



Transposition of EU Directive 2009/29/EC revising EU Directive 2003/87/EC : a public consultation

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The consultation and Impact Assessment can be found on DECC's website:
http://www.decc.gov.uk/en/content/cms/consultations/trans_eu_dir/trans_eu_dir.aspx

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1. General Information

Purpose of this consultation

This consultation seeks views on the proposed revision and recasting of the existing UK regulations implementing the EU greenhouse gas Emissions Trading System (EU ETS) in the UK. The new regulations will take effect from January 2013, the start of Phase III of the EU ETS.

Territorial Extent

Policy responsibility for emissions trading lies with the Department of Energy and Climate Change (DECC) (although policy for aviation emissions trading is shared between the Department for Transport (DfT) and DECC), together with the Northern Ireland Executive, the Scottish Government, and the Welsh Government. References to the Government in this consultation document also cover the Devolved Administrations. The draft regulations that are the subject of this consultation will apply in England, Northern Ireland, Scotland and Wales.

The regulator function for the EU ETS in England and Wales is currently performed by the Environment Agency. However, from late summer 2012 the intention is to establish a new Single Environmental Body in Wales. Accordingly, there will be a transfer of regulator powers for implementation of the EU ETS in Wales from the Environment Agency to the new Single Environmental Body from April 2013. Therefore, the regulations presented in this consultation may need to be updated. DECC is working closely with the Welsh Government to ensure any necessary changes to the regulations are minimised.

Who will this consultation be of interest to?

This consultation will be of particular interest to existing EU ETS participants, operators of installations that will fall within the scope of the EU ETS from 1 January 2013 and operators of small installations and hospitals that qualify for opting out of the EU ETS in Phase III under Article 27 of the revised ETS Directive (see section 3). This consultation is not limited to these stakeholders; any organisation or individual is welcome to respond.

How to respond

We encourage you to frame your reply in direct response to the questions posed using the response form provided. However, further comments and evidence are also welcome.

The consultation period will be between **8 May 2012** and **31 July 2012**. Any responses received after the closing date may not be considered. Please send completed forms by email to the DECC EU ETS team at the following address: euets.consultation@decc.gsi.gov.uk

The reference for this consultation is: URN 12D/069 – Transposition of EU Directive 2009/29/EC revising EU Directive 2003/87/EC : a public consultation

We are also happy to receive responses by post to the following address:

EU ETS Team
Department of Energy & Climate Change
Area 1A
3 Whitehall Place
London, SW1A 2AW

For consultees in Northern Ireland, Scotland and Wales please could you copy your response to:

For Northern Ireland

By email: chris.mcwilliams@doeni.gov.uk

By post: Christopher McWilliams
Environmental Policy Division
Department of the Environment
6th Floor, Goodwood House
44 - 48 May Street
Belfast BT1 4NN

For Scotland

By email: euets@scotland.gsi.gov.uk

By post: Climate Change Division
Scottish Government
1G Dockside
Victoria Quay
Edinburgh, EH6 6QQ

For Wales

By email: climate-change@Wales.gsi.gov.uk

By post: Climate Change Branch
Sustainability, Energy and Climate Change
Welsh Government
Cathays Park
Cardiff, CF10 3NQ

Additional copies

You may make copies of this document without seeking permission. An electronic version can be found at

http://www.decc.gov.uk/en/content/cms/consultations/trans_eu_dir/trans_eu_dir.aspx

Other versions of the document in Braille, large print or audio-cassette are available on request. Versions written in Welsh can also be made available. Please contact the DECC EU ETS team using the above details to request alternative versions.

Confidentiality and data protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Freedom of Information (Scotland) Act 2002, the Data Protection Act 1998 and the Environmental Information Regulations 2004).

If you want information that you provide to be treated as confidential please say so clearly in writing when you send your response to the consultation. It would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded by us as a confidentiality request.

We will summarise all responses and place this summary on our website at www.decc.gov.uk/en/content/cms/consultations/. This summary will include a list of names or organisations that responded but not people's personal names, addresses or other contact details.

Quality assurance

This consultation has been carried out in accordance with the Government's Code of Practice on consultation, which can be found here: <http://www.bis.gov.uk/files/file47158.pdf>

If you have any complaints about the consultation process (as opposed to comments about the issues which are the subject of the consultation) please address them to:

DECC Consultation Co-ordinator
3 Whitehall Place
London SW1A 2AW
Email: consultation.coordinator@decc.gsi.gov.uk

Post consultation process

The following table sets out an indicative timetable for finalisation of the regulations.

Timing	Activity
8 May – 31 July 2012	Consultation period
July 2012-October 2012	Consultation responses analysed and Government response published Legislation and Impact Assessment amended and finalised
November 2012	Regulations laid before Parliament
1 January 2013	Statutory Instrument enters into force

2. Introduction

The European Union Emissions Trading System (EU ETS)

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

The establishment of the EU Emissions Trading System (EU ETS) in 2005 was a major milestone in the global effort to tackle climate change. It was one of the key policies introduced by the European Union to help meet the EU's greenhouse gas emissions reduction target of 8% below 1990 levels under the Kyoto Protocol. It works on a 'cap and trade' basis, so there is a cap on all the emissions covered by the EU ETS.

The rationale behind emissions 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. More abatement will be undertaken by operators with lower abatement costs, therefore reducing the overall costs of meeting the emissions target (or cap) set by the trading system. The EU ETS currently (i.e. in Phase II) covers heavy emitting industries, such as electricity generation, iron and steel, mineral processing industries (e.g. cement manufacture), and pulp and paper processing industries.

All operators under the existing EU ETS must monitor and report their emissions. At the end of each year they are required to surrender allowances to account for their actual emissions. One tonne of carbon dioxide equivalent is equal to one EU allowance (EUA). In Phase II all operators receive a free allocation of allowances. They may surrender all or part of their free allocation to cover their emissions, and have the flexibility to buy additional allowances or to sell any surplus allowances generated from reducing their emissions below their allocation.

The revised ETS Directive and Phase III of the EU ETS

Phase I of the EU ETS ran from 2005-2007, and we are currently in the final year of Phase II (2008-2012).

In December 2008 the 2020 Climate and Energy Package was agreed by the European Council and the European Parliament which included revisions to the ETS Directive that made provision for a third phase, running from 2013 to 2020. As a result, the ETS Directive was revised by Directive 2009/29/EC (the 'revised ETS Directive')², which was agreed in December 2008 and adopted in April 2009. The revised ETS Directive introduces significant modifications to the EU ETS from Phase III so that it makes a more efficient and greater contribution to tackling climate change, and creates more predictable market conditions and improved certainty for industry.

The revised ETS Directive accommodates the introduction of a centralised, EU-wide cap on emissions for Phase III, which will decline over time, delivering an overall reduction of 21% below 2005 verified emissions by 2020. It also includes provisions for the introduction of new sectors and gases, and harmonised rules on free allocation with a move toward greater

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>

auctioning of allowances. These rules are designed to ensure a more consistent approach to implementation of the EU ETS across the EU in Phase III.

In 2008 the European Parliament also voted in favour of including aviation emissions in the EU ETS from 2012. The modalities for inclusion of aviation in the EU ETS are set out in Directive 2008/101/EC (the 'Aviation Directive')³.

Implementation of the EU ETS in the UK

The legal powers for regulating the EU ETS in the UK are currently set out in the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/925 – the '2005 GHG Regulations')⁴ and subsequent amendments. The Aviation Directive is implemented in the UK via the 2010 Aviation Greenhouse Gas Emissions Trading Scheme Regulations (the 'Aviation Regulations')⁵ as amended. A complete list of the relevant regulations is attached at Annex 2. Together, these regulations establish the legislative framework for implementation of the EU ETS in the UK.

The UK now needs to update this framework in order to ensure the UK has the legislation in place to give force to the new provisions set out in the revised ETS Directive that will take effect from January 2013. The revised ETS Directive is implemented in part by a number of EU level decisions and regulations (Annex 3) which apply directly to Member States. However, some national level legislative provision is needed to ensure EU legislation has the desired legal effect domestically.

We are seeking to use this opportunity to simplify the UK's legislative framework for the EU ETS. Our aim is to reduce the complexity and regulatory burden of the current framework, which currently comprises 13 sets of regulations (as set out in Annex 2), for EU ETS participants and regulators. We want to ensure where possible a much simpler legal landscape, which avoids duplication and enables as much harmonisation of the treatment of stationary and aircraft operators as is possible, consistent with the broader integration of aviation into the EU ETS. We have therefore taken account of feedback gathered as part of the Red Tape Challenge Environment theme, discussion with scheme participants via the UK Emissions Trading Group and discussions with the Devolved Administrations and regulators.

