

**EXPLANATORY MEMORANDUM TO**  
**THE RENEWABLES OBLIGATION (AMENDMENT) REGULATIONS 2017**  
**2017 No. 1234**

**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 transposes the amendments made by Directive (EU) 2015/1513 (the “2015 Directive”) to Directive 2009/28/EC (the “Renewables Directive”) on the promotion of the use of energy from renewable sources that are relevant to the Renewables Obligation scheme (the “RO scheme”) in respect of generation from 1 January 2018. The RO scheme is a scheme to incentivise the deployment of large-scale renewable electricity generation. It is governed by separate legislation for each of the three jurisdictions of the UK, which together create a UK-wide RO scheme: the Renewables Obligation Order 2015 (S.I. 2015/1947) (for England and Wales), the Renewables Obligation (Scotland) Order 2009 (S.S.I. 2009/140) and the Renewables Obligation Order (Northern Ireland) 2009 (S.R. 2009/154) (together, the “RO Orders”). This instrument amends all three RO Orders.

**3. Matters of special interest to Parliament**

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

- 3.1 This instrument is made under section 2(2) of the European Communities Act 1972 (the “ECA”). Although there are powers in the Electricity Act 1989 (for England and Wales and for Scotland) and in the Energy (Northern Ireland) Order 2003 (S.I. 2003/419) (for Northern Ireland) under which the amendments might otherwise have been made, and noting that the Government’s general position is that those powers should be used in preference to the ECA, the Department considers that there are good reasons making it appropriate to use powers in the ECA in this case. Section 2(2) gives the Secretary of State the power to make amendments that apply UK-wide. At the request of the Scottish Government and the Northern Ireland Department for the Economy, this instrument transposes the amendments to the Renewables Directive across all three RO Orders in one instrument, ensuring that they come into force consistently for the RO scheme as a whole and on the same date. As explained below, the amendments are limited and technical in nature and have been consulted on. These factors, combined with the desirability of bringing into force and treating all three regimes consistently support this position.
- 3.2 A number of amendments made by this instrument provide for the RO Orders to continue to apply consistently in a number of respects in relation both to liquid biomass (in respect of which the “sustainability criteria” reflect those set by the Renewables Directive – see paragraph 7.4 below) and to solid and gaseous biomass

(in respect of which the UK has established its own sustainability criteria, based on the European Commission's recommendations, rather than an EU law obligation). For example, the amendments made by this instrument provide that "waste" should have a consistent meaning throughout the RO Orders in respect of all types of biomass. The Department considers that the power in section 2(2) of the ECA may be used for this purpose.

- 3.3 Instruments made under section 2(2) of the ECA may adopt either the draft affirmative or the negative resolution procedure. The amendments are technical and represent the minimum changes required to meet the UK's legal requirement to transpose the amendments made by the 2015 Directive in respect of generation under the RO scheme from 1 January 2018, whilst not temporarily reducing existing sustainability criteria set out in the RO Orders (see paragraph 7.13 below) and ensuring continuing consistent application, where relevant, to all types of biomass (see paragraph 3.2 above). The additional cost of complying with the changes made by this instrument is considered to be minimal (see paragraph 10.1 below). The Department therefore considers that the negative procedure is appropriate.

This instrument does not make provision for review within the meaning of section 28 of the Small Business, Enterprise and Employment Act 2015 to be included in the RO Orders. The Department considers that the exception in section 28(3)(a) of that Act for legislation that amends provision "imposing, abolishing or varying any tax, duty, levy or other charge" applies. This is because the obligation to produce a certain number of renewables obligation certificates, or to make a payment, to the Gas and Electricity Markets Authority ("Ofgem") in respect of each megawatt of electricity supplied (see paragraphs 7.1 to 7.3 below), is in effect a requirement to make a payment or to pay a premium for renewable electricity. The cost this imposes on suppliers is passed on to bill payers who do not have a choice as to whether they make this payment – it is compulsory. On this basis, the RO scheme has been classified as a notional or imputed tax by the Office for National Statistics and, as a result, it is subject to the Levy Control Framework.

