



Department
of Energy &
Climate Change

European Union Emissions Trading System for Offshore Installations

DECC CIVIL SANCTIONS GUIDANCE

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Any enquiries regarding this publication should be sent to us at: offshore.inspectorate@decc.gsi.gov.uk.

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CHAPTER 1: GENERAL PRINCIPLES

Introduction

1.1 The European Union Emissions Trading System (EU ETS) is primarily implemented into UK law by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the 2012 Regulations), as amended. The 2012 Regulations allow for the imposition of civil penalties in respect of breaches of the trading system. These civil penalties are distinct from the civil penalties under the Regulatory Enforcement and Sanctions (RES) Act 2008.

1.2 This guidance is designed to set out how the Department for Energy and Climate Change (the Department) applies the civil sanctions regime under the 2012 Regulations; how it makes enforcement decisions, the types of enforcement tools available to it, and the processes followed by it. As the Department is the EU ETS regulator for offshore installations only, this guidance is only relevant to offshore installations.

EU ETS and the 2012 Regulations

1.3 The 2012 Regulations came into force on 1 January 2013. Also from that date, certain provisions of the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (the 2005 Regulations) still apply.

1.4 Generally, where the conduct gives rise to an offence under the 2005 Regulations and the offence occurred before 1 January 2013, the criminal offences in those Regulations apply, and the Department will consider enforcement action on that basis, rather than on the basis of this guidance.

1.5 In relation to a failure to surrender sufficient allowances in respect of emissions arising before 1 January 2013, the civil penalties in the 2005 Regulations apply¹. This Guidance equally applies to these civil penalties.

1.6 Generally, the civil penalties in the 2012 Regulations apply to non-compliance with the trading scheme and/or permit conditions occurring on, or after, 1 January 2013. This includes:

- failure to submit a verified report of annual reportable emissions by 31 March of the following year for 2012 reportable emissions onwards; and
- failure to surrender an equal number of allowances to the reported figure by 30 April of the following year, for 2013 reportable emissions onwards. (As stated in paragraph 1.5 above, the failure to surrender sufficient allowances for 2012 reportable emissions is covered by the corresponding civil penalties in the 2005 Regulations.)

¹ This is subject to Regulation 87B of the 2012 Regulations, as inserted by the Greenhouse Gas Emissions Trading Scheme and National Emissions Inventory (Amendment) Regulations 2013.

Establishing liability

1.7 The penalties under the 2012 Regulations are civil penalties. The Department will investigate suspected breaches of the statutory requirements to establish whether or not a person² should be made subject to such a civil penalty.

1.8 When gathering evidence to establish whether a person has breached the 2012 Regulations, the Department will use evidence reasonably available to it. Alternatively, it may use its statutory investigative powers to require information to ascertain or confirm certain facts. The Department's powers to investigate suspected breaches of the statutory requirements are set out in Regulation 17 of the 2012 Regulations³.

1.9 The Department will apply the civil standard of proof when determining whether there has been a contravention of the 2012 Regulations. As such, before considering whether to impose a penalty, the Department must be satisfied on the balance of probabilities that the person is liable.

Discretion

1.10 Where the Department is satisfied that a person has breached the 2012 Regulations and the imposition of a civil penalty may be appropriate, it will consider whether to exercise the discretion given to it under Regulation 51 of the 2012 Regulations. As stated in paragraph 1.14 below, this discretion does not apply in relation to the €100/tonne penalty for failure to surrender sufficient allowances.

1.11 In general, one or more of the following options may be exercised by the Department where it considers it appropriate. The Department may:

- refrain from imposing a civil penalty at all;
- reduce the amount of a civil penalty from that set in the legislation;
- extend the time for payment of a civil penalty;
- withdraw a penalty notice at any time; and
- modify a penalty notice by substituting a lower penalty at any time.

1.12 The Department will consider each breach individually, according to the facts of the case, whilst seeking to ensure consistency in enforcement in accordance with this guidance. Prior to making a decision as to whether it should exercise its discretion, the Department will generally issue a notice of intent, providing the person with an opportunity to make representations. The Department will take those representations into account prior to a final decision being made.

