

EXPLANATORY MEMORANDUM TO
THE GREENHOUSE GAS EMISSIONS TRADING SCHEME (AMENDMENT)
ORDER 2022

2022 No. [XXXX]

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (the “Department”) 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 This instrument makes various technical and operational amendments to the UK Emissions Trading Scheme (the “UK ETS”). In broad terms these amendments are intended to ensure consistent and effective enforcement of scheme rules through the strengthening and clarification of provisions relating to scheme penalties and notices to enforce scheme rules, and of powers of entry and inspection for the scheme regulators.¹

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument addresses the issue of doubtful vires raised by the Committee in its Fortieth Report of Session 2019-21 in relation to certain amendments made to the Greenhouse Gas Emissions Trading Scheme Order 2020 (the “2020 Order”) by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020. The Committee’s doubts were because the amendments (which relate to enforcement powers) were made in an instrument subject to the negative, rather than the affirmative, resolution procedure. The effect of articles 7, 11, 12 and 14 of this instrument is that the amendments are revoked and are re-made by this instrument, which is subject to the affirmative resolution procedure.
- 3.2 In light of the above and because this instrument also corrects an omission from the 2020 Order, the Department has applied the free issue procedure. In accordance with paragraph 4.7.6 of Statutory Instrument Practice, the Department has consulted the SI Registrar.
- 3.3 This instrument comes into force on the day after the day it is made, so that the new penalty and offence created by the instrument are available, and the issue of doubtful vires is resolved, as soon as possible. The instrument does not impose duties on private persons that are significantly more onerous than before or require them to adopt different patterns of behaviour such that a further period of time is necessary to enable them to adapt.

¹ Regulators are delivery partners of the scheme (The Environment Agency, the Natural Resources Body for Wales, the Scottish Environment Protection Agency, Chief Inspector (DAERA), Offshore Petroleum Regulator for Environment and Decommissioning (OPRED))

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the whole of the United Kingdom.

5. European Convention on Human Rights

- 5.1 The Rt Hon Greg Hands, MP, Minister for Business, Energy and Clean Growth at the Department for Business, Energy and Industrial Strategy, has made the following statement regarding Human Rights:

“In my view the provisions of the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The UK ETS was established under the Climate Change Act 2008 by the 2020 Order as a UK-wide greenhouse gas emissions trading scheme to encourage cost-effective emissions reductions which will contribute to the UK’s emissions reduction targets and net zero goal. This scheme replaced the UK’s participating in the EU Emissions Trading System (EU ETS), and the 2020 Order applied EU ETS rules on the monitoring, reporting and verification of emissions with modifications to ensure that they work for the UK ETS.
- 6.2 The 2020 Order was subsequently amended by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 to include provisions for the free allocation of emissions allowances and the UK ETS Registry. Regulations² under the Finance Act 2020 established the rules for auctioning allowances and mechanisms to support market stability.
- 6.3 Further amendments are made by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 (which is subject to the negative procedure and comes into force on 7th February 2022). This instrument makes various technical and operational amendments to a number of aspects of the UK Emissions Trading Scheme (the “UK ETS”). In particular, provision is made for installations in the hospital and small emitter opt-out scheme to apply to increase their emissions targets; for installations that exceed the thresholds for that opt-out scheme and the ultra-small emitter opt-out scheme to benefit from free allocation when returning to the main scheme; to correct the methodology for calculating the entitlement to free allocation of certain aircraft operators; and to clarify the rules for the use and reporting of aviation biofuels.

7. Policy background

What is being done and why?

- 7.1 The UK ETS runs for the ten scheme years beginning in 2021. Operators of certain industrial installations and certain aircraft operators are required to monitor, report on, and surrender allowances equivalent to, their greenhouse gas emissions in each scheme year. Some operators and aircraft operators receive an allocation of allowances free of charge, details of which are published in allocation tables. Allowances are held in accounts in the UK ETS registry, and there is a cap on the number of allowances that may be created. For installations that meet the eligibility

² [The Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021](#)

criteria, there are two opt-out schemes, one for hospital or small emitters, the other for ultra-small emitters. Such installations are not required to surrender allowances.

