EXPLANATORY MEMORANDUM TO

THE GREENHOUSE GAS EMISSIONS TRADING SCHEME (AMENDMENT) (EU EXIT) REGULATIONS 2019

2019 No. 107

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Act.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 In the event of a disorderly ('No Deal') exit from the European Union, the UK would not have an agreement in place to continue participating in the EU Emissions Trading Scheme (EU ETS). The UK would therefore leave the EU ETS on exit day, making the existing legislation inoperable. The instrument revokes certain provisions that will cease to apply on exit day and amends others so that they will continue to be operable after exit day. This will ensure legal certainty for existing UK participants to the EU ETS in the event of a 'No Deal' exit from the EU. No substantive policy changes have been made in this instrument (this is in line with the powers of section 8 of the EU (Withdrawal) Act 2018).

2.2 The instrument maintains, and makes technical fixes to, the elements which will continue to be operable, namely the Monitoring, Reporting and Verification (MRV) of greenhouse gas emissions. As well as ensuring transparency over greenhouse gas emissions, MRV will also provide information to allow the implementation of HM Treasury's 'Carbon Emissions Tax' (announced in the 2018 Autumn Budget). The Tax will temporarily replace the lost EU ETS carbon price in a 'No Deal' scenario, maintaining a carbon pricing policy for industry in an interim period (i.e. from exit day until a long-term alternative is established). However, the substance of this interim carbon pricing policy will be included in a power under the Finance Bill 2018-19, which will be debated by Parliament separately, and does not form part of this instrument.

2.3 The interim policy is without prejudice to any final decision on the UK's future approach to carbon pricing; the UK is considering a range of options, including continuing to participate in the EU ETS, a UK ETS (linked or standalone) or a carbon tax.

Explanations

What did any relevant EU law do before exit day?

2.4 The relevant EU law established the EU ETS, which allowed for the trade and surrender of emissions allowances. Tertiary legislation also required operators to 'Monitor, Report, and Verify' carbon emissions. MRV is an important facet of the EU ETS as it ensures that one emissions allowance is equivalent to one tonne of carbon dioxide (or equivalent) for all participants and that emissions are accurately reported by participants.

Why is it being changed?

2.5 In the event of a 'No Deal' exit from the EU, the UK would no longer participate in the EU ETS, making the existing legislation inoperable.

What will it now do?

2.6 This instrument will make technical changes to the retained EU law so that it operates effectively in domestic law; the requirement to undertake MRV for existing participants will continue outside of the EU ETS in a 'No Deal'. The instrument will also revoke retained EU law relating to the surrender and trading aspects of the EU ETS, which can no longer operate in the UK after exit. Further details are provided in sections 6 and 7 below.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The instrument was presented for sifting on 11 December 2018. The instrument was presented under the negative procedure because the instrument does not trigger the affirmative procedure as set out in Schedule 7, paragraph 1(2) of the EU (Withdrawal) Act 2018. The substance of the instrument is concerned with fixing technical issues that arise in a 'No Deal' scenario, details of which have already been made public in a Technical Notice (see section 11.3) rather than any longer-term decisions on carbon pricing policy. The announcement that a Carbon Emissions Tax would be used to provide a carbon price signal in a 'No Deal' scenario, made in the 2018 Budget, will provide Parliament with an opportunity to debate carbon pricing policy via the Finance Bill 2018-19. We do not therefore consider this specific instrument to be controversial or politically or legally important and meriting Parliamentary debate. Sifting finished on 10 January 2019, and the instrument is subject to the negative procedure.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England, Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument is England, Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Rt Hon Claire Perry MP has made the following statement regarding Human Rights:

'In my view the provisions of the Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) Regulations 2019 are compatible with the Convention rights.'

6. Legislative Context

6.1 The EU Emissions Trading Scheme Directive 2003/87/EC ("the Directive") is currently implemented in the United Kingdom by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (S.I. 2012/3038) (the "2012 Regulations").

6.2 The Commission Regulations on Monitoring and Reporting (No. 601/2012) and Accreditation and Verification (No. 600/2012) set out the monitoring, reporting and verification framework required by the Directive.

