



Department  
for Environment  
Food & Rural Affairs



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gov.scot

# Consultation on Introducing Civil Penalties for Infringements of the Fluorinated Greenhouse Gases Regulation **Summary of responses**

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## Contents

Background.....	1
Summary of responses .....	1
Next steps.....	8
Annex A: List of respondents .....	9

## Background

1. The purpose of the consultation was to seek views on the proposal to introduce civil penalties for infringements of the EU Fluorinated Greenhouse Gases (F-gases) Regulation in England, Scotland and for offshore installations in the marine areas of the United Kingdom. The consultation was conducted jointly by Defra and the Scottish Government from 26 October to 24 November 2017.
2. Respondents were asked whether they agreed with the introduction of civil penalties, the proposals for how the civil penalties system would work and the proposed appeals process. Respondents were asked to give reasons for their answers and invited to suggest any changes to the proposals.

## Summary of responses

3. Defra received twenty seven responses from a combination of businesses, trade associations, public sector bodies, non-governmental organisations and private individuals. Twenty one responded through citizen space and a further six by email or post.
4. Several respondents did not give a yes or no answer to all the questions but still provided comments which were taken into consideration. Responses that did not indicate a yes or no answer are categorised as “not answered”.

### **Q1: Do you support the introduction of civil penalties? Please explain the reasons for your answer.**

Answer	Yes	No	Not answered
Number of responses	19	3	5

5. The majority of respondents were in favour of introducing civil penalties. Respondents said that civil penalties would be easier and less burdensome to apply than the current criminal penalties, were a more effective deterrent against non-compliance and would therefore create a more level playing field for compliant businesses. They would deter unqualified personnel from operating in the sector and would improve the cost effectiveness of enforcement carried out by the regulators. A few respondents added that the existing criminal sanctions were not respected by industry and did not sufficiently deter non-compliance.

6. Three respondents disagreed. One felt civil penalties should not be introduced until the entire UK (i.e including Wales and Northern Ireland) had decided to adopt them, as companies should not be treated differently depending on which side of the border they were situated. The UK and Scottish Governments consider the benefits of civil penalties are great enough to adopt them just in England, Scotland and in relation to offshore installations, where the majority of businesses subject to the Regulation are based. The decision to introduce civil penalties is a devolved matter and Wales and Northern Ireland have decided not to adopt them at this stage. The Devolved Administrations may adopt the measures they consider best for their administrations, meaning a harmonised approach is not always possible.
7. One respondent felt it was unclear how the new civil penalties would be applied, and how the appropriate level of penalty would be determined. Similar comments were also received in answer to question two, where a respondent perceived the sanctions conditions lacked transparency. The relevant enforcement bodies in England and Scotland will be responsible for applying civil penalties and they provide clear guidance on the circumstances where civil penalties will be used and how the level of penalty will be calculated. The Environment Agency conducted a separate consultation on its Enforcement and Sanctions Policy, which closed on 29 January.<sup>1</sup> It will be using the responses to develop and finalise the policy. Defra has shared the comments relating to the sanction process with the Environment Agency for consideration.
8. The Scottish Environment Protection Agency's (SEPA) approach to applying discretion for civil penalties issued under the F-Gas Regulations will be in line with SEPA's [Enforcement Guidance](#) and the enforcement guidance for other regulatory regimes to reduce greenhouse gas emissions.<sup>2</sup> These may be subject to change as a result of changes to legislation, future government guidance or experience from their use.
9. For offshore hydrocarbon installations, enforcement is undertaken by BEIS's Offshore Petroleum Regulator for Environment and Decommissioning (OPRED). OPRED's current Enforcement Policy, which includes aspects associated with transparency, proportionality and accountability, will also be updated to include the operation of the F-Gas civil sanctions regime. The policy will, to a large extent, mirror the Environment Agency's impending guidance on the new regime. The appeals process is included in the proposed Regulations and will be included in any civil penalty notices that are issued.