As such, the UK is now preparing to lay before the UK Parliament in the Autumn, a single consolidated Statutory Instrument. A draft version of the Statutory Instrument accompanies this consultation document at Appendix 1. Any provisions that are no longer required for Phase III will be repealed. We are therefore proposing that this new Statutory Instrument combines the provisions currently set out in the 2005 GHG and Aviation Regulations as amended. This will remove considerable regulatory duplication as the EU ETS regimes for aircraft and stationary operators rely on many shared provisions, such as those regulations relating to notices, applications, appeals and penalties. Additionally, as a result of a review of the 2005 GHG Regulations we have identified a number of areas for regulatory simplification where the UK has discretion, including changes to the penalty regime in the UK and the appeals system in England and Wales.

³ Directive 2008/101/EC <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:008:0003:0003:EN:PDF>

⁴ SI 2005/925 <http://www.legislation.gov.uk/ukSI/2005/925/contents/made>

⁵ SI 2010/1996 <http://www.legislation.gov.uk/ukSI/2010/1996/contents/made>

Objectives of the consultation

The purpose of this consultation is to seek views on the draft Statutory Instrument which will replace the 2005 GHG Regulations. We do not ask for specific comments about every aspect of the draft 2012 GHG Regulations, but instead have focussed the consultation questions on those areas where we are changing the UK's implementation. As such, the consultation does not cover those parts of the 2005 GHG Regulations that we are proposing to retain in the new Statutory Instrument and which have not materially changed; these areas will have been included in previous consultation exercises. This includes specific regulatory provisions for aircraft operators which have already been subject to consultation as part of the second stage transposition of EU Directive 2008/101/EC to include aviation in the EU ETS⁶. Similarly, the consultation does not cover those areas of the revised ETS Directive that we are copying out directly.

We welcome any comments on the entirety of the Statutory Instrument and in particular, on whether the draft 2012 GHG Regulations:

- facilitate the effective implementation of the EU ETS in the UK in line with Government's legal requirements under EU law;
- successfully avoid placing unnecessary burdens on operators, regulators and Government;
- reflect the best available evidence on the costs and benefits of the UK's proposed policy changes to the EU ETS penalties regime in the UK and the appeals system in England and Wales;
- simplify the existing regulations or could be further simplified.

In addition to this general request, we are asking specific questions about those areas where we have made changes:

Broad structural changes to simplify the UK regulations that implement the EU ETS

This consultation seeks views on proposals to streamline the EU ETS regulations by consolidating 13 sets of existing regulations, including the 2005 GHG Regulations and Aviation Regulations, into one single Statutory Instrument in the UK. This will bring together the requirements for aircraft and stationary operators to reduce regulatory duplication, and repeal a number of existing regulations. Further proposals for simplifying the structure of the 2005 GHG Regulations are proposed which aim to remove unnecessary technical detail from the main body of the regulations.

General legislative provisions to ensure EU legislation has the desired legal effect in the UK

In revising the 2005 GHG Regulations we have sought to 'copy-out' the requirements set out in the revised ETS Directive and associated EU Decisions and Regulations. However, there are instances where we have needed to elaborate on EU legislation to ensure the EU ETS has practical and legal effect in the UK. For example, where there is insufficient detail in the revised

⁶http://webarchive.nationalarchives.gov.uk/20110508074721/http://www.decc.gov.uk/en/content/cms/consultations/euets_aviation/euets_aviation.aspx

ETS Directive to enable UK regulators to administer the EU ETS. This consultation seeks views on the legislative provisions we are proposing to introduce, where necessary to give legal effect to EU ETS legislation domestically. These proposals are largely technical – we are not aiming to alter the original policy intent of European legislation. Wherever possible we are proposing changes that will minimise the administrative burden on operators, for example in terms of the nature of the GHG permit application process.

Small Emitter and Hospital Agreements Scheme

Article 27 of the ETS Directive contains provisions for Member States to choose to opt small emitters (with annual GHG emissions less than 25,000tCO₂ and, where the installation undertakes combustion activities, thermal input below 35MW) and hospitals out of the EU ETS in Phase III. The UK is seeking to take advantage of this option in order to reduce the burden of the EU ETS on eligible installations, consistent with the Government's broader agenda on better regulation. Government has consulted on the policy approach separately, both formally in 2010⁷ and informally in 2011⁸. This consultation seeks views on whether the legislative provisions relating to so called 'excluded installations' set out in the draft Statutory Instrument give legal effect to the UK's *Opt-Out Agreements Scheme*⁹.

Please note the provisions in the Statutory Instrument relating to excluded installations may need to be adjusted pending the outcome of the Commission's assessment of the UK's Opt-Out Agreements Scheme. We currently do not anticipate that this will result in significant changes to the proposed regulations.

The penalty regime for the UK and appeals system for England and Wales

The revised ETS Directive requires Member States to put in place a system of penalties for non-compliance with the national provisions adopted to implement the Directive; the nature of the penalties is largely left to Member State discretion. In line with the European Convention on Human Rights we must also provide a system to enable appeals against the decisions of the competent authority.

As part of the review of the 2005 GHG Regulations, Government has fully impact tested options for penalties and appeals to ensure measures are targeted, proportionate and effective. The consultation document should be considered in conjunction with the Impact Assessment at Appendix 2.

Penalties

Based on this analysis, we are proposing to change the UK's policy on penalties by moving from a mixture of criminal and civil penalties to a civil penalty regime. In doing so we aim: to improve the proportionality of the penalties imposed on operators; to encourage greater compliance (and hence lessen operator exposure to penalties) by enhancing regulator discretion over the issuance of penalties and the levels imposed; to encourage alignment between stationary and aircraft operators; and to ensure penalties are sufficiently dissuasive in order to retain current high levels of compliance in the UK.

⁷ http://www.decc.gov.uk/assets/decc/Consultations/jan2010euets/1_20100115161832_e_@@_JointConsultationDocument.pdf

⁸ <http://www.decc.gov.uk/media/viewfile.ashx?filetype=4&filepath=11/cutting-emissions/eu-ets/3254-draft-uk-policy-opt-out-small-emitters.pdf&minwidth=true>

⁹ <http://www.decc.gov.uk/assets/decc/11/cutting-emissions/eu-ets/3895-the-uks-policy-proposal-for-a-small-emitter-and-h.pdf>

Appeals

We are also proposing to change the appeals system for England and Wales by moving from the current system where appeals are heard by the Secretary of State or Welsh Ministers or an appointed representative, to an approach where appeals are heard by the First-tier Tribunal. Our intention is to achieve a more independent, clear and efficient appeals process which should reduce the cost and time burdens for both operators and regulators.

This consultation seeks general feedback on these proposed policy changes.

3. The new regulations

Introduction

The following sections present and seek feedback on our proposals for improving the existing UK regulatory framework for the EU ETS and are divided into two elements. The first section (questions 1 to 4) deals with **general proposals for structural changes to simplify EU ETS regulation in the UK**, including the introduction of a single, consolidated Statutory Instrument: the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the ‘draft 2012 GHG Regulations’).

The subsequent sections (questions 4 to 30) present more **detailed proposals in the draft 2012 GHG Regulations** comprising provisions that elaborate on EU legislation to ensure it has legal effect domestically, represent changes compared to the 2005 GHG Regulations or accommodate new policy where we have discretion. These proposals are presented in the order in which they appear in the draft 2012 GHG Regulations. You should therefore refer to the draft 2012 GHG Regulations in Appendix 1 when working through this consultation document. For your assistance, a summary of the references to key EU and UK legislation is provided in the transposition table at Appendix 3.

The draft 2012 GHG Regulations will for the first time bring together the regulatory provisions for four types of EU ETS operator:

- Operators of stationary installations (other than offshore installations)
- Aircraft operators
- Operators of excluded installations (i.e. where eligibility for exclusion has been approved by the European Commission)
- Operators of offshore installations

In some cases the same regulatory requirements will apply to all or some of these operators and in other cases, specific regulations will apply. Table 1 summarises where the draft 2012 GHG Regulations contain provisions for each category of EU ETS operator.

Category of operator	Part											Schedule											
	1	2	3	4	5	6	7	8	9	10	11	1	2	3	4	5	6	7	8	9	10	11	12
Stationary installations	X	X		X	X	X	X	X	X	X	X	X	X	X	X		X					X	X
Aircraft operators	X		X	X	X	X	X	X	X	X	X	X	X	X				X	X	X	X	X	X
Excluded installations	X	X			X	X	X	X	X	X	X	X	X	X	X	X						X	X
Offshore installations	X	X		X	X	X	X	X	X	X	X	X	X	X	X		X						

Table 1. Overview of the parts of the draft 2012 GHG Regulations that apply to stationary, aircraft operators, and operators of excluded installations. Please note this does not distinguish between incumbents and new entrants.