- 7.2 This instrument amends the 2020 Order to provide as follows:
- 7.3 *Powers to inspect:* The powers in article 39 of the 2020 Order to inspect premises to ensure compliance with scheme rules may be exercised by an “authorised person” – a person authorised by the regulator - as well as by the regulator. This corrects an omission.
- 7.4 *Offence relating to powers of entry:* It will be an offence to intentionally obstruct persons in the exercise of the enforcement powers referred to in article 40(1) of the 2020 Order . This is required to facilitate an effective inspection regime.
- 7.5 *Targeted penalty for failure to return allowances:* Article 34V of the 2020 Order provides for the regulator to give a notice to an operator or aircraft operator requiring the return of allowances to which the person was not entitled. The circumstances in which this may arise include errors and, in the case of installations, where an initial free allocation of allowances is reduced following activity level changes. An enforcement notice under article 44 is currently the only enforcement response if the notice to return allowances is not complied with. A new penalty in new article 64A of the 2020 Order introduced by this instrument incentivises persons who fail to comply with a notice to return allowances under article 34V as they may be subject to a civil penalty.
- 7.6 *Enforcement powers:* Articles 7, 11, 12 and 14 of this instrument revoke and re-make amendments relating to enforcement powers made to the 2020 Order by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020. The principal effect of the amendments is that the registry administrator³ is able to give enforcement notices under article 44, and information notices under article 75, of the 2020 Order. As far as the Department is aware, no such notices have been given under the existing provisions.
- 7.7 *Surrender and revocation notices:* Where an installation’s greenhouse gas emissions permit is surrendered or revoked, the amendments to Schedule 6 to the 2020 Order made by this instrument require the notice given to the operator of the installation to surrender any deficit of allowances from previous scheme years not surrendered (as well as allowances representing emissions in the final year of operation). This reflects the position in the standard permit “surrender condition”, which provides for any deficit arising from previous scheme years to be added to the number of allowances due in respect of the current scheme year. The effect of the amendments is to give operators a further period in which to surrender the deficit. Amendments to article 52 of the 2020 Order make it clear that the operator will not be subject to a second “excess emissions penalty” in respect of any failure to comply with this requirement.

Explanations

What did any law do before the changes to be made by this instrument?

- 7.8 The amendment to article 40 of the 2020 Order (referenced in section 7.4) provides a specific offence of obstructing the regulator in the exercise of inspection powers, which currently is not in place.

³ The functions of the “registry administrator” for the UK ETS registry are exercised by the Environment Agency with the agreement of the other scheme regulators.

- 7.9 New article 64A (referenced in section 7.5 provides a specific penalty to ensure better compliance as currently the failure to comply with a notice to return allowances can only be enforced through an enforcement notice.
- 7.10 The amendments to Schedule 6 (referenced in section 7.7 will require any deficit of unsurrendered allowances from previous years to be surrendered as part of the notice given when a permit is surrendered or revoked, allowing the operator additional time to comply. Currently the surrender/revocation notice does not deal with any deficit of allowances from previous years.

Why is it being changed?

- 7.11 The proposed amendments are required to improve operational issues and impose penalties in respect of a failure to comply with scheme rules.

What will it now do?

- 7.12 We are introducing amendments to enable the scheme regulators to impose civil penalties on operators that fail to return allowances to which they are not entitled; to enable the registry administrator to exercise powers of enforcement; to make it an offence to intentionally obstruct a regulator or an authorised person as they gain entry to a premises for the purposes of inspection; and to provide for operators of installations whose greenhouse gas emissions permits are surrendered or revoked to be treated, in relation to the surrender of any deficit of allowances, in the same way as operators of installations who remain in the UK ETS.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument is not made under the European Union (Withdrawal) Act 2018 but relates to the withdrawal of the United Kingdom from the European Union because it relates to the UK ETS, which is a policy replacement for the UK's participation in the EU ETS.

