Department of Energy & Climate Change

Llywodraeth Cymru
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Amendments to UK greenhouse gas emissions trading scheme and national emissions inventory regulations: a public consultation

Summary of responses and Government responses to consultation

13 December 2013

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1. Introduction

The Greenhouse Gas Emissions Trading Scheme Regulations 2012

Directive 2003/87/EC[1] of the European Parliament and of the Council (the ETS Directive) established a system for greenhouse gas emission allowance trading within the European Community.

The EU ETS was introduced in 2005 to help the EU meet its greenhouse gas (GHG) target to reduce GHG emissions by 8% on 1990 levels by 2012 under the first commitment period of the Kyoto Protocol. It works on a "cap and trade" basis, where Member States are required to set a cap on power sector and industrial emissions and participants can purchase or sell allowances according to their ability to meet the cap. The rationale behind emission trading is that it enables emission reductions to take place where the cost of the reduction is lowest, thus lowering the overall cost of tackling climate change.

Currently in Phase III (2013-2020), the EU ETS was modified by Directive 2009/29/EC[2] (the revised ETS Directive). These modifications have been implemented in the UK by the Greenhouse Gas Emissions Trading Scheme Regulations 2012[3] (the 2012 Regulations), which came into force in January 2013 to complete the transposition of the ETS Directive.

During transposition of the revised ETS Directive the Government undertook a broad structural review of existing emissions trading legislation with the objective of eliminating regulatory duplication for stationary installations and aircraft operators. Accordingly, the Greenhouse Gas Emissions Trading Scheme Regulations 2005[4] (the 2005 Regulations) and the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010[5] (the Aviation Regulations) have been repealed and consolidated.

In the 2012 Regulations the Government also took the opportunity to review the system of EU ETS penalties by making a shift towards a flexible and more proportionate enforcement regime for non-compliance in Phase III in line with the principles of the Macrory report. This includes giving regulators' power to waive or reduce penalties (powers of discretion) to reflect the seriousness of the breach, and a new discretionary €20 tCO_2 penalty for failure to surrender allowances in cases where emissions are under-reported and the error is self-rectified. The new penalty complements the strict €100 tCO_2 excess emissions penalty set out in the ETS Directive.

Registries Regulations

Article 19 of the revised ETS Directive established a European Union-wide Registry for EU ETS Phase III. The provision also required the Commission to adopt a Regulation setting out how such a registry (i.e. the I.T. framework for the ETS that contains accounts for participants where allowances are stored, traded and surrendered) should operate across the EU.

Rules and responsibilities were set out in Regulation 920/2010[6] (the Registries Regulation 2010) and Regulation 1193/2011[7] (the Registries Regulation 2011). The Regulations apply directly in the UK but, to the limited extent necessary, it has been transposed into UK legislation by the 2012 Regulations.

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[1] Directive 2003/87/EC http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:275:0032:0032:EN:PDF
[2] Directive 2009/29/EC http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0063:0087:en:PDF
[3] SI 3038/2012 http://www.legislation.gov.uk/uksi/2012/3038/pdfs/uksi_20123038_en.pdf
[4] SI 2005/2903 http://www.legislation.gov.uk/uksi/2005/2903/pdfs/uksi_20052903_en.pdf
[5] SI 2010/1996 http://www.legislation.gov.uk/uksi/2010/1996/pdfs/uksi_20101996_en.pdf
[6] Regulation 920/2010 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:270:0001:0052:EN:PDF
[7] Regulation 1193/2011 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:315:0001:0054:EN:PDF

In May 2013 the Commission updated the Registries Regulations through Regulation 389/2013[8] (the Registries Regulation 2013), which also repealed Registries Regulations 2010 and 2011.

The Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005

As a party to the United Nation Framework Convention on Climate Change (UNFCCC) the UK has the obligation to monitor and periodically report human-induced emissions of greenhouse gases not covered by the Montreal Protocol. For such reporting purposes, the UNFCCC requires parties to develop and periodically update national inventories of anthropogenic emissions of greenhouse gases.