Broad structural changes to simplify EU ETS regulation in the UK

The draft 2012 GHG Regulations consolidate all of the existing amendments to the 2005 GHG Regulations and the Aviation Regulations and brings these Regulations together to form one Statutory Instrument. In many instances, such as for applications, appeals and penalties, the same regulatory provisions will apply to both aircraft and stationary operators. In other cases, such as greenhouse gas emissions permits or aviation emissions plans, specific provisions are needed and these are presented in Parts 2 and 3 for stationary and aircraft operators respectively. An overview is provided in Table 1 above.

In addition, whilst we have retained many of the duties and powers in the main body of the Regulations, we have moved some of the detailed mechanics associated with implementing the EU ETS to Schedules in order to make the Regulations easier to access and navigate. For example, the processes for the serving of notices by the regulator which was in regulation 4 of the 2005 GHG Regulations is now available in Schedule 2 of the 2012 GHG Regulations.

Consultation Question

- | | |
|-----------|--|
| 1. | Do you agree that consolidation of the existing regulations, which brings together provisions for stationary and aircraft operators, will help to simplify the regulations and reduce duplication? Do you have other suggestions for simplifying the regulations? |
| 2. | Do you agree that the removal of the detailed mechanics of implementation from the main body of the regulations will make the regulations more accessible? |

In line with the recommendations of the Penfold review¹⁰ (which aims to set clear timescales for determining applications) we propose standardising, where possible, the timeframes in which the regulator must respond to an operator. For the majority of cases this will be within a two month period. This should provide greater certainty for regulators and industry.

Consultation Question

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| 3. | Is standardisation of the timescales for regulators in this manner beneficial? Do you have other suggestions for improving certainty and reducing administrative burdens associated with EU ETS procedures, for regulators and industry? |
|-----------|---|

The specific proposals for changes to provisions in the 2005 GHG Regulations set out in this consultation do not cover those areas of the revised ETS Directive that we are copying out directly. Nonetheless, we welcome any views you may have on the draft 2012 GHG Regulations. For example, on the use of copy-out and whether the proposed Regulations deliver in the UK the legal effect intended by the revised ETS Directive and its associated EU Regulations and Decisions, without placing undue burdens on operators and regulators in the UK.

¹⁰ <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/i/11-1413-implementation-of-penfold-review>

Consultation Question

- | | |
|----|---|
| 4. | Do you have any general comments about the proposed approach to transposition of the revised ETS Directive and associated EU legislation, including the way the draft 2012 GHG Regulations are drafted and the approach to copy-out of EU legislation? |
|----|---|

Detailed provisions in the draft 2012 GHG Regulations

Part 1 – General

Background

This Part of the draft 2012 GHG Regulations contains such general items as the interpretation of words and phrases particular to these Regulations, the standard requirements for the serving and handling of notices and applications, and designations. In particular, in this section we have set out a requirement to review the Regulations within 5 years of them coming into force. This is consistent with the requirements of Government's better regulation agenda, to ensure that the policies are retained only if they are still relevant.

Definitions

Regulation 3 sets out the definitions of terms used within these Regulations: note in particular that the definitions of "installation" and "regulated activity" now refer directly to the Directive.

Powers in Northern Ireland

Regulation 7 ensures that the current powers in Northern Ireland concerning the delegation of the powers of the chief inspector, and the giving of directions, are also extended to the chief inspector's functions as regulator under the draft 2012 GHG Regulations.

Designations

The draft 2012 GHG Regulations are required to transpose the ETS Directive into UK law. However, in addition, the Commission has adopted a number of directly-applicable EU Regulations that do not need to be transposed as such. However, some implementing machinery is required, in particular the designation of the UK authorities to perform the role of competent authority for the purposes of those Regulations. **Regulation 8** of this Part makes the required designations.

Consultation Question

- | | |
|----|---|
| 5. | Do you have any comments on the provisions contained in Part 1, such as the definitions or designations? |
|----|---|

Notices and applications

Regulation 5 and **Schedule 2** contain the general arrangements for serving notices, notifications, or directions under these Regulations. This includes how they are to be served, how corporate bodies and partnerships are to be treated, and what the arrangements shall be in cases where a proper address cannot be ascertained.

Regulation 6 and Schedule 3 deal with the general procedures for the submission of applications and reports to the regulator, such as according to the provisions of a greenhouse gas emissions permit or aviation emissions plan. We are proposing that unless otherwise agreed with the regulator, applications and reports must be submitted electronically on a form provided by the regulator, and that where a form is provided by the regulator for submission through a website, the form must be submitted through that site. This is to facilitate the use of ETSWAP by UK regulators in Phase III. ETSWAP is the Environment Agency’s web-based, greenhouse gas emissions planning, reporting and management tool, which will provide for greater efficiency and reduced administrative burden in terms of managing compliance with the EU ETS for both regulators and operators.

Regulation 6 also covers the processes for the determination of applications by the regulator and proposes that applications will be determined within 2 months of the application being received, unless otherwise agreed with the applicant. Consistent with the recommendations of the Penfold Review, the aim here is to provide certainty to operators on the timeframe within which they can expect their applications to be determined by the regulator, to aid business planning.

Consultation Question

- | | |
|-----------|---|
| 6. | Do you have any comments on the way the provisions are drafted relating to the submission and determination of applications and reports? Do these provisions help to reduce administrative burden and aid business planning? |
|-----------|---|

Part 2 – Stationary installations

Background

Part 2 of the draft 2012 GHG Regulations sets out the requirements for all stationary installations that participate in the EU ETS, as well as for excluded installations (Chapter 2 and Schedule 5) that are subject to equivalent measures (as provided for by Article 27 of the ETS Directive). Specifically, it sets out the regulations relating to greenhouse gas emissions permits (GHG permits), which are necessary for an operator to carry out a regulated activity under the EU ETS. Chapter 1 covers the permit application and granting process, and permit content and conditions. It also establishes arrangements for the review, variation, transfer, surrender and revocation of permits.

Chapter 3 of Part 2 establishes the free allocation of allowances for Phase III according to the UK’s submission to the European Commission of National Implementation Measures (NIMs), which lists the number of allowances to be allocated to all EU ETS installations in the UK in Phase III. Further detail on any revisions to that list according to the rules for new entrants, capacity changes and cessations in operation is contained in Schedule 6.

Chapter 4 sets out the specific arrangements relating to offshore installations.

Chapter 1 – Permits (in conjunction with Schedule 4)

Articles 4, 5 and 6 of the ETS Directive set out the basic permitting requirements for the EU ETS, namely that Member States have a duty to ensure that no installation carries out an Annex I activity unless its operator holds a GHG permit; the minimum information to be contained in a permit application; and the conditions for and content of the GHG permit. All other aspects of the GHG permit process are left to Member State discretion.

All technical information relating to the process of managing the permitting regime is contained within **Schedule 4**. This includes detailed information on the content of a permit application and the permit conditions, once granted. Schedule 4 also contains the detail on how a permit may be transferred between operators (including partial transfers). The detailed requirements in relation to the surrender or revocation of a permit, for example where an installation ceases to operate, are also contained within Schedule 4.

Regulation 10 puts a duty on the regulator to grant a GHG permit if the regulator is satisfied that the application is duly made (i.e. that the application has been made in accordance with the Regulations), and, in line with Article 6(1) of the ETS Directive, that the operator will be capable of monitoring and reporting emissions in accordance with the EU Monitoring and Reporting Regulation (MRR)¹¹. Conversely, if the regulator is not satisfied that the application is duly made, or is not satisfied that the operator is capable of monitoring and reporting emissions, the GHG permit may not be granted. The GHG permit may cover more than one installation on the same site, provided they are operated by the same operator.

Regulation 11 (with **Schedule 5**) covers the granting of an excluded installation emissions permit (excluded GHG permit) or conversion of a GHG permit to an excluded GHG permit, for those installations which are excluded from the EU ETS in Phase III but subject to equivalent measures, according to Article 27 of the ETS Directive. Excluded installations must hold an excluded GHG permit to participate in the UK's opt-out scheme as it sets out different provisions, including for example, simplified verification requirements compared to the EU ETS. In particular, the requirement to surrender allowances under the EU ETS is replaced with a requirement to meet an installation-based emissions reduction target (See Chapter 2).

Regulation 12 requires the regulator to review a GHG permit within 5 years of it being granted and at intervals not exceeding 5 years. This is a requirement set out in Article 6 of the revised ETS Directive. It also provides for the regulator to vary a GHG permit and the conditions for doing so.

Regulation 13 provides for GHG permits to be transferred between operators (in whole or in part) where the regulator is satisfied that the application is duly made, and the operator is capable of monitoring and reporting emissions in accordance with the EU MRR. Paragraph 3 of Schedule 4 provides more detail on the GHG permit transfer process, including the content of the application to transfer a GHG permit, specific issues relating to partial transfers, and what the regulator has to do for a transfer to be effected. It also puts a duty on the regulator to notify the registry administrator of the transfer. As the GHG permit for an installation that has ceased operation must be surrendered under **Regulation 14**, the GHG permit of an installation that has ceased operation may not be transferred, either in whole or in part.

