



Department of the
Environment
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Statutory Guidance:

Civil penalties under the CRC Energy Efficiency Scheme Order 2010

April 2011

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1. Purpose

This guidance is given to the administrators of the CRC Energy Efficiency Scheme ('the Scheme') under section 51 of the Climate Change Act 2008 by the Secretary of State, the Scottish Ministers, the Welsh Ministers and the Northern Ireland Department for the Environment (collectively called 'the National Authorities').

This document is designed to provide guidance to the Environment Agency, the Scottish Environment Protection Agency and the Chief Inspector (Northern Ireland Environment Agency) as the administrator of the Scheme on the imposition of civil penalties under the CRC Energy Efficiency Scheme Order 2010¹ ('the Order').

Unless otherwise specified the words used in this guidance document are as defined in the Order. All references to articles are to articles in the Order. References to a breach or non-compliance are to a breach of, or non-compliance with, the Order. Reference to a person is to an individual or legal entity as appropriate.

2. General Principles

The Scheme is a new and innovative scheme which requires a large number of organisations to fulfil new and unfamiliar obligations.

For the Scheme to achieve its aims of reducing emissions in the target sectors, the overriding necessity is that organisations ultimately comply with their obligations.

¹ S.I. 2010/768

2.1. Rationale for civil penalties

The Scheme relies on participants' self-certification of energy use. Incorrect reporting can unfairly affect other participants. The Scheme therefore includes strong financial and reputational penalties to deter abuse and secure compliance. This ensures that the enforcement provisions, while fair and proportionate, provide adequate incentive to comply. It is the intention under the Scheme that the penalties should only be used as a last resort. It may be appropriate for the administrator to waive or reduce penalties in certain circumstances. This is particularly the case in the early years of the Scheme when participants are adjusting to their new obligations. The Order provides for the administrator to apply discretion to the application of penalties, provided that certain tests are met.

3. Application of discretion

3.1. Article 94 discretion

Article 94 provides for the administrator to use discretion to waive or modify a civil penalty on a limited basis, as follows:

94.—(1) Paragraph (2) applies in respect of a person (“A”) on whom a civil penalty may be or has been imposed and where the administrator is satisfied that A has provided evidence to the administrator within a reasonable time that—

- (a) A took all reasonable steps—
 - (i) to comply with the provision of this Order giving rise to the penalty; or
 - (ii) to rectify any failure in compliance as soon as it came to A’s notice;and
- (b) in all the other circumstances it is reasonable to exercise the powers in paragraph (2) in relation to A.

(2) Where this paragraph applies, the administrator may—

- (a) waive a penalty;
- (b) allow additional time to pay;
- (c) impose a lower financial penalty or substitute a lower financial penalty where one has already been imposed; or
- (d) modify the application of a publication or blocking penalty.

Where the administrator has discretion to do so in accordance with article 94, it may waive or modify a penalty. The administrator should determine whether it

has discretion in relation to each non-compliance in accordance with this Guidance.

3.2. 'Reasonable time'

The National Authorities consider that a “reasonable time” for the person on whom a penalty may be or has been imposed to provide evidence to the administrator, as referred to in article 94(1) is, other than in exceptional circumstance, 28 calendar days after that person is notified that a civil penalty may be or has been imposed.

3.3. All reasonable steps to comply with a provision of the Order

With regard to article 94 (1)(a)(i) the administrator should consider that a person has met this test where they have taken all reasonable steps that would be necessary to achieve compliance but for some reason has still ultimately failed to comply.

What constitutes all ‘reasonable steps’ may vary according to the nature of the non-compliance and to the phase of Scheme – for example, what may be considered reasonable in the first phase of the Scheme may be different from what is reasonable in subsequent phases when a participant should know what they are doing.

In determining whether a person took ‘all reasonable steps’ to comply with the Order the administrator should consider the individual facts of the case. An example of where a person may be considered to have taken ‘all reasonable steps possible’ to comply with the Order is where:

- The non-compliance was caused as a result of incorrect information having been supplied by a third party and the person did not know and had no reason to believe that the information provided was incorrect.

3.4. All reasonable steps possible to rectify any failure in compliance with the Order as soon as it came to notice

The test in article 94(1)(a)(ii) will be met where a person has immediately taken all reasonable steps to rectify non-compliance at the first available opportunity after the non-compliance was brought to their notice.