This obligation was extended by Article 5 of the Kyoto Protocol and Article 4(4) of the EC Monitoring Mechanism Decision No 280/2004/EC[9], which required Member States to have in place national inventory systems for the estimation of anthropogenic emissions of greenhouse gases by sources and removals of carbon dioxide by sinks.

The Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations 2005 (the Inventory Regulations)[10], which also transposed Directive 2004/101/EC (the Linking Directive)[11], implements such a national inventory system by making provisions that relate to the collection of data required for preparing the national inventory.

The Inventory Regulations accord the Secretary of State the power to request information for the purpose of preparing the emissions inventory. A request under regulation 10 of the Inventory Regulations can be made of any person and is made by serving a notice. The notice must specify the information required (which can include any information which it is reasonable to require the person to compile) and the timescale for providing the information.

Regulation 11 set out a power of entry and enables the Secretary of State to authorise persons to inspect premises to obtain information to prepare the inventory or verify information provided for the purpose of preparing the national inventory.

Under regulation 13 of the Inventory Regulations the failure to comply with a notice requesting information (or the provision of false or misleading information) is punished as a criminal offence.

Territorial extent:

Policy responsibility for the EU ETS and the National Emissions Inventory lies with DECC (although policy for aviation emissions is shared with the Department for Transport (DfT)), together with the Northern Ireland Executive, the Scottish Government, and the Welsh Government. References to the Government in this document also cover the Devolved Administrations. The draft Regulations that were the subject of this consultation will apply in England, Northern Ireland, Scotland and Wales.

Objectives and scope of the consultation

The purpose of the consultation was to seek views on the draft Statutory Instrument “The Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013 (the ‘2013 Regulations’)” which will amend the 2012 Regulations and the Inventory Regulations to:

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[8] Regulation 389/2013 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:122:0001:0059:EN:PDF
[9] Decision 280/2004/EC http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004D0280:EN:NOT
[10] SI 2005/2903 http://www.legislation.gov.uk/uksi/2005/2903/introduction/made
[11] Directive 2004/101/EC http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:338:0018:0018:EN:PDF

- Clarify the level of civil penalty to be imposed on operators carrying out unauthorised EU ETS activities and the discretion available to regulators to waive or reduce such penalty;
- Bring the penalty applicable as a result of under-reporting EU ETS emissions prior to 2013 into line with the penalty from 2013 where a penalty notice has not yet been issued, enabling regulators to impose a lower level of civil penalty, or even waive a penalty entirely, where operators self-report and surrender the requisite number of allowances;
- Clarify that regulators have power of discretion in relation to other EU ETS penalties and bring them in line with the system introduced in Phase III;
- Implement the EU's Registries Regulation 2013; and
- Replace the National Emissions Inventory's system of criminal sanctions with a civil penalty scheme and remove the associated power of entry.

We also took the opportunity to carry out some minor corrections required to the 2012 Regulations, including typographical errors and erroneous references. We did not specifically consult on these mechanical changes as they have no impact on the policy.

About the consultation

This document is the Government response to the public consultation "Amendments to UK greenhouse gas emissions trading scheme and national emissions inventory regulations: a public consultation" (URN 13D/198)[12]. On 8 August 2013 we published the consultation document containing the details of our proposals with the draft Statutory Instrument.

The consultation sought views on all aspects of our proposals. The consultation closed on 19 September 2013. In total we received 31 responses from a variety of organisations.

We would like to thank all those who responded.

We have carefully considered all the views expressed and have reviewed the policy accordingly. This document sets out the Government's position on the key issues highlighted through the consultation process.

Format of this response

This document does not attempt to respond individually to every comment received during the consultation period but responds to significant issues that respondents raised. However, all points raised during the consultation have been taken into account when considering whether changes to the policy were required. Section 2 and 3 of this document contains the summary of responses to each of the questions asked in the consultation document.

Next steps

Taking these responses into account we have decided to lay the legislation before the Houses of Parliament. The Regulations will come into force at the end of January 2013.