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<sup>1</sup> <https://consult.environment-agency.gov.uk/environment-and-business/enforcement-and-sanctions-policy/>

<sup>2</sup> <https://www.sepa.org.uk/media/286937/guidance-on-the-use-of-enforcement-action-for-the-crc-energy-efficiency-esos-and-greenhouse-gas-emissions-trading-schemes.pdf>

10. The third respondent who opposed the introduction of civil penalties stated that the current sanctions were already severe enough to ensure compliance with the quota system used to phase down hydrofluorocarbons. This was because the European Commission already penalised infractions by removing double the exceeded quota the following year. The respondent also felt that the consultation did not show evidence of non-compliance and they were not aware of significant non-compliance. In response, Defra notes that the Environment Agency is currently investigating a number of potential quota breaches. In addition, general concerns about non-compliance in the sector have been raised by industry and NGOs on several occasions since the EU Regulation came into force in 2015, including most recently in response to this consultation and in evidence given to the Environmental Audit Committee's [inquiry into the phase down of F-Gases](#). Furthermore, the European Commission can only penalise breaches of quota, whereas the GB Regulations cover many other infringements. Civil penalties are being introduced to provide a more effective and proportionate response and deterrent to these breaches.
11. One respondent called for the introduction of civil penalties to be postponed until the UK's position on F-Gases was resolved in relation to EU exit. The response did not clearly give a view on whether the respondent supported civil penalties generally, so has been categorized in the "not answered" section. The UK and Scottish Governments do not propose to change the regulatory requirements as part of this exercise, only the tools available to regulators to enforce them. Adequate enforcement provisions need to be in place both before and after the UK leaves the EU.
12. One of the respondents also believed the regulatory requirements were unclear and there was insufficient guidance available. A similar comment was received in response to question two, so both will be addressed here. The civil penalties will be used to enforce the existing provisions of the EU F-Gas Regulation and therefore do not make it more difficult to comply. Furthermore, if an organisation or individual needs help complying with any aspect of the EU Regulation, there are specialist services available to give free advice and support. Organisations should contact their regulator if they have any queries. The Environment Agency and Scottish Environmental Protection Agency have dedicated helpdesks as follows: Environment Agency [f-gassupport@environment-agency.gov.uk](mailto:f-gassupport@environment-agency.gov.uk) and SEPA [FGas\\_ODS@Sepa.org.uk](mailto:FGas_ODS@Sepa.org.uk). Defra has published [guidance for users, producers and traders](#) on the UK government website and the European Commission also provides guidance on its [Climate Action website](#).
13. For offshore hydrocarbon installations, OPRED published guidance on the EU Regulation in October 2016. This remains largely applicable with no changes other than to make reference to the new 2018 Regulations. The system presently in use for inspections of offshore hydrocarbon installations involves the provision of an agenda to an operator prior to an inspection, which is discussed at an onshore pre-inspection meeting. This agenda is then followed during the inspection, but can be subject to change depending on circumstances during the inspection. OPRED is in the process of

developing internal inspection guides which will be shared with the offshore industry in due course. OPRED would be happy to engage further with the offshore hydrocarbons sector to ensure that the updated guidance on the amended F-Gas legislation is clear to all operators.

**Q2: Are you content with the proposals for how the system would work and with the proposed level of penalties? What, if any, changes would you propose?**

Answer	Yes	No	Not answered
Number of responses	15	8	4

14. The majority of respondents agreed with the way the civil penalties system would work. There were a range of responses given by those who did not agree with the proposals, which are summarised below.
15. Two responses stated that regulators should not always resort to civil penalties to bring companies into compliance. The introduction of civil penalties does not mean they will be used in every instance. When enforcing the regulations, enforcement bodies may deploy a range of measures, proportionate to the potential infringement, to bring a company into compliance and these alternative measures will remain options alongside civil penalties. These measures may include issuing enforcement notices, warnings, advice or guidance. Further details are provided in the regulators’ sanctions and enforcement policy guidance.
16. This ability for enforcement bodies to exercise discretion also addresses the comments of a respondent who was concerned that the size of the civil penalty might have a disproportionate impact on small businesses. Regulators take proportionality into account when deciding the appropriate level of penalty and the enforcement guidance of each enforcement body will explain how they would determine the level of penalty. For example, the Environment Agency’s Enforcement and Sanctions Policy takes into account the size of the organisation when deciding the level of the penalty. This proportionate approach means that the penalty imposed on larger businesses may be higher than for smaller ones so that it is pitched at the appropriate level for deterring future non-compliance.
17. Some respondents felt that criminal sanctions should be retained, making the point that criminal and civil sanctions are not mutually exclusive and are dissuasive in different ways. In this instance, we believe there would be little added value in a duplicate penalty system for the same infringements. For most F-gas breaches, retaining criminal sanctions is unlikely to add further deterrence as civil penalties can be applied more

readily and rapidly and are likely to carry higher fines than would be imposed through the courts. Civil penalties are also not the only tool available to bring an entity into compliance. Enforcement bodies may use a range of measures to inform entities of their obligations. One criminal sanction will be retained, for the deliberate release of F-gases, as required under the Environmental Crime Directive (2008/99/EC).