If the administrator considers that there is sufficient evidence that a person was aware of its non-compliance prior to an official notification from the administrator and failed to take substantial steps to rectify the non-compliance then it would not have rectified the failure ‘as soon as it came to A’s notice’.

As with the test at article 94(1)(a)(i) what constitutes ‘ all reasonable steps’ may vary according to the nature of the non-compliance and to the phase of the Scheme.

In the example given in paragraph 3.3 above, a person will have taken ‘all reasonable steps ’ to rectify a failure to comply where, when the person found out that the information was incorrect, they:

- Asked the third party to provide correct information (repeatedly if necessary) and used all means available to ascertain the extent of the inaccuracy.

3.5. In ‘all other circumstances’ it is reasonable to exercise powers

The administrator should not consider whether ‘in all other circumstances’ it is reasonable to waive or modify a penalty unless one of the first two tests have been met. This means a person has taken all reasonable steps to comply with the Order or they have taken all reasonable steps to rectify any failure to comply with the Order as soon as it came to their notice. If one of these tests have been met, the administrator should then consider whether in all other circumstances it is reasonable to exercise the powers in article 94(2), which are to: (a) waive a penalty; (b) allow additional time to pay; (c) impose or substitute a lower financial penalty; or (d) modify the application of a publication or blocking penalty. In determining whether or not to exercise these powers and, if so, how, the national authorities would expect the administrator to act in accordance with the views of the national authorities stated below. It is for the administrator to decide how important each factor is in the circumstances of each case and to make an overall assessment

1. Intent
2. Forseeability
3. Deterrent effect
4. Previous history
5. Attitude of the person in breach
6. Length of participation in the Scheme
7. Personal circumstances
8. Nature of breach
9. Financial implications

Intent – It is more likely to be reasonable to waive or modify a penalty if a breach is committed as a result of a genuine accident or mistake than if it was committed deliberately, recklessly or negligently.

Forseeability – It is more likely to be reasonable to waive or modify a penalty where a non-compliance could not have been foreseen rather than if it could reasonably have been foreseen.

Deterrent effect – It is more likely to be reasonable to impose a penalty without modification where the effect of the penalty is to act as a deterrent to the person in breach or to other persons.

Previous history – Whether any breach(es) and/or criminal offence(s) have previously been committed by the person in breach in relation to the Scheme and, if they have, the number and severity of the breach(es) and/or criminal offence(s) previously committed, will influence whether or not it is reasonable to waive or modify a penalty

Attitude of the person in breach – It is more likely to be reasonable to waive or modify a penalty where the person in breach is co-operative than where they have a poor attitude to the non-compliance and is uncooperative. There may be instances where organisations themselves bring to the attention of the administrator errors that have or will lead to non-compliance. The National Authorities want to encourage openness and transparency in communications between participants and the administrator. The administrator should show leniency in applying penalties where possible where errors are self reported, especially in the first phase of the Scheme. Leniency on penalising self-reported errors should not, however, enable persons to systematically benefit in any way. If the administrator considers that a person is purposefully or negligently not complying with the Scheme, and subsequently self-reporting the non-compliance then discretion should not be applied.

Length of participation in the Scheme – The newer that a person is to the Scheme, the more likely that it is to be reasonable to waive or modify a penalty. It is therefore more likely to be reasonable to waive or modify a penalty for a breach committed in the first phase of the Scheme than it would be if the breach was committed by the same person in the second phase of the Scheme.

Personal circumstances - The administrator may take into consideration the personal circumstances of the person in breach when determining whether it is reasonable to waive or modify a penalty.

Nature of breach – The severity of a non-compliance can vary substantially and should be considered when determining whether and the extent to which to modify

a penalty. It will not be appropriate to waive or modify a penalty incurred as a result of a breach having lasted for 40 days or more.

Financial implications – Where non-compliance leads to financial gain, the extent that a person benefits financially from not having complied with the Order may influence whether a penalty should be waived or modified.

4. Application of the penalty for inadequate records

The Order provides for a penalty to be applied to participants which fail to provide records to support the information provided to the administrator.

Failures to maintain records

102.—(1) The penalties in paragraph (2) apply where—

- (a) the administrator has given notice under article 90 in respect of a failure to comply with article 58; and
- (b) the participant has failed to comply by the time stated in that notice.

(2) The penalties are—

- (a) a financial penalty at the rate of £40 per tCO₂ of so much of the CRC emissions of the participant in the annual reporting year immediately preceding the year in which the non-compliance is discovered; and
- (b) publication.