Contact details

If you have any questions regarding this response please contact:

EU ETS Team

[12] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/226910/EU_ETS_amend_regs_-_condoc_130808.pdf

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2. Summary of responses on amendments to 2012 Regulations and Government responses to these

Penalty for carrying out an unauthorised activity

Consultation Question	
1.	**Do you agree that the proposed amendments to Regulation 52: a) provide for a default civil penalty equal to the economic benefit gained from operating without a permit, with an additional percentage determined through Ministerial Direction; and b) make it clear that regulators are able to exercise discretion to waive or reduce penalties where they consider it appropriate to do so?**

Summary of responses

There was broad support for the proposal to increase flexibility in the application of the civil penalty for carrying out an unauthorised activity set out in regulation 52. The majority of consultees agreed with the proposal to provide regulators with power to reduce or waive the penalty below the amount of any economic benefit gained as a result of operating without a permit, or increase the penalty above such benefit. Overall, the proposed system was seen as fairer, clearer and more proportionate, able to strike the right balance between creating an incentive to comply and avoiding flat penalties that fail to take into account the underlying circumstances.

A number of issues were raised in relation to the application of the penalty. Concerns were raised on how the economic benefits from operating without a permit will be measured, and about the lack of a clear criterion to establish how the extra percentage determined through Ministerial Direction will be added. It was suggested the Government should make provisions to ensure discretion is consistent and the same penalty applies to similar cases. One consultee suggested that the regulators' power to reduce or waive the penalty should be limited to one time per operator to ensure the penalty maintains its deterrent effect.

A small number of consultees contested the proposal under question 1 as they did not agree that the regulators' powers to waive or reduce the penalty for failure to surrender allowances or failure to report emissions should be extended.

Government Responses

This response provides an opportunity for the Government to reiterate and clarify that the proposal under Question 1 is only related to the **penalty for operating without a permit. That is, that this penalty applies when an operator that falls under the scope of the ETS Directive fails to obtain a GHG permit prior to the start of operation and that it does not relate to the under-surrender of allowances.** As such, this proposal does not enable regulators to reduce or waive the excess emissions penalty (€100 tCO_2) for failure to surrender allowances, nor does it extend existing powers to waive or reduce the penalty for failure to report emissions and the penalty that result from under-reporting emissions, which are covered in more detail in the Government response to questions 2 and 3.

The Government believes these amendments are sufficient to ensure a fair, consistent and effective application of the penalty in regulation 52, and as such no extra measures are required.

In February 2013, the Secretary of State issued a Ministerial Direction[1] to instruct regulators on how the penalty for operating without a permit should be calculated. The Direction already includes a transparent methodology for estimating the economic benefits from operating without a permit. Regulators are also required to apply a 5% increase to ensure the penalty is above such benefits and the desired deterrent effect is produced. In addition, the regulators have policies on enforcement and sanctions to ensure a consistent approach. It is the Government view that these measures are sufficient. Equally, the 2012 Regulations already establish a system of remedies to ensure operators can appeal against any penalty decision from the regulator if they believe the use of discretion is unfair. The Government therefore believes this system is effective in achieving such a purpose and no extra provisions are required.

It is also the Government's view that the current powers of discretion do not undermine the deterrent effect of the penalty system. Regulators should be able to assess non-compliance on a case by case basis, including the role of discretion in cases of repeated non-compliance.

Penalties for under-reporting emissions prior to 2013

Consultation Question	
2.	**Do you agree with our proposed approach to extend the €20 tCO_2 penalty regime already in place for Phase III to operators that self-rectify under-reporting of emissions in previous years, and that the regulations as drafted give legal effect to it?**

Summary of responses

Of the responses to question 2 received, the majority of respondents supported the proposal to align Phase II and Phase III penalties. The €100 tCO_2 penalty was seen as disproportionate in cases of self-rectification, consultees agreed a more proportionate approach to cases of under-reporting emissions needed to be considered in relation to Phase II. The proposed approach was seen to be a key driver in developing an open and honest relationship between operators and regulators, and encouraging greater compliance. It was however suggested that regulation 51(2) in the 2012 Regulations should be removed to ensure the proposed amendment is effective and regulators are accorded the power to reduce or waive the €20 tCO_2 applicable in cases of under-reporting emissions prior to 2013. It was also suggested the Government should clarify whether the aim of this amendment is to review all historical cases, including cases whereby penalties have already been applied.