6.3 This instrument will be made under section 8 of the EU (Withdrawal) Act 2018 ('dealing with deficiencies arising from withdrawal'). The Commission Regulations will be brought into domestic law upon exit. The instrument will make technical fixes to the Commission Regulations, which will be retained, and revoke those provisions that will no longer apply after exit day because they relate to the surrender and trading aspects of the EU ETS (which can no longer function in the UK after exit day, as the UK would not participate in the EU ETS). The instrument will also repeal those parts of the 2012 Regulations which require participants to surrender emissions allowances as part of the EU ETS (technical fixes will also be made where necessary).

6.4 The European Commission recently amended the Monitoring Regulation effective from 1 January 2019 and revoked and replaced the Monitoring Regulation effective 1 January 2021 and the Verification Regulation effective 1 January 2019. In overview, this was to accommodate changes for Phase IV of the EU ETS (predominantly to provisions on verification of emissions, and accreditation of verifiers) and the Carbon Offsetting and Reduction Scheme for International Aviation. These amendments were being consulted on during the sifting of the first SI, and could not be incorporated in the instrument. Laying the instrument now in its current form, however, ensures that operators continue with monitoring and reporting emissions from day one, supporting business continuity and implementation of the Carbon Emissions Tax. On exit, the amended EU Regulations as they apply in EU law will be incorporated into UK law but will not be fully operable. We plan to lay a second SI to fix further deficiencies as early as possible.

7. Policy background

What is being done and why?

7.1 The EU ETS drives cost-effective decarbonisation in power, aviation and industrial sectors set on greenhouse gas emissions. Participants must surrender one emissions allowance at the end of the compliance year for each tonne of carbon dioxide (or equivalent) emitted. Allowances can be obtained via auction, trading on the secondary market, or free allocation; often, participants will obtain allowances through a combination of these approaches. Allowances are only freely allocated to energy intensive industries and aviation operators which are at risk of 'carbon leakage', i.e. relocating to a state that does not participate in the EU ETS, where climate ambition is lower, and therefore cheaper to not comply with. The EU ETS supports the UK and EU's commitment to a 20% reduction in greenhouse gas emissions by 2020 (compared to a baseline of 1990 emissions levels).

7.2 To ensure the system remains robust and transparent, emissions are reported under an MRV framework. Participants must put together monitoring and reporting plans, to be approved by a national competent authority, upon entry to the EU ETS. Greenhouse gas emissions must be monitored annually in accordance with this plan during the

calendar year. An accredited verifier must verify that the reporting process adheres to the monitoring and reporting plan, and that the final emissions value provided is correct. A final, verified emissions report is submitted and the corresponding allowances are surrendered by the operator to cover the total number of reported emissions. Overall, this ensures that one tonne of carbon dioxide (or equivalent) equates to one allowance for all participants.

7.3 There are reduced burdens for smaller emitters who can 'opt-out' of the EU ETS as part of the UK's 'Small Emitter and Hospital Opt-Out' scheme. Smaller emitters do not trade and surrender allowances, but must adhere to an individual emissions target, and pay a civil penalty for emissions which exceed the target. Smaller emitters can also choose to 'self-verify' the monitoring and reporting process (the competent authority will audit this). Smaller emitters also do not need to monitor smaller source streams on site (which cumulatively emit less than 1,000 tonnes of carbon dioxide per annum). Aviation operators with total emissions below 25,000 tonnes or emissions of less than 3,000 tonnes for flights within the European Economic Area can use simplified verification procedures.

7.4 On 23 June 2016 the EU referendum took place and the people of the United Kingdom voted to leave the European Union. The Government respected the result and triggered Article 50 of the Treaty on European Union on 29 March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation.