#### *Other matters of interest to the House of Commons*

- 3.4 As this instrument is subject to the negative 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 This instrument transposes, in the RO Orders, the amendments made by the 2015 Directive to the Renewables Directive that are relevant to the RO scheme in respect of generation from 1 January 2018. The transposition deadline was 10 September 2017.
- 4.2 On 8 November 2012, the Department for Transport (DfT) provided the European Scrutiny Committees with an Explanatory Memorandum on the European Commission's proposal which ultimately resulted in the 2015 Directive. The House of Commons European Scrutiny Committee considered the proposal on 28 November 2012 and cleared it from scrutiny on 4 December 2013. The House of Lords Select Committee on the European Union referred the Explanatory Memorandum to Subcommittee D on 20 November 2012 and cleared the proposals by letter on 8 July 2015.

- 4.3 Most of the changes made by the 2015 Directive relate solely to biofuels and will be transposed by the DfT. (The term “biofuels” is used to mean biomass-derived liquid fuels used solely in transport, whilst “bioliquids” is used to mean such fuels used solely for the generation of electricity and/or heat.)
- 4.4 A transposition note in respect of the amendments relevant to the RO scheme is submitted with this memorandum. In transposing the amendments made by the 2015 Directive, copy out has been used where possible, except where alternative or additional text is required for clarity.

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

- 5.1 The extent of this instrument is the United Kingdom. Amendments made by this instrument have the same extent as the instrument being amended.
- 5.2 The territorial application of this instrument is, for each amendment, the same application as the instrument being amended.

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

- 6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

### *How the RO scheme works*

- 7.1 The RO scheme was introduced in 2002 to incentivise the deployment of large-scale renewable electricity generation. The “renewables obligation” or “RO” is an obligation on electricity suppliers to produce a certain number of renewables obligation certificates (“ROCs”) to Ofgem, the administrator of the RO scheme, in respect of each megawatt hour of electricity supplied during the year ended 31 March, a period known as the “obligation period”.
- 7.2 Ofgem issue ROCs to generators accredited under the RO scheme in relation to the renewable electricity they generate. Generators sell those ROCs to suppliers or traders, with or without the electricity generated, as tradable commodities. This allows generators to receive a premium in addition to the wholesale price of their electricity. The value of a ROC is a matter for negotiation between generator and supplier/trader.
- 7.3 Suppliers present ROCs to Ofgem to demonstrate their compliance with the RO. Suppliers failing to, or choosing not to, present enough ROCs to meet their RO in full, make a payment per ROC into a buy-out fund. After Ofgem's administration costs have been deducted, the money collected in the buy-out fund is recycled on a pro-rata basis to the suppliers who presented ROCs. This encourages suppliers to choose ROCs over the buy-out price. It is assumed that suppliers pass on the costs of meeting the RO to consumers through their electricity bills.
- 7.4 The RO scheme supports a range of technologies, including wind, solar, hydro, wave, tidal, landfill gas, sewage gas and biomass. Biomass can be used in its liquid, solid or gaseous forms. Since 2011, strict sustainability criteria have been in place under the RO scheme to ensure biomass delivers real carbon savings and is sourced sustainably. The Renewables Directive provides that energy generated from bioliquids is eligible for financial support only if bioliquids meet the sustainability criteria set out in the

Directive. For liquid biomass, the RO scheme's sustainability criteria therefore reflect those set by the Renewables Directive. As stated above, for solid and gaseous biomass, the sustainability criteria are based on the European Commission's recommendations.

- 7.5 Under the RO scheme, electricity generators of all capacities using liquid biomass, and generating stations with a capacity greater than 50 kilowatts using solid or gaseous biomass, are required to report on whether the fuel has met specified sustainability criteria. In addition, all generators using liquid biomass, and generating stations of 1 megawatts or more using solid or gaseous biomass, are required to meet the sustainability criteria in order to be eligible for ROCs. These criteria set out minimum greenhouse gas emission savings and include "land criteria", which require that the fuel must not be made from raw material obtained from certain "protected sources". Subject to some exceptions, these protected sources include land with high biodiversity value or high carbon stock, and peat land.
- 7.6 Certain fuels made from waste or certain types of residue are automatically considered to meet the land criteria in all cases. But residue from agriculture, aquaculture, fisheries or forestry will meet the land criteria only if not from a protected source. Some of these fuels are also considered to have zero life-cycle greenhouse gas emissions up to the process of collection of the materials.