Several issues were raised in relation to the application of the penalty. There were concerns (also raised under question 3) about the definition of reportable emissions. It was suggested this definition is not consistent with the ETS Directive, making operators liable for a penalty even when they surrender against verified emissions. There was concern about the materiality threshold not being taken into account in this amendment, particularly in relation to the surrender of allowances.

A few consultees objected to the proposal to extend the discretionary €20 tCO_2 penalty to pre-2013 cases, particularly in relation to aviation. It was suggested that, following the recent "Stop the Clock" decision, regulators should not have the power to reduce or waive penalties, particularly in relation to cases whereby aviation operators deliberately refuse to comply; increasing discretion would further undermine the effectiveness of the scheme; and

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/80705/penalties_n.pdf

discrimination between operators of intra and extra-EU flights would be exacerbated. One consultee suggested the full €100 tCO_2 penalty should always apply. It was suggested that the possibility to benefit from a lower penalty would induce operators to deliberately leave reportable emissions out of their reporting obligation, shifting the onus on to the regulator, who will be required to investigate and discover frauds.

Government responses

We welcome the support for this proposal and take this opportunity to clarify that it is the Government's intention to **harmonise the enforcement of Phase II penalties that have not been issued yet with the enforcement of Phase III. The proposed regulations do not accord EU ETS regulators the power to re-open pre-2013 cases whereby penalties have already been issued**. We also take this opportunity to clarify that regulation 51(2) does not prevent regulators from waiving or reducing the €20 tCO_2 applicable as a result of under-reporting emissions, this provision only prevent regulators from exercising discretion over the "excess emission penalty" (€100 tCO_2) set out in the EU ETS Directive. With respect to the €20 tCO_2 penalty, it is clearly envisaged in the proposed regulation 4(5) that operators that have not already been sent a penalty notice, and that self-report a shortfall in the verified emissions report and surrender the required amount of allowances, are not liable for the €100 tCO_2 penalty, the penalty being the reduced €20 tCO_2 instead. This sanction is subject to full discretion in the same way as any other penalty in the 2012 Regulations. There continues to be no discretion in respect of the €100 tCO_2 excess emission penalty. It is the Government's view that the regulations are clear and the provision in regulation 51(2) should not be removed.

With regard to the definition of "reportable emissions", the Government has already expressed its view on this particular problem in the Summary of Responses and Government Responses to consultation on transposition of the EU Directive 2009/29/EC[2]. It is still our view that this is the appropriate definition given the underlying aims of the Directive, which is to ensure that all relevant emissions of greenhouse gases are monitored and reported, and accounted for by means of the surrender of allowances. The overriding aim must be to produce a verified report of "total emissions", as required by Article 12 of the Directive. Thus we believe the application of a penalty to cases where there is a shortfall in reportable emissions is in line with the objective of the EU ETS Directive. Emissions are also required to be monitored and reported in accordance with the Monitoring and Reporting Regulation and the Verification Regulation (and similar requirements apply in respect of aviation emissions). Since the Verification Regulation covers materiality levels and, as an EU Regulation, is directly applicable, this therefore does not need to be specifically referred to in the amendment to the penalty applicable in cases of under-reporting emissions prior to 2013.