7.5 Exit negotiations have not yet been concluded, however robust contingency planning must be in place. In the event of a 'No Deal' exit from the EU, the UK will be unable to participate in the EU ETS (i.e. trade and surrender allowances). To maintain continuity for business, the Monitoring and Reporting, and Accreditation and Verification Regulations will be brought into domestic law under the Withdrawal Act. This instrument will revoke retained EU law relating to EU ETS surrender requirements and the provisions relating to the surrender of allowances in the Greenhouse Gas Regulations and make technical fixes to these regulations and the MRV framework. UK operators of stationary installations will continue to report on their emissions. UK aircraft operators will continue to report their emissions on Flights within the UK; flights to and from the European Economic Area (EEA); and flights between EEA states. UK operators that will participate in CORSIA will be required to monitor, report and verify emissions on all international flights. Operators in the Small Emitter and Hospital Opt-Out scheme will also continue to report but will not have any emissions targets.

7.6 The purpose of maintaining MRV after a 'No Deal' exit is to ensure transparency over greenhouse gas emissions until a long-term alternative to the EU ETS is established. In the short term, the UK will remain bound by its domestic carbon budgets, and alternative carbon pricing mechanisms will also remain (e.g. environmental taxes under the Climate Change Levy). HMG will also initially apply a carbon price in a 'No Deal' scenario, to temporarily replace the lost EU ETS price, under the 'Carbon Emissions Tax'. This was announced at Budget 2018 and will be included under the Finance Bill 2018-19, separate to this instrument. In the long term, as stated in the Clean Growth Strategy, HMG remains committed to carbon pricing as an emissions reduction tool and will ensure that any future approach is at least "as ambitious" as the EU ETS and

provides a smooth transition for the relevant sectors. The UK will also remain party to international climate change commitments.

7.7 This instrument applies to environmental issues which are a transferred matter for Northern Ireland under the Northern Ireland Act 1998. The UK Government remains committed to restoring devolution in Northern Ireland. This is particularly important in the context of EU Exit where we want devolved Ministers to take the necessary actions to prepare Northern Ireland for exit. We have been considering how to ensure a functioning statute book across the UK including in Northern Ireland for exit day absent a Northern Ireland Executive. With exit day months away, and in the continued absence of a Northern Ireland Executive, the window to prepare Northern Ireland's statute book for exit is narrowing. UK Government Ministers have therefore decided that in the interest of legal certainty in Northern Ireland, the UK Government will take through the necessary secondary legislation at Westminster for Northern Ireland, in close consultation with the Northern Ireland departments. This is one such instrument.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

9. Consolidation

9.1 Several amendments have now been made to the 2012 Regulations, however the Department has not made consolidating regulations at this time, given the fact that the provisions in the 2012 Regulations are expected to be replaced by a longer term alternative. This is likely to lead to the revocation of this legislation, and it is therefore more appropriate for new regulations to be made in respect of those more extensive amendments as necessary, rather than consolidating the 2012 Regulations at this point.

10. Consultation outcome

10.1 As the EU (Withdrawal) Act 2018 does not require a formal consultation to take place for instruments relating to exit, a public consultation was not held because the SI reflects the inevitable consequence of EU exit and so there were no policy options to consult on and also to avoid prejudicing ongoing exit negotiations. No substantive policy changes have been made (this is in line with the powers of section 8) and the instrument is assessed as low impact (see section 12).

10.2 Informal conversations were held between the Department, competent authorities and devolved administrations (as this policy area falls under a devolved competence). Devolved administrations also provided comments on drafts of this instrument, and a ministerial consent letter was sent on 14 September.

10.3 Overall, maintaining the MRV framework is not viewed as controversial in itself. This is a procedure which operators are familiar with and will also be used to record emissions which will be taxed under the ‘Carbon Emissions Tax’. There has been a positive response from industry stakeholders following recent consultation after the

announcement of the interim carbon pricing policy (the Carbon Emissions Tax) for a 'No Deal' scenario.

11. Guidance

11.1 A Technical Notice on HMG's EU exit climate policy was published on 12 October 2018. The EU ETS is covered in the Notice. The Notice outlines what steps current participants of the EU ETS will need to take if the UK leaves the EU on 29 March 2019 without a deal. The Notice also explains what obligations will remain for existing participants.

11.2 As this instrument maintains an element of the EU ETS, with which existing participants are familiar, and does not apply to new sectors or businesses, no additional guidance will be published.