9. Consolidation

- 9.1 There are no plans to consolidate the legislation amended by this instrument.

10. Consultation outcome

- 10.1 Between 28th July and 7th September 2021, the UK Government and Devolved Administrations ran a public consultation⁴ seeking views on proposed amendments to the 2020 Order to be made by this instrument and by the further instrument subject to the affirmative resolution procedure referred to above.
- 10.2 Alongside the consultation, the UK Government and Devolved Administrations jointly sought the advice of the Committee on Climate Change (CCC) on the public consultation. The CCC reviewed the UK Emissions Trading Scheme: proposed amendments consultation of 28th July and had no comments on the content.
- 10.3 The public consultation received 7 responses, from a range of stakeholders. Responses were largely considered clarification based, none of which impacted the proposed policy changes.

⁴ Consultation on proposed amendments to the Greenhouse Gas Emissions Trading Scheme Order 2021. Found here: <https://www.gov.uk/government/consultations/uk-emissions-trading-scheme-proposed-amendments>

- 10.4 The amendments made to the surrender and revocation notice provisions (referenced in section 7.7) were not included in the consultation mentioned above. The Department took the view that the policy represented by these amendments is within the scope of the consultation previously carried out on the Future of UK Carbon Pricing in 2019 and is covered by the Government Response to that consultation (published in June 2020). This is noted in the Government Response. The scheme regulators were consulted on, and agreed with, the proposed amendments. The CCC were advised of the additional provisions and reverted back with a nil response.
- 10.5 The Government Response to the consultation was published on the 14th December 2021.
- 10.6 Full details of the consultation and response can be found at:
<https://www.gov.uk/government/consultations/uk-emissions-trading-scheme-proposed-amendments>

11. Guidance

- 11.1 UK ETS guidance has been published and is available at:
<https://www.gov.uk/government/publications/participating-in-the-uk-ets/participating-in-the-uk-ets>.
- 11.2 Guidance will be updated regularly, and updates will take account of relevant changes to legislation.

12. Impact

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 A full Impact Assessment has not been prepared for this instrument because it is not a regulatory provision.
- 12.4 The overall level of climate ambition in the UK ETS is unchanged by the proposals. There is no overall impact on the monetised costs and benefits to businesses. There is no change to the supply of allowances or the expected emissions from emitters. There is also no expected change to the general administrative burden for emitters.
- 12.5 In terms of other impacts, these provisions are also designed to address a number of specific circumstances for regulators and the registry administrator, including options to apply penalties specifically if operators or aircraft operators fail to return allowances. Again, these are not expected to generally apply, but might take effect in specific circumstances.
- 12.6 Although not required by Government policy, a regulatory impact assessment of the effect of the UK ETS on the costs of business, the voluntary sector and the public sector was produced and is available from the Industrial Energy Directorate, Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London SW1H 0ET and is available alongside the 2020 Order on www.legislation.gov.uk.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.

- 13.2 To minimise the impact of the requirements on small businesses operators and aircraft operators with relatively low levels of emissions are either not caught by the scheme or can take advantage of opt-outs. This is provided for in the 2020 Order.

14. Monitoring & review

- 14.1 The 2020 Order commits the UK ETS authority (the UK Government and Devolved Administrations) to reviewing the operation of the UK ETS (including the measures introduced by this instrument) in 2023 and in 2028. The UK ETS authority must subsequently publish a report setting out the conclusions of the review.

15. Contact

- 15.1 Gabriella Conlon at the Department for Business, Energy and Industrial Strategy (telephone: 0300 068 2846 or email: gabriella.conlon@beis.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Charlie Lewis, Deputy Director for Emissions Trading, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 The Rt Hon Greg Hands, MP, Minister for Business, Energy and Clean Growth at the Department for Business, Energy and Industrial Strategy, can confirm that this Explanatory Memorandum meets the required standard.