We believe that a more proportionate approach to under-reporting of aviation emissions prior to 2013 will neither undermine the effectiveness of the EU ETS, nor lead to under-reporting. The reduced €20 tCO_2 penalty is already envisaged in the 2012 Regulations, and fully applies to both incumbent installations and aircraft operator that fail to comply with Phase III obligations. With the same penalty only being extended to pre-2013, it is the Government view that this amendment will not reduce the effectiveness of the aviation EU ETS. In the Government responses to the consultation on the transposition of the EU Directive 2009/29/EC, we made clear that, under this more flexible regime, regulators are still required to enforce strict penalties when it is appropriate to do so. This amendment will not allow any serious case of non-compliance to go un-punished. As far as the limited scope of this amendment is concerned (non-

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205214/7185-consultation-response-to-eu-ets-transposition.pdf

compliance prior to 2013), operators will still have the incentive to produce comprehensive reports, ensuring all reportable emissions are captured accordingly. If they do not, and the regulator discovers emissions are under-reported first, the regulator is still required to enforce the fixed €100 tCO_2 penalty set out in the ETS Directive, and no discretion is granted. The discretionary €20 tCO_2 penalty only applies in a narrow window of cases where the operator takes the initiative to alert the regulator and corrects the shortfall before the regulator issues a penalty notice. In the absence of this specific requirement, as well as in all the remaining cases of failure to surrender allowances, the automatic, non-discretionary excess emissions penalty in the ETS Directive still apply.

Penalty for breaches of the 2005 and Aviation Regulations

Consultation Question	
3.	**Does the proposed drafting clarify that Regulators have the powers to reduce and waive civil penalties for breaches of the 2005 and Aviation Regulations in Phase III?**

Summary of responses

The majority of consultees supported the proposal to extend powers of discretion to civil penalties for breaches of the 2005 and Aviation Regulations. The drafting was deemed appropriate to clarify that regulators have powers to waive or reduce such penalties. It was however pointed out that powers of discretion could undermine the effectiveness of these penalties, and it was suggested the possibility to waive or reduce penalties should be limited to one time only per operator.

Several issues were raised in relation to the application of the penalty applicable to cases of under-reporting emissions (also raised in relation to question 2). In addition, it was pointed out that this amendment does not address the situation whereby operators have to deliberately under-report emissions to offset emissions that were reported in excess in a previous year. It was suggested operators will be liable for under-reporting emissions even though they have reported the correct amount of emissions overall.

Government responses

The Government welcomes the general support for the intention to clarify that regulators have power of discretion in relation to penalties for breaches of the 2005 and Aviation Regulations. As already covered under the Government response to Question 1, we believe powers of discretion should not be limited to one time only per operator.

We note that one response raised a number of concerns around the definition of annual reportable emissions, the materiality threshold and other issues that are not relevant to this amendment. The Government is taking this opportunity to clarify that the proposal referred to in Question 3 aims to extend regulators' power to reduce and waive other EU ETS penalties that are un-related to the penalty applicable to cases of under-reporting emissions. Equally, these penalties are not intended to address cases whereby reported emissions are higher than actual emissions and the operator surrenders too many allowances. For clarity, the correct procedure in cases where the operator realises it has over reported emissions, and over-surrendered allowances, is to contact the regulator, who has the power to determine the operator's reportable emissions and correct the error. Next year emissions therefore shouldn't be under-reported.

3. Summary of responses on amendments to Inventory Regulations and Government responses to these

Powers of entry and inspection

Consultation Question	
4.	**Do you agree that the powers of entry and inspection are unnecessary and that removing such powers will help to reduce the regulatory burden on businesses?**

Summary of responses

Of the responses to question 4 received, almost all consultees supported the proposal to repeal the Secretary of State's powers of entry and inspection, which were largely deemed burdensome and unnecessary. Consultees saw the Secretary of State's power to request the provision of inventory data as sufficient to ensure effective collection of such data, though some pointed out that the removal of powers of entry and inspections would not ease the regulatory burden of businesses as they have rarely been used.

Government responses

We welcome the general support for the proposal to simplify inventory legislation as part of the Government's deregulatory agenda under the Red Tape Challenge. We acknowledge these powers have not been used often. However, it is the Government's view that they should be removed as they create unnecessary uncertainty for businesses. We understand there are concerns around the possibility of entering and inspecting a business premise and the potential burden associated with this. We believe the removal of these powers will create the right balance between the Government's need to comply with its reporting obligation under the UNFCCC and businesses' need for clarity and certainty.