18. One respondent proposed that penalties should be subject to mandatory progressive increases for repeated infringements. Enforcement bodies have the discretion to vary the level of penalty, according to each regulators' own enforcement policy, up to the maximum limit set out in the Regulations. The Environment Agency Enforcement and Sanctions Policy, takes compliance history and previous breaches into account when deciding an appropriate penalty.
19. This respondent also asked whether infringements of Article 7(2) of the EU Regulation, which requires F-Gas producers and importers to show proof that HFC23 had been destroyed in the production of the gas, would be treated with the maximum threshold of £200,000 as well as criminal penalties, since infringement might entail a deliberate release of F-Gas. This infringement would not be classified as a deliberate release. A failure to comply with Article 7(2) continues to be considered a separate breach of the EU Regulation under Schedule 2 of the 2015 Regulations. The relevant civil penalty would fall within the maximum threshold of £200,000.
20. A respondent questioned why the civil penalties regime would not use the framework under the Regulatory Enforcement and Sanctions Act (RESA). The RESA requires the regulator to have the option to apply a criminal sanction to every offence covered. As a result, the RESA requires regulators to apply the criminal standard of proof, "beyond reasonable doubt", whereas the proposed civil sanctions would require the lower threshold of the "balance of probability" as its burden of proof. Retaining criminal sanctions for all infringements and the higher, criminal standard of proof would undermine the purpose of civil penalties for the F-Gas Regulations, which is to provide regulators with the means to apply penalties more readily and thus increase the level of deterrence for non-compliance. The proposed approach is consistent with how other climate legislation is already enforced, such as the Greenhouse Gas Emissions Trading Scheme.
21. The approach of having tailored civil sanctions that are outwith RESA and yet use elements of the RESA structure is also consistent with other environmental legislation, including the Nagoya Protocol (Compliance) Regulations 2015, the Nitrate Pollution Prevention Regulations 2015 and the Control of Mercury (Enforcement) Regulations 2017.
22. One respondent did not support the provision allowing the regulators to recover the costs of investigating infringements. They considered these costs to be part of normal government operations. This proposal is similar to those in other regulatory regimes to ensure the enforcement body can cover their regulatory costs. In line with the "polluter



pays” principle, the UK government believes that it is fair for businesses to cover the cost of regulatory action resulting from their non-compliance, rather than the burden falling upon the taxpayer.

23. One respondent felt the maximum fine that SEPA would be able to impose under the new F-Gas Regulations was out of step with the other regimes covered by the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015. Under this Order, SEPA are able to impose variable monetary penalties to a maximum of £40,000 for environmental offences which matches the maximum fine that can be imposed by the Sheriffs Courts. The Scottish Government points out that in Scotland, the civil penalties for the F-Gas Regulations are intended to align broadly with those used by regulators across the UK for other climate change regimes such as the EU Emissions Trading Scheme, the Carbon Reduction Commitment and the Energy Savings Opportunity Scheme. These various climate change regulations specify civil penalty levels that apply throughout the UK, and therefore sit outwith the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015. Furthermore organisations importing, using, installing and recovering F-Gas operate throughout the UK with the same obligations to comply with the provisions of the EU Fluorinated Greenhouse Gas Regulation 517/2014. Therefore it is appropriate for the F-Gas regime to sit outwith the Enforcement Measures Order in order to ensure comparable deterrence across various different climate change regimes, provide a consistent enforcement framework for operators across England and Scotland, and to reflect the seriousness of infringements given the significant global warming potential of F-Gases.
24. Five respondents proposed changes that would require amending the provisions of the EU Regulation itself. These included a new sanction for people that allow unqualified personnel to carry out work without being in possession of an F-Gas certificate and a new requirement to have equipment containing F-Gases regularly serviced by an external contractor. There were also requests for larger changes to the regulatory regime. One proposed that the F-Gas sector should be regulated in a similar way to the Gas Safe system. Another respondent proposed that the Regulations should align with the requirements across other regulatory regimes, specifically the requirements under Ofgem’s RIIO (Revenue=Incentives + Innovation + Outputs) price control. This regime requires operators of high-voltage switchgear to submit detailed annual reports to Ofgem on F-Gas banks and emissions, and their environmental performance, which is then subject to scrutiny within the RIIO regulatory framework.
25. Implementing any of these five changes would require amending the main EU F-Gas Regulation, which was not within the scope of the consultation. The EU Regulation includes the requirement for a review of its operation by the end of 2022. However, we are not aware of any plans for the European Union to amend it before then. Neither are there any plans for the UK government to amend the provisions. The European Union Withdrawal Bill will ensure that the whole body of existing EU environmental law, including the F-Gas Regulation, continues to have effect in UK law in order to provide businesses with maximum certainty and regulatory stability as we leave the EU.

