**

**54.**—(1) Where an installation’s reportable emissions in a scheme year for which the installation is a hospital or small emitter exceed the installation’s emissions target for that year, contrary to paragraph 19 of Schedule 7, the operator of the installation is liable to a civil penalty.

(2) The civil penalty is  $(RE-ET) \times CP$ , where—

RE is the installation’s reportable emissions in the scheme year;

ET is the installation’s emissions target for the scheme year;

CP is the carbon price for the scheme year.

(3) For the purposes of article 47(2)(b), this paragraph applies where the regulator considers that the installation’s emissions target for the scheme year was incorrectly calculated.

(4) In this article, “emissions target” has the meaning given in paragraph 1 of Schedule 7.

### **Hospitals and small emitters: failure to pay civil penalty for exceeding emissions target**

**55.**—(1) Where the operator of an installation fails to pay a civil penalty (the “first penalty”) under article 54 on or before the due date set out in the penalty notice imposing the first penalty, the operator is liable to a further civil penalty.

(2) The further civil penalty is—

(a) 10% of the first penalty; and

(b) a daily penalty at a daily rate of £150 for each day that the operator fails to pay the first penalty beginning with the day on which the initial notice is given, up to a maximum of £13,500.

### **Hospitals and small emitters: under-reporting of emissions**

**56.**—(1) The operator of an installation is liable to a civil penalty where the installation has unreported emissions in a scheme year for which the installation is a hospital or small emitter, that is to say reportable emissions in the scheme year that—

(a) are not reported in the emissions report submitted for the scheme year under paragraph 11(2)(b) of Schedule 7; but

(b) are determined by the regulator under article 45.

(2) The civil penalty is  $£5,000 + (UE \times CP)$ , where—

UE is the unreported emissions in the scheme year (in tonnes of carbon dioxide equivalent);

CP is the carbon price for the scheme year.

### **Hospitals and small emitters: failure to notify when ceasing to meet criteria**

**57.**—(1) This article applies where—

(a) either—

(i) a hospital-qualifying installation ceases to be an installation that primarily provides services to a hospital in a scheme year for which the installation is a hospital or small emitter; or

(ii) the reportable emissions of an installation (other than a hospital-qualifying installation) in a scheme year for which the installation is a hospital or small emitter exceed the maximum amount; and

(b) the operator of the installation fails to comply (or to comply on time) with a requirement to give notice on or before 31st March in the following year (the “default year”) under a

condition of a hospital or small emitter permit included under paragraph 11(3)(a) or (4) of Schedule 7.

(2) Where the operator fails to give notice on or before 31st March in the default year, but does give notice on or before 31st October in that year, the operator is liable to a civil penalty of £2,500.

(3) Where the operator fails to give notice on or before 31st October in the default year—

- (a) if there is no penalty year, the operator is liable to a civil penalty of £5,000;
- (b) if there is a penalty year, the operator is liable (after the end of the last penalty year) to a civil penalty of the sum of—
  - (i) £5,000; and
  - (ii) 2 x the avoided compliance costs for each penalty year.

(4) The avoided compliance costs, for each penalty year, are  $(RE \times CP) - PP$ , where—

RE is the installation's reportable emissions (determined as if the modification made to Article 38(2) of the Monitoring and Reporting Regulation 2018 by paragraph 13(4)(a) of Schedule 7 did not apply) in the penalty year;

CP is the carbon price for the penalty year;

PP is, where a penalty notice imposing a civil penalty under article 54 in respect of the penalty year has previously been given to the operator, the amount of the civil penalty.

(5) In this article—

“hospital-qualifying installation” has the meaning given in paragraph 1 of Schedule 7;

“maximum amount” has the meaning given in that paragraph;

“penalty year” means a scheme year for which the installation—

- (a) is a hospital or small emitter; but
- (b) would not have been a hospital or small emitter if, by reason of the matters referred to in paragraph (1)(a)(i) or (ii), the regulator had, in the default year, given a conversion notice as required by paragraph 23(1) to (3) of Schedule 7 to the operator of the installation.

#### **Installations: failure to apply to surrender permit**

**58.** The operator of an installation is liable to a civil penalty of £5,000 where the operator fails to apply (or to apply on time) to surrender a permit, contrary to paragraph 11(1) of Schedule 6.

#### **Ultra-small emitters: reportable emissions exceeding maximum amount**

**59.**—(1) Subject to paragraph (3), where an installation's reportable emissions in a scheme year for which the installation is an ultra-small emitter exceed the maximum amount, the operator of the installation is liable to a civil penalty.

(2) The civil penalty is  $(RE - \text{maximum amount}) \times CP$ , where—

RE is the installation's reportable emissions in the scheme year;

CP is the carbon price for the scheme year.

(3) A civil penalty under this article may be imposed only in respect of—

- (a) the first scheme year in an allocation period in which the installation's reportable emissions exceed the maximum amount; and
- (b) if the following scheme year is in the same allocation period, that scheme year.

(4) In this article, “maximum amount” has the meaning given in paragraph 1 of Schedule 8.



### **Ultra-small emitters: failure to notify where reportable emissions exceed maximum amount**

60.—(1) Where—

- (a) an installation’s reportable emissions in a scheme year (the “excess year”) for which the installation is an ultra-small emitter exceed the maximum amount; and
- (b) the operator of the installation fails to give notice to the regulator under paragraph 6 of Schedule 8 on or before 31st March in the following year (the “default year”) or at all,

the operator is liable to a civil penalty.