Penalties

Consultation Question	
5.	**Do you agree with our proposed approach to removing criminal penalties and establishing a regime comprising of civil penalties only?**

Summary of responses

Of the responses to question 5 received there was overall support for the proposal to move away from criminal penalties for breaches of inventory legislation. A system based on civil penalties only was seen as a more proportionate and effective approach, while criminal penalties were seen as burdensome. However, concerns were raised on the level of the civil penalty. One response suggested a fixed £1,000 penalty for providing false or misleading information was too high, and should be reduced. Another response suggested the Secretary of State should be given the power to increase this penalty in case of repeated non-compliance. One response suggested there should be no penalty at all.

One consultee objected to the proposal on the incorrect understanding that it was intended to remove EU ETS criminal penalties. It was suggested criminal penalties should be retained to limit frauds in the carbon market.

Government Responses

The Government welcomes the views expressed in response to this question, and takes this opportunity to clarify that the amendment under question 5 proposes to repeal criminal penalties related to the provision of national inventory information. We are not seeking views on the replacement of EU ETS criminal penalties, the Government has already consulted on this as part of the broader consultation on the 2012 Regulations.

With respect to inventory penalties, the Government welcomes the general support for this proposal to introduce a new system of sanctions based on civil penalties only. Similar powers and equivalent penalties are already provided in relation to EU ETS Phase III, as set out in the 2012 Regulations. We intend to keep inventory penalties, including the fixed £1,000 penalty for providing false or misleading information, consistent with those set out in the 2012 Regulations, so as to provide greater clarity and certainty for businesses. Equally, it is the Government view that these powers and related sanctions are adequate, already providing a strong signal to discourage businesses and individuals from non-compliance. Ultimately, a penalty system is required to ensure the Government can comply with its reporting obligation under the UNFCCC, the Kyoto Protocol and national emissions target. A legal power is therefore necessary to ensure inventory data can be collected when needed.

The First-tier Tribunal (FtT)

Consultation Question	
6.	**Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions to issue a civil penalty for failure to provide inventory information?**
7.	**Do you consider that the General Regulatory Chamber Rules of the First-tier Tribunal will suit the handling of these appeals against decisions by the Secretary of State? If not, why not?** **(The General Regulatory Chamber Rules may be found at:** **http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm)**

Summary of Responses

The large majority of responses to question 6 and 7 agreed with the proposal. The First-tier Tribunal was seen as the appropriate body to hear appeals, and General Regulatory Chamber Rules were considered adequate for such a purpose. One response however pointed out the FtT and the General Regulatory Chamber Rules would introduce a burdensome procedure for operators.

Government Reponses

The Government welcomes the broad support for this proposal. It is the Government view that this proposal will ensure sanctioned entities will benefit from a simplified and less burdensome procedure in line with the principles of the Macrory report, which suggested the use of the FtT tribunal as a more proportionate and effective way to address non-compliance with

environmental and climate legislation. The Government also believes the proposal will create greater clarity as the same body (FtT) already hears similar appeals with respect to the EU ETS.

Annex 1 – List of respondents

Atlanta Air

Aviation Environment Federation

Basildon and Thurrock University Hospital NHS Foundation Trust

British Glass Manufacturers' Confederation

CEMEX UK Ltd

Climenomics Ltd

Confederation of UK Coal Producers

Confederation of Paper Industries

DNV Certification Ltd

EDF Energy

EEF and UK Steel

European Low Fares Airline Association

Heathrow Airport Ltd

Kellogg's

Marathon Oil UK LLC

Mahendra Research foundation, Mahendra Arts & Science College

Other respondents[15]

Pennine Acute Hospitals NHS Trust

Petroineos Refining and Trading

Planet & Prosperity Ltd

RWE npower

Sahaviriya Steel Industries, SSI UK

Salvo Llp

Sandbag

The Energy Consortium

The Scotch Whiskey Association

The Society of Motor Manufacturer and Traders Ltd

UK Petroleum Industry Association

University of Oxford

[15] An international airline, a risk management firm and a trade body who have requested their responses remain confidential.

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