11.3 The Notice can be found here: https://www.gov.uk/government/publications/meeting-climate-change-requirements-if-theres-no-brexit-deal/meeting-climate-change-requirements-if-theres-no-brexit-deal

12. Impact

12.1 The impact of this specific instrument (i.e. maintaining MRV) on business, charities or voluntary bodies is limited to the existing stationary installations and off-shore installations (of which there are around 1,000), and 140 domestic aircraft operators, who currently participate in the EU ETS in the UK. As the intention of this instrument is to fix inoperabilities and to maintain the status quo in terms of the operation of monitoring, reporting and verification, there are no estimated additional direct costs to business arising from this amendment (compared to what they currently face in complying with monitoring, reporting and verification under the EU ETS regulations).

12.2 The impact on the public sector is limited to the competent authorities who administer the EU ETS. The Secretary of State for Business, Energy and Industrial Strategy is the competent authority for off-shore operators. The Environment Agency is the competent authority for all operators (both stationary and aviation) in England and Wales. Likewise, the Scottish Environment Protection Agency is the competent authority for all operators in Scotland, and the Chief Inspector of the Department of Environment for all operators in Northern Ireland. Regulatory costs are recovered by competent authorities in terms of a subsistence fee – this will continue after exit with respect to monitoring, reporting and verification.

12.3 An Impact Assessment has not been prepared for this instrument because the impact is estimated to be low and falls below the threshold required to submit a full Impact Assessment. Businesses will not need to familiarise themselves with any of the changes proposed with this instrument, as the intention is to fix inoperabilities to maintain the status quo in terms of the operation of MRV. There shall be no additional direct costs to business arising from this amendment compared to what they currently face in complying with MRV as part of the EU ETS regulations. A separate assessment of the impact of the Carbon Emissions Tax will be undertaken by HM Treasury.

13. Regulating small business

13.1 The legislation applies, in part, to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses, the approach taken is to maintain the reduced burdens for smaller emitters (and hospitals) as part of the UK's

'opt out' scheme. This is not expected to add any additional cost. See sections 7.3 and 12.3 above.

14. Monitoring & review

14.1 As this instrument is made under the EU Withdrawal Act 2018, no review clause is required.

15. Contact

15.1 Ina Selimić at the Department for Business, Energy and Industrial Strategy, Telephone: (020) 7215 1840 or email: ina.selimic@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Jess Ayers, Deputy Director for Emissions Trading and Industrial Decarbonisation, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Rt Hon Claire Perry MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

Annex

Statements under the European Union (Withdrawal) Act 2018

Part 1

Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them. State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

Part 2

Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

1. Sifting statement

1.1 The Rt Hon Claire Perry MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) Regulations 2019 should be subject to annulment in pursuance of a resolution of either House of Parliament (i.e. the negative procedure)".

1.2 This is because this instrument is not making any provisions which fall within the list at paragraph 1(2) of Schedule 7 of the EU (Withdrawal) Act and the instrument is making only technical fixes to remove existing obligations under the EU Emissions Trading System, which the UK can no longer participate in after exit day if there is no further agreement with the EU (this is set out in sections 2 and 3.1 above). This instrument maintains certain aspects of a policy area which is assessed as low impact as set out in sections 12 and 13 above.

2. Appropriateness statement

2.1 The Rt Hon Claire Perry MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view the Greenhouse Gas Emissions Trading Scheme (Amendment) (EU Exit) Regulations 2019 does no more than is appropriate".

2.2 This is the case because the SI introduces no new policy and only makes technical fixes as set out in sections 6.3 and 8.1 above.

3. Good reasons

3.1 The Rt Hon Claire Perry MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

"In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action".

3.2 These reasons are set out in sections 6.3 and 8.1 above.

4. Equalities

4.1 The Rt Hon Claire Perry MP has made the following statement:

"The instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts."

"In relation to the draft instrument, I, Claire Perry have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010."

4.2 The instrument does not raise any issues relevant to the public sector equality duty under the Equality Act 2010 given that it makes technical changes in relation to a policy

area which impacts on business behaviour in relation to climate change and energy policy and does not relate to unlawful behaviour like discrimination, harassment and victimisation and any other conduct that is prohibited by or under the Equality Act 2010.

5. Explanations

5.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.