Consultation Question

7.	Do you agree with the way these provisions are drafted, including presenting the detailed permitting procedures in Schedules rather than the main body of the regulations?
8.	Do these provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators?

¹¹This is currently subject to European Parliament scrutiny and is expected to come into force later in 2012
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0789:FIN:EN:PDF>

Regulation 14 requires operators of installations that have ceased operation to apply to the regulator to surrender their GHG permit. Currently, this application must be made within one month of the installation ceasing operation. Experience from implementation of Phase II of the EU ETS suggests that the one month deadline in the 2005 GHG Regulations is very tight, and has led in some cases to GHG permits being revoked by the regulator with subsequent appeals by operators. We are seeking to avoid this situation in Phase III by allowing those operators who do need additional time to agree this with the regulator. This should avoid instances of operators having their GHG permits revoked by the regulator as experienced in Phase II.

Paragraph 4 of Schedule 4 provides more detail on the procedures for the surrender of GHG permit, including the content of a surrender report and the requirements for surrendering allowances.

Regulation 15 provides the regulator with the powers to revoke a permit. This may take place, for instance, where an operator has failed to pay the permit subsistence fee; it must take place where the operator has failed to comply with an obligation to surrender a permit (for example, once an installation has ceased operation). It is proposed that the revocation will take effect 28 days after the revocation notice has been served, unless a later date is specified in the revocation notice. **Paragraph 5 of Schedule 4** provides detail on the revocation process, including what must be included in the revocation notice, and the requirements for surrendering allowances.

Consultation Question

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| 9. | Do these provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators? For example, are the timescales for the operator to notify the regulator or for the regulator to respond, appropriate? |
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EU Monitoring and Reporting Regulations: the treatment of biofuels and bioliquids

Schedule 4 of the draft 2012 GHG Regulations sets out the content of a GHG permit including the provisions relating to the monitoring and reporting requirements of the operator with respect to the EU MRR. The requirements of the EU MRR replace those currently in the Commission's Monitoring and Reporting Decision. The EU MRR may also require a change in the way that emissions associated with biofuels and bioliquids are treated under the EU ETS from Phase III.

Currently under the EU ETS, biomass (including biofuels and bioliquids) is considered as CO₂ neutral and an emission factor of 0tCO₂/TJ (or t or Nm³) is applied; there is therefore no requirement to surrender allowances to cover such emissions.

Directive 2009/28/EC on the promotion of the use of energy from renewable sources (the 'Renewable Energy Directive'¹²), distinguishes solid biomass from the bioliquids and biofuels produced from it, and requires Member States to ensure that the sustainability criteria of that Directive apply to those bioliquids and biofuels in certain circumstances. For Phase III of the EU ETS, Article 53 of the EU MRR expressly requires the use of biofuels for aviation to be assessed in accordance those criteria. It follows that the zero emissions factor will only apply to biofuels

¹² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0016:0062:en:PDF>

used in aviation that comply with the sustainability criteria set out in Article 17(2) to (5) of the Renewable Energy Directive. That provision of the EU MRR is directly applicable in UK law, and does not require any further implementation by the UK.

However, recital 2 to the EU MRR goes further, suggesting that the same sustainability criteria are required to be satisfied in all cases where a zero emissions factor is claimed in the case of bioliquids. This would therefore apply to stationary installations (including excluded installations) using bioliquids as well as to aircraft operators. But because this principle is not stated in the operative provisions of the EU MRR in the case of stationary installations, it would require express implementation in UK law.

Whilst the UK supports the broad thrust of the proposal, to avoid the EU ETS becoming a sink for unsustainably sourced bioliquids, it is not clear what the implications are of implementation of the proposal in the UK.

In the UK, the Renewable Energy Directive sustainability criteria for bioliquids are implemented through the Renewables Obligation (RO)¹³. This is likely to cover the majority of bioliquids used in the UK. If this is the case, there will be no need to cover them separately for the purposes of the EU ETS. However, based on our current understanding, we cannot be certain that all bioliquid use under the EU ETS in Phase III will be covered by the RO.

Therefore, we are still considering our approach pending further guidance from the European Commission on how the Renewable Energy Directive sustainability criteria might be applied to bioliquids and biofuels used by EU ETS operators, and a fuller understanding of the role of UK domestic renewables policy in delivering the EU ETS requirements.

Consultation Question

10. Do you have any views or information on the UK approach to extending the application of sustainability criteria under the Renewable Energy Directive to the use of bioliquids by stationary installations under the EU ETS?

Chapter 2 – Excluded installations (in conjunction with Schedule 5)

Chapter 2 and **Schedule 5** provide the regulations that give legal effect to the UK's alternative measure for small emitters and hospitals under Article 27 of the revised ETS Directive. They set out the measures which will be applied to eligible small emitters (those with annual GHG emissions less than 25,000tCO₂ and, where the installation undertakes combustion activities, thermal input below 35MW) and hospitals in the UK that choose to opt-out of the EU ETS in Phase III. Opted-out installations and hospitals must be approved by the European Commission. Such installations are termed 'excluded installations' in the draft 2012 GHG Regulations.

Chapter 2 establishes the general application of the draft 2012 GHG Regulations to excluded installations but lists a number of exemptions, including those regulations relating to free allocation (Chapter 3 of this Part) and requirements relating to permits (paragraph 2 of Schedule 4). This is because, in line with Article 27 of the ETS Directive, excluded installations in the UK will be subject to an alternative, domestic measure that delivers emission reductions equivalent to the EU ETS (as provided by Schedule 5).

¹³ Renewables Obligation Order 2009 (S.I. 2009/785) as amended by the Renewables Obligation (Amendment) Order 2011 (S.I. 2011/984)

The UK's policy proposal for an Opt-out Agreement Scheme¹⁴ aims to reduce the regulatory burden of the EU ETS on excluded installations whilst maintaining incentives for emission reductions. These installations will not be obliged to surrender allowances but instead will be required to meet installation-based emissions targets and be subject to simplified rules on, for example, emissions verification. The bulk of the provisions for excluded installations will be set out in an excluded GHG permit - a variation on the standard GHG permit - which an excluded installation is required to hold. In combination with the alternative permit requirements, the detailed requirements for excluded installations are set out in **Schedule 5**. This includes specific definitions (e.g. of a hospital), procedures for the conversion of a GHG permit to an excluded GHG permit (building on Regulation 11), an obligation to meet an emissions target (paragraph 4 of Schedule 5) and annual emissions verification requirements.

The Authorities must issue directions to regulators on the calculation of excluded installation targets. These directions will implement the final policy approved by the European Commission. The authorities may amend those directions (**paragraph 3(3)**) if this is needed to reflect relevant changes in policy, such as amendments to the carbon leakage list or changes to the climate change obligations of the UK or the EU, including through revisions to UK carbon budgets, the amended EU ETS Directive or Effort Share Decision, or as the result of a binding international agreement on climate change.

Paragraphs 5 and 6 of Schedule 5 give power to the regulator to increase the emissions target where there is an increase in capacity at the installation. They also allow the regulator to increase an emissions target for an excluded installation where the installation has over-achieved against its emissions target in the previous year by 'banking' the over-achieved amount.

Paragraph 7 places an obligation on the regulator to issue a termination notice should the annual emissions of an excluded small emitter installation (which does not serve a hospital) exceed the 25,000tCO₂e annual emissions limit set by Article 27 of the ETS Directive; if an excluded installation ceases to primarily serve a hospital; if the excluded installation fails to pay a penalty for exceeding its emissions target; or if there is a sufficiently serious breach of the permit conditions. As Article 27 of the revised ETS Directive applies to Phase III of the EU ETS only, excluded installations must return to the EU ETS on 1 January 2021, in accordance with **paragraph 8**.

Provisions relating to penalties, including for exceeding emissions reduction targets or providing misleading information to the regulator, are dealt with under Part 7 of the draft 2012 GHG Regulations.

Consultation Question

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| 11. | Do the provisions for excluded installations give legal effect to the EU ETS opt-out for eligible small emitters and hospitals in the UK, according to the UK's proposal for an Opt-out Agreement Scheme¹⁵? |
|-----|---|

¹⁴ <http://www.decc.gov.uk/assets/decc/11/cutting-emissions/eu-ets/3895-the-uks-policy-proposal-for-a-small-emitter-and-h.pdf>

¹⁵ <http://www.decc.gov.uk/assets/decc/11/cutting-emissions/eu-ets/3895-the-uks-policy-proposal-for-a-small-emitter-and-h.pdf>

Chapter 3 – Free allocation of allowances (in conjunction with Schedule 6)

Chapter 3 and **Schedule 6** implement Article 10a of the revised ETS Directive and Decision 2011/278/EU¹⁶ (also known as the Community-wide Implementation Measures or CIMs, and referred to in the draft 2012 GHG Regulations as the Free Allocation Decision).