*What is being done and why*

- 7.7 In view of concerns about indirect land-use change, the European Union enacted the 2015 Directive, which amends Directive 98/70/EC relating to the quality of petrol and diesel fuels and Directive 2009/28/EC on the promotion of the use of energy from renewable sources (i.e., the Renewables Directive). The 2015 Directive is informally called the 'Directive to reduce indirect land-use change for biofuels and bioliquids'.
- 7.8 Indirect land-use change occurs where energy crops (such as cereals or oilseed rape, etc.) intended to be used for the production of fuel are grown on agricultural land and displace agricultural production to previously un-cropped land (such as grasslands and forests). This risks cancelling out the greenhouse gas savings that result from using the energy crops because grasslands and forests typically absorb high levels of carbon dioxide. By converting these land types to crop land, atmospheric carbon dioxide levels may increase.
- 7.9 This instrument makes the minimum changes necessary to transpose into the RO Orders, in respect of generation from 1 January 2018, the amendments to the Renewables Directive, whilst not temporarily reducing existing sustainability criteria for bioliquids and ensuring continuing consistent application, where relevant, to all types of biomass. These changes are set out in paragraphs 7.10 to 7.17 below. Apart from a minor difference in wording (which reflects existing differences in the wording of the various RO Orders), the changes are the same across the three RO Orders.
- 7.10 The existing definition of "waste" in the RO Orders is amended to take account of the new definition introduced by the Directive (see amendments made by regulations 3(2), 8(2) and 13(2) of this instrument). The amended definition provides that substances will not be considered to be waste where they have been intentionally modified or contaminated to fall within the definition of waste given in Article 3(1) of Directive 2008/98/EC.

- 7.11 New definitions or explanations are added in respect of “residue from processing”, “residue from agriculture, aquaculture, fisheries or forestry” and “starch-rich crops” (see amendments made by regulations 3(3), 4(3) and 6(3); 8(3), 9(3) and 11(3); and 13(3), 14(3) and 16(3)). The first provides that references to residue in the RO Orders do not include any substance that is a primary aim of a production process or that the process has been deliberately modified to produce. The second makes it clear that bioliquids (and certain solid and gaseous biomass) produced from residues from industries related to agriculture, aquaculture, fisheries and forestry, or processing residues, are automatically considered to meet the land criteria in all cases. They therefore only need to demonstrate that they comply with the greenhouse gas criteria in order to receive support under the RO scheme. The definition of "starch-rich crops" is needed for data-collection to monitor the use of crop-derived bioliquids (see paragraph 7.17 below).
- 7.12 To ensure that generation from bioliquids counts towards the UK's targets under the Renewables Directive, and to allow support to be given to generators under the RO scheme, greenhouse gas emission savings compared to fossil fuel must meet the minimum requirements in the Directive. The savings required for bioliquids produced in an installation that started production between 6 October 2015 and 31 December 2016 are therefore increased in the RO from the current level of 50% to 60%, where the bioliquid is used to generate electricity from 1 January 2018 onwards (see the new definition of “relevant percentage” substituted by regulations 5(2)(b), 10(2)(b) and 15(2)(b)).
- 7.13 The amendments made to the Renewables Directive reduce the current minimum greenhouse gas savings required by the Directive from 50% to 35% in respect of generation during 2017 for bioliquids produced in installations that began operation on or before 5 October 2015. The rate reverts to 50% in respect of generation from 1 January 2018 onward. After having consulted on this issue, the UK Government (for the RO scheme in England and Wales) and the devolved administrations for their respective schemes, have decided to leave unchanged the UK's current requirement to achieve a 50% minimum greenhouse gas emission saving where this is not affected by the increase to 60% explained in paragraph 7.12 above. As at present all generators currently receiving support under the RO scheme exceed the current 50% requirement, the decision to leave the current requirement unchanged does not make any difference in practice. Taking this approach is therefore a proportionate and reasonable means of complying with the Directive.
- 7.14 The current restriction on the use of default values when calculating the greenhouse gas emission savings from the use of bioliquids is removed (see amendments made by regulations 5(2)(a), (3) and (4); 10(2)(a), (3) and (4); and 15(2)(a), (3) and (4)). This aligns the rules for using default values to ensure equal treatment for producers regardless of where production takes place. The existing definition in the RO Orders of “disaggregated default values for cultivation” relates to the restriction on the use of the default values. It is now redundant and so has been removed.
- 7.15 The 2015 Directive also puts a limit on the maximum combined contribution from crop-derived biofuels and bioliquids that can be taken into account for the purpose of compliance with the Member States’ 2020 targets under the Renewables Directive. This limit is no more than the energy quantity corresponding to a maximum of 7% of the final consumption of energy in transport in the Member State. The RO scheme already applies a cap on the support for bioliquids in the UK. Following a