² In the context of the Department's enforcement work, the "person" who has committed the breach under the 2012 Regulations will normally be the "operator" of the offshore installation, as defined at Regulation 3(2) of the 2012 Regulations. Generally the operator is the corporate entity that holds the permit for the offshore installation.

³ Regulation 17 of the 2012 Regulations has been amended by The Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2014. The amended Regulation 17 now refers to the powers of entry contained within Regulation 25 of the Offshore Combustion Installations (Pollution Prevention and Control) Regulations 2013.

1.13 In considering the exercise of its discretion, the Department will have regard to certain public interest factors, which will generally include the following:

- **Intent:** Whether or not the non-compliances were committed deliberately, recklessly or with gross negligence, or were instead the result of an accident or a genuine mistake.
- **Foreseeability:** Could the circumstances leading to the non-compliance have reasonably been foreseen, and if so, whether any avoiding and/or preventative measures were taken.
- **Nature of the non-compliance:** The extent to which the non-compliance undermines important aspects of the trust in, transparency, reliability and effectiveness of the schemes, taking into account the length of time that a person has been required to comply with the legislation and has taken to rectify the situation.
- **Deterrent effect:** The deterrent effect, both on the non-compliant person, and others.
- **Previous history:** Where previous enforcement action has been taken in respect of similar non-compliances, the Department will normally increase the level of its enforcement response and impose a more serious or severe sanction.
- **Attitude of the offender:** Whether or not the non-compliant person has a poor attitude towards the non-compliance and/or is uncooperative with the investigation. Conversely, whether the offender has provided the Department with the details of a non-compliance voluntarily, or through a self-reporting mechanism, or has independently remedied the non-compliance.

Mandatory penalties

1.14 There are some breaches in respect of which the legislation does not permit the Department to exercise discretion. In those cases, the Department is required to impose a civil penalty where a breach has been proved. A civil penalty of €100/tonne (indexed in accordance with Regulation 54(8)) must be imposed where an operator fails to surrender allowances contrary to Regulation 54(1) of the 2012 Regulations and does not self-report the failure to the Department.

Insolvency

1.15 Where the Department has discretion over the imposition of a civil penalty, it will not normally impose financial penalties in respect of individuals or corporate entities subject to an insolvency procedure.

CHAPTER 2: CALCULATING AND IMPOSING PENALTIES

Assessing the penalty to be imposed

2.1 The level of penalty applicable to each breach is set out in Regulations 52 to 70 of the 2012 Regulations. In some cases, a fixed sum only is specified; in others the penalty consists of a fixed sum and an additional daily penalty (up to a prescribed maximum); and in other cases, the penalty must be calculated in accordance with a formula.

2.2 Where the Department considers it may be appropriate to impose a penalty, the sum specified in (or calculated in accordance with) the 2012 Regulations will generally be the starting point. If applicable, the Department will then consider whether or not it is appropriate to exercise its discretion under Regulation 51, to reduce or waive that penalty.

Additional daily penalty

2.3 An additional daily penalty may apply in respect of the following breaches:

- Failure to comply with a condition of a permit;
- Failure to return allowances;
- Failure to comply with an enforcement notice; and
- Failure to comply with an information notice.

2.4 An additional daily penalty may be appropriate if there is a continuing breach which the person could take action to remedy. If the breach cannot be remedied, or if it has already been remedied by the time the initial civil penalty notice is served, an additional daily penalty will not apply.

2.5 Where awarded, an additional daily penalty will start to accumulate from the date that the initial civil penalty notice is served and will stop accumulating either after a set period has elapsed, on the date that the person remedies the breach, or on the date that the maximum amount payable (if applicable) has been reached. It is therefore an effective tool to encourage timely compliance.

2.6 The Department may exercise its discretion over either or both elements of the penalty; that is, the fixed sum and the additional daily penalty.