(3) The penalties in paragraph (4) apply where a participant fails to keep records as provided by article 59.

(4) The penalties are—

- (a) £5000; and
- (b) publication.

Records required to be kept under articles 58 and 59 must meet the standard set in article 57(4), as follows:

57 (4) Records must be—

- (a) adequate to show to the satisfaction of the administrator that the participant has complied with its obligations under the Order;
- (b) up to date and so far as possible, kept together; and

(c) available for inspection by the administrator at any time.

The administrator should consider records to be adequate where it is able to verify with reasonable certainty the information reported to it. This means that a small number of missing records may not amount to a non-compliance where the administrator can still verify with reasonable certainty the reported information is accurate.

5. Application of related penalties

There are a number of civil penalties provided for in the Order. Each relates to an aspect of compliance within the Scheme. There are certain non-compliances which result in liability for more than one civil penalty. In these circumstances the administrator should only apply one penalty for each instance of non-compliance, so that the same non-compliance is not be penalised more than once. Details of the appropriate civil penalty to apply where more than one penalty applies in relation to a non-compliance, are set out below.

Where more than one civil penalty exists for the same non-compliance the penalty should be applied as follows:

5.1 Penalties for non-compliance with registration requirements

There are three penalties which relate to failures in respect of registration as follows:

1. Failure to register or to do so late (article 95(1));
2. Failure to have included all the meters for which an organisation is responsible when making its registration (article 95(3)); and
3. Failure to provide complete and correct information when registering (article 98(1)(a) and (b)).

The administrator should apply these penalties according to the following:

- A failure to register should incur a penalty for failing to register under article 95(1). No additional penalty should be incurred for failing to provide a correct list of meters or complete and accurate information under articles 95(3) and 98(1) respectively.

- Registering late should incur a penalty for registering late under article 95 (1). An additional penalty may be incurred for failing to provide a correct list of meters or other information required to be provided at registration under articles 95(3) and 98(1) respectively if a correct list of meters or other information is not provided at registration.
- If an organisation fails to provide correct meter information at registration a civil penalty should be imposed under article 95(3), but should not also be imposed under article 98(1) for a failure to provide complete and accurate information when registering.

For the first phase only, when deciding whether a penalty should be incurred for failing to register under article 95 (1) the administrator should consider that if a participant has determined whether it is required to register for the Scheme in reliance of guidance outlined in the Environment Agency’s ‘Registering as a CRC Participant’ updated March 2010²(i.e. that qualifying electricity supplies are calculated from the point at which an undertaking joins the group or from the time that a group is formed following a merger) then a penalty should not be imposed.

Guidance for the second phase will be updated to reflect the position in the Order, that the requirement to register is based on the total amount of qualifying electricity supplied throughout the whole of the qualifying year to any member of a group (as defined on the last day of the qualification year) regardless of when they joined the group during the qualification . Therefore from the second phase onwards the administrator should not apply the discretion set out above.

5.2 Penalties relating to the submission of footprint and annual reports

There are three penalties which relate to failing to submit, or submitting late, a footprint report and/or annual report.

1. Failure to provide a footprint report or to do so late (article [96]).
2. Failure to provide a annual report or to do so late (article [97]).
3. Failure to provide complete and correct information in a footprint report or annual report (article [99]).

The administrator should apply these penalties according to the following:

² ‘Registering as a CRC Participants’, March 2010, page 60 and 61

- Where an organisation has failed to provide a footprint or an annual report, a penalty should be imposed under article 96 or article 97 respectively. No additional penalty should be incurred for providing inaccurate information under article 99.
- Failure to provide a footprint or annual report on time should incur a penalty for late filing under articles 96 and 97 respectively. An additional penalty may be incurred for providing an inaccurate footprint report or annual report under article 99.

6. Liability for compliance

A notice imposing a civil penalty will normally be served on the compliance account holder. However, where the compliance account holder is part of a private group for the purposes of CRC, all members of that group are jointly and severally liable for complying with that notice and the administrator has discretion to serve the notice on any member of the group. Where the compliance holder is a member of a public group for the purposes of CRC, all other members of that group must provide the compliance account holder with such reasonable information and assistance as the compliance account holder may need to comply with the notice.

7. Appeal process

The administrator will be required to follow the appeals process as notified in due course by the National Authorities.

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URN 10D/760