consultation, DfT have announced that they will introduce a sliding scale for the maximum amount of transport biofuels supplied under their Renewable Transport Fuel Obligation (RTFO) that can be made from crops. The maximum level will begin at 4% in 2018 and reduce linearly year on year from 2021 to reach 3% in 2026 and 2% in 2032. Full details are in the Government response to the consultation<sup>1</sup>.

- 7.16 On the basis of current evidence, the combined supply of bioliquids and biofuels from crops will be much less than the 7% limit. So no changes are needed to the level of the cap under the RO scheme at the present time.
- 7.17 The current data-reporting requirements are amended to require information on bioliquids sourced from the four categories of crops specified in the 2015 Directive, that is, starch-rich crops, sugars, oil crops and other crops grown as a main crop primarily for energy purposes on agricultural land, to be provided to Ofgem (see amendments made by regulations 4(2), 9(2) and 14(2)). This will ensure that the UK Government can report to the European Commission on the use of bioliquids in accordance with Article 22(1)(o) of the Renewables Directive, and to ensure compliance with the Directive's 7% cap.

### *Consolidation*

- 7.18 This instrument comprises the fourth amendment made to the Renewables Obligation Order 2015, the twelfth amendment made to the Renewables Obligation (Scotland) Order 2009, and the twelfth amendment made to the Renewables Obligation Order (Northern Ireland) 2009. Further consolidation is not proposed at this time.

## **8. Consultation outcome**

- 8.1 A UK-wide public consultation on transposing the Directive<sup>2</sup> was carried out from 23 October to 13 November 2017 (3 weeks). A short consultation was considered sufficient because there was little to consult on and the changes that needed to be made are minor and technical and will affect a very small sector. The consultation was available on the Department's website. In addition, an email announcing the launch of the consultation was sent to all current and pending generating stations using biomass fuel under the RO scheme, and to renewable electricity suppliers, trade associations, biomass fuel suppliers, environmental organisations, non-departmental public bodies, consultants, financiers, academics, Citizens Advice Bureaux and Ofgem.
- 8.2 The Department's webpage for the consultation was accessed by 830 unique viewers, which resulted in 7 actual responses. These were from renewable electricity generators, an energy company, a renewable energy trade association and Government bodies. A detailed summary of the responses is in the Government response to the

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<sup>1</sup> The Government response to DfT's consultation 'Renewable Transport Fuel Obligation: proposed changes for 2017' is at: <https://www.gov.uk/government/publications/renewable-transport-fuel-obligations-order-government-response>

<sup>2</sup> The Consultation on new rules for bioliquids, wastes & residues under the renewables obligation is at: <https://www.gov.uk/government/consultations/new-rules-for-bioliquids-wastes-and-residues-under-the-renewables-obligation>

consultation<sup>3</sup> but the key issues were as follows (not all respondents commented on each question):