(2) The civil penalty is the sum of—

- (a) £2,500; and
- (b)  $CA + (RE \times CP)$  for each scheme year (or part of a scheme year) falling within the penalty period (if any), where—

CA is an estimate of the costs avoided by the operator in the scheme year (or part of the scheme year) as a result of carrying out a regulated activity without the authorisation of the relevant permit;

RE is an estimate of the installation’s reportable emissions in the scheme year (or part of the scheme year) during which a regulated activity that was not authorised by a permit was carried out;

CP is the carbon price for the scheme year.

(3) The penalty period is the period—

- (a) beginning on 1st January in the year following the default year; and
- (b) ending on the earlier of the following—
  - (i) the day before the day on which a permit for the installation comes into force; and
  - (ii) the last day of the same allocation period as the excess year is in.

(4) But there is no penalty period if—

- (a) 1st January in the year following the default year is not in the same allocation period as the excess year; or
- (b) a permit for the installation is in force on that date.

(5) When setting the amount of the civil penalty to be imposed, the regulator may increase the amount calculated under paragraph (2)(b) by a factor designed to ensure that the amount of the civil penalty exceeds the value of any economic benefit that the operator has obtained as a result of carrying out a regulated activity that was not authorised by the relevant permit.

(6) The regulator must—

- (a) estimate CA and RE under paragraph (2); and
- (b) exercise the regulator’s functions under paragraph (5),

in accordance with a direction given by the relevant national authority under section 52 of CCA 2008.

(7) In this article—

“maximum amount” has the meaning given in paragraph 1 of Schedule 8;

“relevant permit” means—

- (a) where a hospital or small emitter permit for the installation comes into force before the last day of the same allocation period as the excess year is in, a hospital or small emitter permit;
- (b) in any other case, a greenhouse gas emissions permit.

**Aviation: failure to apply or make revised application for emissions monitoring plan**

- 61.**—(1) An aircraft operator is liable to a civil penalty where the aircraft operator fails—
- (a) to apply (or to apply on time) to the regulator for an emissions monitoring plan, contrary to article 28; or
  - (b) to make a revised application (or to make a revised application on time) for an emissions monitoring plan, where required to do so under article 30(3).
- (2) The civil penalty is—
- (a) £20,000; and
  - (b) a daily penalty at a daily rate of £500 for each day that the application is not submitted or, as the case may be, the revised application is not submitted, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

**Aviation: failure to comply with condition of emissions monitoring plan**

- 62.**—(1) An aircraft operator is liable to a civil penalty where the aircraft operator fails to comply (or to comply on time) with a condition of an emissions monitoring plan, contrary to article 32(2).
- (2) The civil penalty is—
- (a) £20,000; and
  - (b) a daily penalty at a daily rate of £500 for each day that the person fails to comply with the condition, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

**Aviation: failure to monitor aviation emissions**

- 63.**—(1) An aircraft operator is liable to a civil penalty where the aircraft operator fails to monitor aviation emissions in accordance with article 32(1).
- (2) The civil penalty is—
- (a) £20,000; and
  - (b) a daily penalty at a daily rate of £500 for each day that the person fails to monitor aviation emissions in accordance with article 32(1), beginning with the day on which the initial notice is given, up to a maximum of £45,000.

**Aviation: failure to report aviation emissions**

- 64.**—(1) An aircraft operator is liable to a civil penalty where the aircraft operator fails to submit (or to submit on time) a verified report of aviation emissions to the regulator, contrary to article 33(1).
- (2) The civil penalty is—
- (a) £20,000; and
  - (b) a daily penalty at a daily rate of £500 for each day that the report is not submitted, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

**Failure to comply with enforcement notice given by regulator**

- 65.**—(1) A person is liable to a civil penalty where the person fails to comply (or to comply on time) with the requirements of an enforcement notice given by the regulator under article 44.
- (2) The civil penalty is—
- (a) £20,000; and

- (b) a daily penalty at a daily rate of £1,000 for each day that the person fails to comply with the requirements of the notice, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

#### **Failure to comply with information notice**

**66.**—(1) A person is liable to a civil penalty where the person fails to comply (or to comply on time) with the requirements of a notice (the “information notice”) given under article 75.

(2) The civil penalty is—

- (a) £5,000; and
- (b) a daily penalty at a daily rate of £500 for each day that the person fails to comply with the requirements of the information notice, beginning with the day on which the initial notice is given, up to a maximum of £45,000.

#### **Providing false or misleading information, etc.**

**67.** A person is liable to a civil penalty of £50,000 where the person provides false or misleading information, or makes a statement that is false or misleading in a material respect, where the information is provided, or the statement is made—

- (a) in an application under this Order;
- (b) in compliance with a notice given to the person under this Order;
- (c) in a notice that the person is required to give under this Order;
- (d) in compliance with a condition of a permit or an emissions monitoring plan;
- (e) in a report of aviation emissions under article 33.

#### **Inspection: refusal to allow access to premises**

**68.** A person in control of premises is liable to a civil penalty of £50,000 where the person does not allow the regulator or authorised person (within the meaning of Part 6) access to the premises contrary to article 39(3).