The primary purpose of Article 10a and the CIMs is to set out the harmonised rules for determining installation-level allocations, where eligible. Levels of free allocation for incumbent installations will be approved by the European Commission in late 2012 in advance of Phase III commencing in January 2013. The provisions in the draft 2012 GHG Regulations transpose the requirements for applications to the New Entrants' Reserve (NER). The NER represents 5% of the total number of allocations available for free in Phase III. This is reserved for new entrants (non incumbents) to the EU ETS or, for example, for incumbent installations that extend their capacity. The regulations also allow for adjustments to allocations in cases of changes to an installation's capacity, cessations and partial cessations in an installation's activity.

It is important to note that the rules for the free allocation of allowances and the procedures for accessing the NER are harmonised across all EU Member States, as set out in the revised ETS Directive and the CIMs. The European Commission has the right to approve or reject proposals for adjustments to allocations and all applications to the NER. Accordingly, the draft 2012 GHG Regulations relate to the specific responsibilities for UK regulators and the requirements on operators relating to this process, and any powers required by the Secretary of State and the Devolved Administrations. It is not possible to impose an obligation on the European Commission in terms of the timings for processing NER applications.

Paragraphs 2 and 3 of Schedule 6 set out the NER application requirements in terms of procedural timings and the provision of data and information that an operator must provide when it makes an application for an allocation of allowances from the new entrant reserve, either as a new entrant, or where an incumbent has undergone a capacity extension. A duty is placed on the regulator to approve the installation's capacity and to calculate the provisional free allocation.

Paragraph 4 of Schedule 6 requires the regulator to submit applications for an allocation from the NER to the European Commission for approval. The CIMs require this information to be submitted 'without delay' but stop short of providing a specific deadline. To provide certainty for operators, a period has been included within the draft 2012 GHG Regulations of two months from the point at which a regulator has calculated the preliminary number of allowances to be allocated to an applicant installation.

Paragraph 5 places an obligation on the regulator to finalise the allocation once the European Commission has indicated its approval.

Paragraph 6 of Schedule 6 imposes a duty on operators to provide the regulator with information if an installation has a significant capacity reduction, as defined in Article 3 of the CIMs. This paragraph transposes the requirements set out in Article 21 of the CIMs, whereby the regulator must determine the new capacity of the installation based on production after the 'start of changed operation' and calculate any adjustments to the installation's allocation. Where an installation has received allowances it is no longer entitled to (as a result of a reduction in capacity) and an adjustment cannot take place before the annual issuance of allowances in February, the draft 2012 GHG Regulations impose a duty on the operator to return any surplus allowances in accordance with a notice given to it under **paragraph 12**. In this event, the

¹⁶ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:130:0001:0045:EN:PDF>

regulator will provide information to the operator on the procedure for returning allowances. Should the operator fail to meet this obligation then the operator is liable to a civil penalty provided for in Part 7, regulation 68.

Paragraph 7 of Schedule 6 defines when an installation is deemed to have permanently ceased the carrying out of regulated activities, and when an installation is deemed to have temporarily ceased the carrying out of regulated activities, and the consequences that flow from either of these insofar as the allocation of allowances to that installation are concerned. In the case of potential permanent cessations, the regulator has a power to withhold the allocation of allowances in certain circumstances (see Article 22 of the CIMs).

Paragraph 8 of Schedule 6 defines when an installation is deemed to have partially ceased the carrying out of regulated activities, and the consequences that flow from this insofar as the allocation of allowances to that installation are concerned (see Article 23 of the CIMs). The operator is required to notify the regulator when there is a partial cessation of activities.

Paragraph 9 of Schedule 6 requires the regulator to notify the revised preliminary total amount of allowances to specified persons, including the European Commission within two months of making the calculation.

Paragraph 10 of Schedule 6 places an obligation on the regulator to finalise the revised allocation once the European Commission has indicated its approval.

Paragraph 11 of Schedule 6 is a general provision, as required by Article 24 of the CIMs, for operators to inform the regulator, by 31 December of each year, of any ‘planned or effective’ changes to the installation (e.g. reduced capacity or production rates) which may have an impact on the installation’s eligibility for free allocation. Failure to comply with this provision would expose the operator to liability for a civil penalty (see Part 7 regulation 71 (failure to notify the regulator) and regulation 73 (providing false or misleading information)).

Paragraph 12 of Schedule 6 places a duty on an operator to comply with a notice to return allowances to which it is no longer entitled as a consequence of changed capacity or production levels. Failure to comply with a notice given under this paragraph exposes the operator to a civil penalty (see Part 7 regulation 68 (failure to return allowances)).

Consultation Question

12.	Do these provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators?
13.	Do you agree with the proposal to place an obligation on the operator to surrender surplus allowances following a reduction in capacity, or full or partial cessation in operation of an installation? If not do you see an alternative method for addressing the over-allocation?

Part 3 - Aviation

Background

Part 3 of the draft 2012 GHG Regulations contains the provisions for aircraft operators corresponding to those currently contained in the 2010 Aviation Regulations¹⁷ (as amended). Most of the provisions have therefore already been subject to public consultation as part of the second stage transposition of EU Directive 2008/101/EC to include aviation in the EU ETS¹⁸. Hence, the scope of this consultation in relation to aviation provisions, is largely limited to views on the overall approach to consolidating the regulatory requirements for stationary and aircraft operators in one Statutory Instrument (see question 1) and adapting the provisions to take account of the new European Commission regulations for Phase III. It does not seek views on the provisions pertaining to aircraft operators where there is no material change in the draft 2012 GHG Regulations compared to the 2010 Aviation Regulations.

Whilst in general there is no change to our approach to aviation in the draft 2012 GHG Regulations, we are proposing to make a number of technical amendments to the text of the 2010 Aviation Regulations. Note also that, for the sake of clarity, “UK operators” in the 2010 Aviation Regulations have been renamed “UK administered operators”, and “aircraft operators” renamed “UK aircraft operators”.

Technical amendments

Regulation 25 applies where responsibility for the regulation of an aircraft operator is transferred between the UK and another Member State in the course of a scheme year. It enables the regulator make arrangements with the regulator of the other Member State for a single regulator to be responsible for that operator for whole of the year in question.

Regulation 26 provides a power for the Secretary of State to designate a UK administered operator as a “Gibraltar operator”, where the operator is identified in the European Commission list of aircraft operators as being a ‘Gibraltar (UK)’ operator. The designation can only be made where the Secretary of State is satisfied that the operator will be subject to the Gibraltar legislation implementing the Directive. The operator will then cease to be regulated by the UK, thereby avoiding the possibility of double regulation .

General provisions on monitoring, reporting and verification for aircraft operators have been updated to reflect the new EU MRR¹⁹, and accreditation and verification²⁰ Regulations.

Consultation Question

14. Do you have any views on our approach to aviation in the draft 2012 GHG Regulations, including the technical amendments outlined above?

¹⁷ SI 2010/1996 <http://www.legislation.gov.uk/ukxi/2010/1996/contents/made>

¹⁸ http://webarchive.nationalarchives.gov.uk/20110508074721/http://www.decc.gov.uk/en/content/cms/consultations/euets_aviation/euets_aviation.aspx

¹⁹ Proposal for EU MRR <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0789:FIN:EN:PDF>

²⁰ Proposal for accreditation and verification regulation http://ec.europa.eu/clima/news/docs/regulation_va_en.pdf

Part 4 – Surrender of allowances

Background

The regulations in Part 4 implement the requirement to surrender allowances in Article 12(2a) and (3) of the ETS Directive. They also implement Article 11a of the ETS Directive which applies qualitative and quantitative restrictions on EU ETS operators for the surrender of project credits for Phase III compliance. The draft 2012 GHG Regulations includes the existing qualitative restrictions from earlier phases of the EU ETS which will continue into Phase III. Operators will be able to surrender Certified Emission Reduction (CER) units, Emission Reduction Units (ERU) and EU allowances (EUAs or EUAAs) in order to comply with their obligations under the EU ETS, subject to certain restrictions. This Part also covers provisions relating to the requirement on stationary and aircraft operators to surrender allowances covering their annual emissions.

Use of project credits

Regulation 42(3) sets out the type of project credits that cannot be surrendered by an operator in order to comply with their obligations under the EU ETS. It continues the existing restrictions on CERs/ERUs generated from nuclear and land use, land use change and forestry (LULUCF) activities. Additionally, from 1 May 2013, operators will not be able to surrender CERs/ERUs generated from projects involving the destruction of trifluoromethane (HFC-23) and nitrous oxide (N₂O) from adipic acid activities. These restrictions were introduced in Commission Regulation 550/2011²¹.