- Three respondents thought that in future years there would not be any significant change from the current level of use of bioliquids;
- Two respondents thought that crop-derived bioliquids should be covered by the RO's current 4% supplier cap on bioliquid ROCs, regardless of the generating technology that they were used in. Two disagreed;
- Three respondents agreed that no changes were needed at the present time to the current level of the supplier cap on bioliquids under the RO scheme. One thought the cap should increase;
- Two respondents were not aware of any generating stations that were, or intended to be, accredited under the RO scheme and had used, or intended to use, consignments of bioliquid which had a greenhouse gas (GHG) emission saving of at least 35% but less than 50%. Two respondents were aware of the occasional use of consignments within this range but they were not eligible for support under the RO scheme;
- Four respondents agreed that the RO should retain the UK's current date for achieving a minimum of 50% GHG emission savings. One had no preference over retaining the current date or temporarily lowering the UK's current requirements from 50% to 35% GHG emission savings;
- Two respondents agreed that generators over 50kW should provide Ofgem with information on the energy content of crop-derived bioliquids. One disagreed;
- Three respondents agreed there was no need to change the current reporting requirements for microgenerators (up to 50kW);
- Two respondents agreed that there was no need to define the terms 'sugars' and 'oil crops' in the RO Orders as they were already sufficiently well understood. One disagreed;
- No comments were received about not amending the current references to Annex 5 of the Renewables Directive in the RO Orders (it was proposed that no changes were needed because those references already refer to Annex 5 as amended by the 2015 Directive);
- Six respondents agreed that the draft implementing legislation included with the consultation document was clear.

8.3 After carefully considering the consultation responses, the Government has decided to leave unchanged the current exemptions from the 4% supplier cap for crop-derived bioliquids. All the other issues will be implemented as proposed in the consultation document.

## **9. Guidance**

9.1 Ofgem, who administer the RO scheme, publish guidance documents for generators wishing to benefit from the RO scheme. Ofgem will update their guidance to reflect the changes made by this instrument and publish it on their website.

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<sup>3</sup> The Government response is available at the website in footnote 2 above

## **10. Impact**

- 10.1 The changes made by this instrument will apply to business, charities, voluntary bodies and the public sector where they generate eligible renewable electricity. It is estimated that they will result in a very minor increase in their costs: the combined cost for the 41 generators using bioliquids in 2015-16 (the latest year for which information is available) is estimated to be around £6,800, spread over the 20-year life of their support under the RO scheme. This is proportionate and appropriate in view of the significant reward that will be achieved.
- 10.2 Ofgem have a number of duties in administering the RO scheme, with associated costs. There is existing provision to allow for these costs to be met from monies paid by electricity suppliers who do not meet their RO, as explained in paragraph 7.3 above.
- 10.3 This instrument is not subject to an impact assessment as the RO scheme is classed as a 'tax and spend' measure and the policy changes have a gross cost below £1m.

## **11. Regulating small business**

- 11.1 The legislation applies to activities that are undertaken by small businesses.
- 11.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken has been to exclude “microgenerators” (i.e., generating stations which have a declared net capacity of 50kW or less) from the new requirement to provide additional information to Ofgem on bioliquids used for generation which were sourced from starch-rich crops, sugars, oil crops and other crops grown as a main crop primarily for energy purposes on agricultural land. This is because sufficient information is already provided by microgenerators under their current monthly reporting and annual audit reporting requirements to allow adequate determination of crop use for the small quantities of crop-derived bioliquids used by them.

## **12. Monitoring & review**

- 12.1 Ofgem carries out monitoring to ensure compliance by electricity generators when claiming support under the RO scheme. Ofgem publishes an annual report into the operation of the RO scheme in the preceding obligation period.

## **13. Contact**

- 13.1 Katherine Donne at the Department for Business, Energy and Industrial Strategy, Telephone: 0300 068 6182 or email: [katherine.donne@beis.gov.uk](mailto:katherine.donne@beis.gov.uk), can answer any queries regarding this instrument.