Procedure for imposing penalties

2.7 Where the Department considers it may be appropriate to impose a penalty, and has calculated the penalty to be imposed, it will generally serve a notice of intent giving the person an opportunity to make representations, usually within 28 calendar days from the date of the notice. The notice will normally contain the following information:

- A summary of the evidence being relied upon;
- The regulation under which the liability arises;

- The amount of civil penalty proposed;
- How that amount has been calculated;
- Whether or not an additional daily penalty will apply.

The Department will take account of any representations received in response to that notice, before coming to its final decision. Where an additional daily penalty is appropriate, the Department may serve a civil penalty notice on a person and subsequently provide them with an opportunity to make representations.

2.8 Once the Department has made a final decision, it will notify the person of this. Where the Department imposes a penalty, it will provide a penalty notice containing a summary of its reasons. The penalty notice will inform the person of the regulation that has been breached, the amount of the civil penalty due, the date by which the penalty must be paid where no additional daily penalty applies and, where appropriate, how that penalty was calculated. The notice will also indicate whether the person is required to pay an additional daily penalty.

2.9 When the level of any additional daily penalty can be determined, a further civil penalty notice will be served, confirming the total amount due (the further notice). This notice must also specify the date by which the amount due must be paid.

Publication of penalties

2.10 The 2012 Regulations impose on the Department a requirement to publish the name of an operator against whom a civil penalty has been imposed under Regulation 54(1). The Department may also publish the name of operators who have been awarded civil penalties in respect of other breaches of the 2012 Regulations. Publication will take place as soon as possible after the expiry of the period for appealing the imposition of a penalty; or when an appeal has been made, after the determination or withdrawal of that appeal.

2.11 Generally, the Department will publish the following information:

- the person in respect of whom the penalty was imposed;
- the legal requirement that was not complied with; and
- the amount of the penalty.

2.12 The Department will normally publish on its website the details of penalties imposed for a period of 3 years.

Failure to pay a civil penalty

2.13 If a person fails to pay a civil penalty, it is recoverable as a civil debt.

CHAPTER 3: OTHER ENFORCEMENT POWERS

Enforcement Notices

3.1 Enforcement notices may be served when the Department considers that a person has contravened, is contravening, or is likely to contravene any provision of the 2012 Regulations or a permit issued to them. An enforcement notice is primarily used to restore compliance with the relevant provisions.

3.2 A notice will contain the following information:

- the fact that the Department is satisfied that a relevant provision has, is, or is likely to be, contravened;
- the circumstances of the contravention;
- the steps which must be taken in order to remedy the contravention; and
- the period within which those steps must be taken.

3.3 The Department may use an Enforcement notice to specify actions required to be taken by an operator to restore compliance, or where an operator has failed to comply with a requirement, even when an additional daily penalty has reached its maximum.

Revocation of Permits

3.4 Regulation 14 of the 2012 Regulations states that the Department may at any time revoke a permit. The Department must do so where an operator fails to apply to surrender their permit in accordance with the timescales set out in the 2012 Regulations. The Department envisages that this power will otherwise only be exercised in exceptional circumstances.

Power to Determine Reportable Emissions

3.5 Article 70 of EU Regulation 601/2012 (the Monitoring and Reporting Regulation) imposes upon the Department a duty to make a conservative estimate of emissions in certain circumstances, including when a person fails to submit a verified annual emissions report by 31 March each year. The Department will generally recover the cost of making a determination of reportable emissions from the person concerned.

Appeals Procedure

3.6 Regulation 73 of the 2012 Regulations provides a right of appeal for persons against whom a notice or civil sanction has been awarded. Such an appeal must be submitted within 28 calendar days of the date on which the notice from the Department was sent to the appellant. Appeals against decisions made by DECC should be submitted to the First-tier Tribunal. You can find a notice of appeal form and guidance notes [here](#).

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Department of Energy & Climate Change
3 Whitehall Place
London SW1A 2AW
www.gov.uk/decc