Regulation 45 sets out the restrictions on the quantity of project credits that can be surrendered by operators in order to comply with their obligations under the EU ETS. Levels of access vary for different classes of operator: operators of incumbent and new entrant installations and aircraft operators. These classes of operator are defined in **Regulation 42(2)**. The minimum levels of project credit use that are set out in Article 11a(8) of the ETS Directive have been specified in the draft 2012 GHG Regulations and will apply in the absence of any further measures on quantitative limits for Phase III adopted by the European Commission under Article 11a(8) of the ETS Directive. In the event the European Commission adopts such measures, **Regulation 45(3)** ensures that they take precedence over the quantities specified in **Regulation 45(1) and (2)**.

Consultation Question

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| 15. | Do you agree that the regulations provide flexibility to accommodate any further measures on quantitative limits on project credit use as determined by the European Commission? |
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Surrender of allowances

Subject to those limits, stationary and aircraft operators may surrender both allowances and project credits to discharge their obligation under Article 12(3) and (2a) of the ETS Directive, to surrender allowances covering their annual reportable emissions for each year. (Aircraft operators only may surrender aviation allowances issued or auctioned under Chapter II of the ETS Directive as well as those under Chapter III). This is implemented by **regulation 43** (read with paragraph 2(4) to (6) of Schedule 4) and **regulation 44**. The deadline for surrender is 30

²¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:149:0001:0003:EN:PDF>

April in the following year. Article 16(3) of the revised ETS Directive fixes a penalty of €100/tonne for failure to surrender allowances by that deadline (see under Part 7 below). However, Article 16(3) is also clear that payment of that penalty does not release the operator from the obligation to make up the deficit when surrendering allowances in relation to the following year's emissions.

Currently, regulation 10(3) to (5) of the 2005 GHG Regulations ensures that the obligation to surrender the missing allowances continues to apply, and continues to attract the €100/tonne penalty, for each year that the operator fails to comply. By contrast, regulation 26 of the Aviation Regulations applies a different approach: the duty to make up the deficit applies when allowances are surrendered in respect of the following year (and under regulation 38(1)(b) attracts the €100/tonne penalty) but no further penalty after the second year if the missing allowances are still not surrendered.

We are considering aligning the provisions for aircraft and stationary operators, in keeping with our general approach to the new regulations. Alignment could be achieved in two ways: amend the requirements for stationary operators in line with those for aircraft operators as currently set out in regulation 26 of the Aviation Regulations, or, amend the provisions for aircraft operators (as in Regulation 26 of the Aviation Regulations) with those for stationary operators according to regulation 10(3) to (5) of the 2005 GHG Regulations. The latter is set out for illustrative purposes in **Regulation 44** of the draft 2012 GHG Regulations.

Consultation Question

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| 16. | Do you have views on how best to implement Article 16 (3) of the ETS Directive with respect to application of the €100/tonne penalty? For example, alignment of the requirements for stationary and aircraft operators, in keeping with our general approach? |
| 17. | How could alignment of the provisions best be achieved? For example, that the penalty continues to apply for each year the operator fails to comply (as is currently the case for stationary operators), or that the penalty should not applied after the second year if the missing allowances from the previous year are still not surrendered (as is the case for aircraft operators). |

Part 5 - Enforcement etc.

Background

Part 5 provides powers for the regulator to ensure that the system is being implemented by operators in the right way. It gives the regulator the power to prevent an operator becoming non-compliant, or to bring a non-compliant operator back into compliance, through the use of enforcement notices.

The power to determine the reportable emissions of an installation or aircraft operator is now given directly by Article 70 of the EU MRR. **Regulation 47** ensures that the power can also be exercised where the operator of an installation has not complied with their reporting obligations following the revocation or surrender of the GHG permit. As under the 2005 GHG Regulations, the regulator may recover a fee from the operator for carrying out this determination.

Consultation Question

18. Do you agree with the provisions in Part 5 as drafted?

Part 6 – Information

Background

Part 6 of the draft 2012 GHG Regulations sets out powers for gathering information (e.g. through serving information notices), and for the disclosure of information, for example, to the Secretary of State on how the regulator is discharging its EU ETS functions. **Regulation 49** sets out where information may or may not be disclosed and how. This regulation also provides the Secretary of State with the power to use or share with other government bodies, information held or obtained for the purpose of these regulations to prepare national energy and emissions statistics. This includes preparing and publishing a national GHG emissions inventory, which is required under the United Nations Framework Convention on Climate Change (UNFCCC). **Regulation 50** provides for information to be withheld from publication if it would be contrary to the interests of national security.

These regulations remain essentially unchanged from the existing provisions for stationary installations (although the provisions on national security have been modified to take account of the new arrangements for the publication of the allocation of allowances). The provisions were previously set out in the 2005 Greenhouse Gas Emissions Trading Scheme Regulations, the 2005 Greenhouse Gas Emissions Trading Scheme (Amendment) and National Emissions Inventory Regulations and the 2006 Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations. The provisions for aircraft operators, previously in regulations 29 and 55 of the Aviation Regulations, have now been aligned and consolidated with those for stationary installations. These provisions have now been consolidated into the draft 2012 GHG Regulations so whilst we are not seeking your views on the regulatory provisions, question 1 of this consultation invites feedback on our general approach to consolidation.

Consultation Question

19. Do you agree with the provisions in Part 6 as drafted?

Part 7 – Civil Penalties

Background

A penalty regime is essential to preserving the integrity of the EU ETS by establishing a sufficient deterrent against, and punishment for, non-compliance (e.g. for operating without a GHG permit or not surrendering the required volume of allowances to equal their verified emissions). Article 16 of the ETS Directive requires Member States to put in place a system of penalties for non-compliance with the provisions of the Directive (as set out in national provisions) which is effective, proportionate and dissuasive. The form of the penalties and level of fines are left to Member State discretion, with the exception of the level of fines for failure to surrender sufficient allowances, which is mandatory and set by the Directive.

Penalties in the draft 2012 GHG Regulations

In the context of the discretion over penalties afforded to Member States by the ETS Directive, Government undertook a review of the 2005 GHG Regulations to impact test whether the current penalties system was fit for purpose. The Impact Assessment is available at Appendix 2. We wanted to ensure that the penalties system in the UK achieves the requirements set out in the Directive (i.e. that it is effective, proportionate and dissuasive) in a manner that is least burdensome to operators, regulators and Government.

The review outcomes recommended a change from the current UK penalties regime, which comprises both criminal and civil penalties, to a system of civil sanctions only, with the aims of:

- encouraging greater compliance (and hence lessening operator exposure to penalties);
- achieving alignment of the treatment of stationary and aircraft operators where appropriate;
- taking an approach consistent with the recommendations of the Macrory report²² in support of a general shift in UK Government policy thinking on penalties, away from on the application of criminal sanctions in environmental legislation; and,
- ensuring new civil penalties are sufficiently dissuasive in order to retain current high levels of EU ETS compliance in the UK.

In order to achieve these aims our intention is to improve the proportionality of the penalties imposed through the application of civil penalties only (under the criminal system a term of imprisonment is possible), and by enhancing the discretion of the regulator. Part 7 of the draft 2012 GHG Regulations sets out our proposals for a civil penalty regime to support enforcement of the EU ETS in the UK in Phase III. As set out in **Regulation 54**, regulator discretion may take the form of refraining from imposing a civil penalty, reducing the amount of a penalty (or the amount of a daily penalty), extending the time for payment, withdrawing a penalty notice, or modifying a penalty notice by substituting a lower penalty. As stated in **Regulation 55**, the regulator must publish guidance on how they will exercise this discretion.

Penalty for not surrendering allowances

Article 16(3) of the Directive itself fixes the penalty that Member States are required to impose in respect of a failure by an operator or aircraft operator to surrender sufficient allowances to cover a year's annual emissions. That penalty (the 'excess emissions penalty') is €100 for each allowance that should have been surrendered by the deadline of 30 April in the following year.

The 2005 GHG Regulations (regulation 39) are clear that the obligation to surrender allowances by 30 April applies in respect of all emissions in the preceding year, even those that were not determined until after the 30 April deadline, and there is currently no scope for the regulator to exercise discretion in the imposition of the excess emissions penalty. This approach has been challenged in an appeal brought under the 2005 GHG Regulations, and is currently also the subject of an application to the Administrative Court for judicial review. The question is whether the Directive allows – or should allow – a flexible approach to application of the penalty in the case of emissions that were not originally reported in the verified emissions report for the year, but were subsequently determined to have been emitted.