26. With regard to the suggestion for aligning the penalty requirements with those in other regimes, it is not always possible to align every regulatory regime across the UK. Regimes have diverse requirements and their implementation and enforcement must be suitably adapted to achieve the purpose of the specific regulations.

27. Two respondents noted that it could be difficult to comply with some aspects of the EU Regulation. One explained that complying with the labelling requirements could be difficult when dealing with long supply networks where businesses might not be aware that their products would be placed on the EU market and might be subject to different regulatory regimes. Another felt that the HFC phase down quotas were not an exact science due, for example, to challenges such as shipping delays. As mentioned above, changes to the way the EU Regulation operates were not within scope of the consultation. However, when applying civil penalties, enforcement bodies have the discretion to take mitigating factors into account when determining an appropriate penalty. Enforcement bodies provide further information on how they determine an appropriate penalty in their respective sanctions and enforcement guidance, which will, where necessary, be updated to cover the F-Gas civil penalty regime.

**Q3: Are you content with the proposed appeals processes? What, if any, changes would you propose?**

Answer	Yes	No	Not answered
Number of responses	18	4	5

28. The majority of respondents agreed with the proposed appeals process via the First Tier Tribunal in England and to the Scottish Ministers, or the Sheriffs courts when appealing against Scottish Ministers, in Scotland. Four respondents disagreed with the proposed appeals processes and their comments are considered below.

29. One respondent was concerned that First Tier Tribunals did not appear to have the specialist knowledge of F-Gas usage and regulation to be able to consider appeals effectively. The Composition of a Tribunal is a matter for the Senior President of Tribunals to decide and may include non-legal members who are either professionally qualified or qualified by experience in their field. Rule two 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.

30. One respondent felt that appellants should have 6 months rather than 28 days to lodge an appeal. The approach proposed for First Tier Tribunals, including the 28 day deadline, is the standard process applied consistently across many regimes and is considered an appropriate amount of time for parties to prepare their case and make representations. The overriding objective of the Tribunal Procedure (First-tier Tribunal) (Regulatory Chamber) Rules 2009 is to deal with cases fairly and justly. The Rules provide extensive case management powers which can be used to expedite an application or appeal hearing where necessary in the interests of justice. It must balance this against the need to allow the parties a reasonable time to prepare their cases.
31. One respondent pointed out that a fee of £120 would be applicable at the Sherriff courts. The appeal process in Scotland is set out in Schedule 5. Appeals must be made to Scottish Ministers, except where civil penalties are issued by or on Scottish Ministers, in which case appeals are to the Sheriff Court. In all cases appeals must be made within 28 days of the notice being served. However, Scottish Ministers may at any time allow an appeal after this time. Where an appeal is made to the Sheriff, court rules will determine the procedure to be followed and the corresponding fee.

## Next steps

32. Defra and the Scottish Government are grateful to all respondents who provided their views. We are pleased the majority supported introducing civil penalties and we will proceed with the proposed approach.
33. The new Regulations will be laid before the UK Parliament in January 2018 and, subject to Parliamentary approval, will come into force within the next few weeks. Enforcement bodies will be able to apply civil penalties from April 2018.

# Annex A: List of respondents

## **Businesses**

AIMS

Apache North Sea Ltd

BOC Gases

Boeing

British Vehicle Salvage Federation

Brooktherm Refrigeration Ltd

Business Edge Ltd

Firetec Systems Ltd

JAVAC UK Limited

Leonardo MW Ltd

MacWhirter Western Ltd

REFCOM

## **Non-governmental organisations (NGOs)**

Environmental Investigation Agency

## **Public sector bodies**

Lisburn & Castlereagh City Council

Scottish Courts and Tribunal Service

## **Trade associations**

Air Conditioning and Refrigeration Industry Board (ACRIB)

Energy Networks Association

Food Storage and Distribution Federation

Oil & Gas UK

There were three responses from private individuals.

There were five other respondents who asked for their details to be kept confidential.