Even if it is found that the Directive does not require the approach to the €100/tonne penalty adopted by the 2005 GHG Regulations, Member States have a general duty to put in place any effective, proportionate and dissuasive penalties necessary to implement effectively the ETS. A

²²Regulatory Sanctions : Making Justice Effective <http://www.bis.gov.uk/files/file44593.pdf>

penalty is necessary to discourage the inaccurate reporting of emissions, although it may be considered unduly harsh to impose the full €100 per tonne in respect of under-reported emissions where the operator identifies a reporting error and notifies the regulator in a timely manner. We are therefore giving active consideration to the adoption of a more nuanced approach. A suggested provision is included in **Regulation 58** of the draft 2012 GHG Regulations. According to the proposed regulation, the €100 penalty will of course apply where insufficient allowances are surrendered to cover the emissions stated in the verified report by 30 April in the following year. But where that report is subsequently found to have understated emissions, the operator can avoid the imposition of the €100 penalty in respect of the unreported emissions by promptly submitting an amended report and surrendering the necessary additional allowances. However, this must be done before the regulator notifies the operator of its intention to impose the €100 penalty. A lesser penalty for each unsurrendered allowance will then apply, which (unlike the €100 penalty) is subject to the regulator’s discretion under **Regulation 54**.

Consultation Question

20.	Do you have any comment on the approach taken to the penalty for the under-reporting of emissions contained in regulation 58(3) to (5) of the draft 2012 GHG Regulations?
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Levels of other penalties

The levels of the penalties for the new civil regime must be set at levels that still retain a sufficient deterrent against non-compliance. Our proposals for penalty levels aim to achieve this whilst being proportionate to the offence. They also aim to align, where appropriate, the penalties for stationary operators with those for equivalent offences under the 2010 Aviation Regulations. In terms of our proposal for the penalty level for the offence of operating without a GHG permit, our main intention is to ensure that an operator does not gain financially from carrying out an EU ETS activity without a GHG permit compared to carrying out the same activity with a GHG permit. Hence, the basis for this penalty is the EU ETS costs forgone by operating outside the system.

Regulation 59 sets out the requirement that operators of excluded installations must pay a penalty on annual emissions that exceed their installation’s target for the relevant year. The penalty price per tonne of carbon dioxide equivalent will be set in line with the EUA price (**Regulation 52**) and is one of the elements of the Opt Out Agreement scheme that ensures an equivalent contribution to emission reduction, as required by the Directive.

Consultation Question

21.	Do you agree with our proposed approach to establishing a regime in the UK comprising civil penalties only?
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22.	Do the regulations as drafted give legal effect to this penalty regime?
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23.	Do you agree with the proposed penalty levels as drafted?
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Part 8 – Appeals

Background

The ETS Directive does not specify how appeals under the EU ETS should be addressed by Member States, apart from putting a duty on Member States to make the appropriate administrative arrangements for the implementation of the rules of the ETS Directive (Article 18). However, once the decision has been made to regulate, then some form of enforcement mechanism becomes necessary. As is the case under the EU ETS, we judge the service of an enforcement notice or the imposition of a civil sanction such as a monetary penalty to be a determination of an operator's civil rights. Article 6 of the European Convention on Human Rights (ECHR) states that:

“...in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

Whilst Member States must provide the right of appeal against decisions of a competent authority, the appeal procedures are at their discretion, subject to the requirements of the ECHR. Under the draft 2012 GHG Regulations, as it is the regulator who will be imposing penalties and making many of the decisions dealing with the administration of the scheme, many decisions of the regulator will also be subject to appeal.

Current appeals system

The current appeals system in England is the ‘appointed person’ system, whereby the Secretary of State (for Energy and Climate Change) may appoint a person to hear and determine the appeal on his behalf; or the Secretary of State may appoint a person to hear the appeal on his behalf and provide a recommendation, with the Secretary of State making the final determination. This system also applies for offshore installations, where appeals are made to the regulator (the Secretary of State).

A similar system exists in Wales, with the Welsh Ministers appointing a person to hear and determine an appeal on their behalf; or appointing a person to hear an appeal, but the Ministers then make the final determination themselves.

Appeals in Northern Ireland are heard and determined by the Planning Appeals Commission (PAC).

In Scotland, the Directorate for Planning and Environmental Appeals (DPEA) in the Scottish Government hears and determines appeals on behalf of the Scottish Ministers. There may be occasions where the Scottish Ministers determine the appeal themselves, in which case DPEA officials will hear the appeal and then make a recommendation for Ministers to consider before determining the outcome.

Review of 2005 GHG Regulations

The Government review of the 2005 GHG Regulations tested the current UK appeals system to see whether it provides operators access to a fair and transparent process, and whether the costs and complexity of the procedures are proportionate to the nature of what is being appealed. It concluded that it is not possible to find one system that best suits all four administrations of the UK. The appeals systems in Northern Ireland and Scotland will be retained, in that appeals in Northern Ireland will be heard and determined by the PAC, and appeals in Scotland will be heard and determined by the DPEA, on behalf of the Scottish Ministers to provide consistency with other environmental appeals and cost effectiveness.

The Scottish Government is however considering how appeals against a decision by Scottish Ministers will be handled. The options are to continue with the current position (by an independent person appointed by Scottish Ministers); to use the First-tier Tribunal (FTT); or to go through the Scottish court system i.e. an appeal to the Sherriff.

We are proposing a change in approach in England and Wales (for both operators of stationary installations and aircraft operators, as well as offshore installations), to a system where appeals are heard and determined by the First-tier Tribunal (FTT) (see Annex 4 for more detail on the FTT). An assessment of the impacts of this move is available in the accompanying Impact Assessment (Appendix 2). The proposed change in approach to appeals in England and Wales aims to deliver a system that is:

- Relatively low cost, both to Government and operators by providing for local hearings that avoid high travel costs and by ensuring the procedure (i.e. written or oral) is proportionate to what is being appealed;
- Efficient with capacity to handle multiple procedures, and avoiding overly burdensome and complex processes;
- Proportionate to the nature of what is being appealed with more costly oral hearings taking place only with the consent of all Parties and where it is warranted by the complexity of the case. This is incentivised by an award of costs for unnecessary appeals;
- Transparent and accessible to operators thereby reducing the risk that genuine appeals are deterred by the upfront investment needed to understand the requirements;
- Independent of Government;
- Consistent with a broad Government shift towards the use of the FTT for appeals against decisions under environmental and climate policy, in line with the recommendations of the Macrory Report. This will help all Parties build understanding of the appeals system and hence, reduce the burden of the appeals system over time.

Part 8 of the draft 2012 GHG Regulations presents our proposals for appeals to be heard and determined by the FTT in England and Wales, the PAC in Northern Ireland and the DPEA in Scotland for Phase III of the EU ETS. It sets out who may appeal and on what grounds.

Schedule 11 and **Schedule 12** set out the appeals procedure for Scotland (other than those against decisions by Scottish Minsters as outlined above) and Northern Ireland respectively. In England and Wales, the appeals procedure for EU ETS appeals will be governed by the rules of the FTT. These are set out in The Tribunal Procedure (First-tier Tribunal) General Regulatory Chamber Rules 2009, and so are not dealt with in these draft regulations.

Consultation Question

24.	Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions relating to enforcement of the 2012 GHG Regulations in England and Wales?
25.	Do you have any views on the relative costs of the First-tier Tribunal compared to the other options considered in the Impact Assessment accompanying this consultation (Appendix 2)?

26.	<p>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 regulator? If not, why not?</p> <p>(The General Regulatory Chamber Rules may be found at: http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm)</p>
27.	<p>Do you have any comment on the approach to handling appeals against decisions relating to enforcement of the 2012 GHG Regulations in Northern Ireland or Scotland?</p>

Part 9 – The Union Registry

Background

Phase III of the EU ETS sees the establishment of a European Union-wide Registry (the ‘Union Registry’). This is a change from Phases I and II, where each individual Member State was responsible for maintaining its own Registry system (the I.T. framework that allows functioning of the EU ETS, that contains accounts for participants where allowances are stored, traded and surrendered). The rules and procedures relating to the operation of the Union Registry as well as Member States’ responsibilities are set out in EU Regulation 920/2010 (the ‘Registries Regulation 2010’)²³ and EU Regulation 1193/2011²⁴ (the ‘Registries Regulation 2011’).

EU Regulations are directly applicable in the UK and therefore do not need to be transposed into national law. However, there are some provisions within the Registries Regulation that leave Member States the choice to develop national arrangements which require some form of domestic legislation to render them effective and enforceable. These are broadly related to the duties of the regulator, the national registry administrator and the operator in the context of the EU Union Registry.

Regulation 8 appoints the relevant authorities in the UK that will perform registry related functions. The Environment Agency is the national administrator designated by the United Kingdom for the purposes of the Registries Regulation, and in the draft 2012 GHG Regulations is referred to as the ‘registry administrator’. The national administrator will continue to perform key functions in relation to the operation of the area of the Union Registry assigned to the UK, managing the opening and closure of accounts, and compliance with key obligations of the scheme. The national administrator will continue to play an important role in maintaining the security and integrity of the I.T. system by overseeing access to the area of the system the UK is responsible for.

The Regulator will continue to be the competent authority designated in the majority of instances for the purposes of the Registries Regulation. The Secretary of State is the designated competent authority in the following instances:

- Provisions related to opening and managing the national accounts (Article 17 of the Registry Regulations, on opening national holding accounts in the Union Registry and article 29(2), on positive balance of accounts at the point of closure);

²³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:270:0001:0052:EN:PDF>

²⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:315:0001:0054:EN:PDF>

- Decisions relating to the closure of accounts and suspension of access to accounts (Articles 30(1) and 31(7) of the Registry Regulations); and,
- Suspension of access to allowances or Kyoto units in the case of a suspected fraudulent transaction (Article 71(1) of the Registry Regulations).

Consultation Question

28. Do you agree with the provisions in Part 9 as drafted?

Part 10 – Supplementary

Background

Part 10 of the draft 2012 GHG Regulations contains provisions covering the procedures for recovery by the regulator of any unpaid fees and the issuance of guidance to the regulator or to the registry administrator by the competent authority.

Consultation Question

29. Do you agree with the Part 10 provisions as drafted?

Part 11 – Revocations, savings and transitional provisions

Background

Part 11 of the draft 2012 GHG Regulations sets out the statutory instruments that are to be revoked, following the coming into force of the new provisions, together with appropriate transitional and savings provisions.

Consultation Question

30. Do you agree with the Part 11 provisions as drafted?

Annex 1 : Catalogue of consultation questions

Consultation Question	
1.	Do you agree that consolidation of the existing regulations, which brings together provisions for stationary and aircraft operators, will help to simplify the regulations and reduce duplication? Do you have other suggestions for simplifying the regulations?
2.	Do you agree that the removal of the detailed mechanics of implementation from the main body of the regulations will make the regulations more accessible?
3.	Is standardisation of the timescales for regulators in this manner beneficial? Do you have other suggestions for improving certainty and reducing administrative burdens associated with EU ETS procedures, for regulators and industry?
4.	Do you have any general comments about the proposed approach to transposition of the revised ETS Directive and associated EU legislation, including the way the draft 2012 GHG Regulations are drafted and the approach to copy-out of EU legislation?
5.	Do you have any comments on the provisions contained in Part 1, such as the definitions or designations?
6.	Do you have any comments on the way the provisions are drafted relating to the submission and determination of applications and reports? Do these provisions help to reduce administrative burden and aid business planning?
7.	Do you agree with the way these provisions are drafted, including presenting the detailed permitting procedures in Schedules rather than the main body of the regulations?
8.	Do these provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators?
9.	Do these provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators? For example, are the timescales for the operator to notify the regulator or for the regulator to respond, appropriate?
10.	Do you have any views or information on the UK approach to extending the application of sustainability criteria under the Renewable Energy Directive to the use of bioliquids by stationary installations under the EU ETS?
11.	Do the provisions for excluded installations give legal effect to the EU ETS opt-

	out for eligible small emitters and hospitals in the UK, according to the UK's proposal for an Opt-out Agreement Scheme ²⁵ ?
12.	Do these provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators?
13.	Do you agree with the proposal to place an obligation on the operator to surrender surplus allowances following a reduction in capacity, or full or partial cessation in operation of an installation? If not do you see an alternative method for addressing the over-allocation?
14.	Do you have any views on our approach to aviation in the draft 2012 GHG Regulations, including the technical amendments outlined above?
15.	Do you agree that the regulations provide flexibility to accommodate any further measures on quantitative limits on project credit use as determined by the European Commission?
16.	Do you have views on how best to implement Article 16 (3) of the ETS Directive with respect to application of the €100/tonne penalty? For example, alignment of the requirements for stationary and aircraft operators, in keeping with our general approach?
17.	How could alignment of the provisions best be achieved? For example, that the penalty continues to apply for each year the operator fails to comply (as is currently the case for stationary operators), or that the penalty should not be applied after the second year if the missing allowances from the previous year are still not surrendered (as is the case for aircraft operators).
18.	Do you agree with the provisions in Part 5 as drafted?
19.	Do you agree with the provisions in Part 6 as drafted?
20.	Do you have any comment on the approach taken to the penalty for the under-reporting of emissions contained in regulation 58(3) to (5) of the draft 2012 GHG Regulations?
21.	Do you agree with our proposed approach to establishing a regime in the UK comprising civil penalties only?
22.	Do the regulations as drafted give legal effect to this penalty regime?
23.	Do you agree with the proposed penalty levels as drafted?

²⁵ <http://www.decc.gov.uk/assets/decc/11/cutting-emissions/eu-ets/3895-the-uks-policy-proposal-for-a-small-emitter-and-h.pdf>

24.	Do you consider that the First-tier Tribunal is the appropriate body to hear and determine appeals against decisions relating to enforcement of the 2012 GHG Regulations in England and Wales?
25.	Do you have any views on the relative costs of the First-tier Tribunal compared to the other options considered in the Impact Assessment accompanying this consultation (Appendix 2)?
26.	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 regulator? 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)
27.	Do you have any comment on the approach to handling appeals against decisions relating to enforcement of the 2012 GHG Regulations in Northern Ireland or Scotland?
28.	Do you agree with the provisions in Part 9 as drafted?
29.	Do you agree with the Part 10 provisions as drafted?
30.	Do you agree with the Part 11 provisions as drafted?

Annex 2 List of current UK EU ETS Regulations

[SI 2005/925 Greenhouse Gas Emissions Trading Scheme Regulations 2005](#)

[SI 2005/2903 Greenhouse Gas Emissions Trading Scheme \(Amendment\) and National Emissions Inventory Regulations 2005](#)

[SI 2006/737 Greenhouse Gas Emissions Trading Scheme \(Amendment\) Regulations 2006](#)

[SI 2007/465 Greenhouse Gas Emissions Trading Scheme \(Amendment\) Regulations 2007](#)

[SI 2007/1096 Greenhouse Gas Emissions Trading Scheme \(Miscellaneous Provisions\) Regulations 2007](#)

[SI 2007/3433 Greenhouse Gas Emissions Trading Scheme \(Amendment No. 2\) Regulations 2007](#)

[SI 2009/2301 Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009](#)

[SI 2009/3130 Greenhouse Gas Emissions Data and National Implementation Measures Regulations 2009](#)

[SI 2010/1996 Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010](#)

[SI 2011/765 Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2011](#)

[SI 2011/727 Greenhouse Gas Emissions Trading Scheme \(Amendment\) \(Fees\) and National Emissions Inventory Regulations 2011](#)

[SI 2011/1506 Greenhouse Gas Emissions Trading Scheme \(Nitrous Oxide\) Regulations 2011](#)

[SI 2011/2911 Greenhouse Gas Emissions Trading Scheme \(Amendment\) \(Registries and Fees etc.\) Regulations 2011](#)

Annex 3 List of EU Decisions and Regulations

Those that implement, in part, the revised ETS Directive:

[Commission Regulation 1193/2011 establishing a Union Registry for the trading period commencing on 1 January 2013](#)

[Commission Regulation 920/2010 for a standardised and secured system of registries](#)

[Commission Decision 2010/2/EU determining a list of sectors and subsectors which are deemed to be exposed to a significant risk of carbon leakage](#)

[Commission Regulation 550/2011 determining certain restrictions applicable to the use of international credits from projects involving industrial gases](#)

[Commission Decision 2011/278/EU determining transitional Union-wide rules for harmonised free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC](#)

[Commission Decision 280/2004/EC concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol](#)

[Proposed Regulation for a mechanism for monitoring and reporting greenhouse gas emissions](#)

[Proposed Regulation on the verification of greenhouse gas emission reports and tonne-kilometre reports and the accreditation of verifiers](#)

Annex 4 The First Tier Tribunal

The First-tier Tribunal is empowered to deal with a wide range of issues which might form the substance of appeals, and to ensure the cases are dealt with in the interest of justice and minimising parties' costs. The composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non legal members with suitable expertise or experience in an appeal in addition to Tribunal judiciary.

If the First-tier Tribunal is selected as the appropriate body to hear appeals in these matters then it is likely that they would be made to the General Regulatory Chamber which hears appeals in various matters.

The General Regulatory Chamber operates under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009²⁶ which provide flexibility for dealing with individual cases. Rule 2 of the General Regulatory Chamber Rules states its overriding objective as being to deal with a case fairly and justly. This includes dealing with a case in ways which are proportionate to the importance of the case, the complexity of the issues and the anticipated costs and resources of the parties. The Rules give the Tribunal judge wide case management powers in order to achieve these objectives

Any party to a case has a right to appeal to the Upper Tribunal on points of law arising from a decision of the First-tier Tribunal. The right may only be exercised with the permission of the First-tier Tribunal or the Upper Tribunal. Where permission is given, the further appeal would be made to the Upper Tribunal.

²⁶ <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/rules.htm>

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