Llywodraeth Cymru
Welsh Government

The Scottish Government

DOE
Department of the Environment
www.doeni.gov.uk

DEPARTMENT OF ENERGY & CLIMATE CHANGE

Transposition of EU Directive 2009/29/EC revising EU Directive 2003/87/EC

Summary of responses and Government response to consultation

December 2012

Contents

1. Introduction

The European Union Emissions Trading System (EU ETS)

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

The 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, where Member States are required to set an emissions cap for all the sectors 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 production, mineral processing industries (e.g. cement manufacture), and pulp and paper processing industries, and aviation.

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 provisions for a third phase, running from 2013 to 2020. As a result the ETS Directive was revised by Directive 2009/29/EC[2] (the 'revised ETS Directive'), 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.

[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

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, from 2012, are set out in Directive 2008/101/EC[3] (the 'Aviation Directive').

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 towards greater 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.

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[4] (the '2005 GHG Regulations') and subsequent amendments. The Aviation Directive is implemented in the UK via the 2010 Aviation Greenhouse Gas Emissions Trading Scheme Regulations[5] (the 'Aviation Regulations') as amended. 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 complemented further by measures in the form of Decisions and Regulations adopted by the European Commission under delegated powers . Although Commission Regulations are directly applicable in UK law, some national level legislative provision is needed to ensure EU legislation has the desired legal effect domestically.

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 document also cover the Devolved Administrations. The draft regulations that were the subject of this consultation will apply in England, Northern Ireland, Scotland and Wales.

Objectives of the consultation

The purpose of the consultation was to seek views on the draft Statutory Instrument (the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (the '2012 GHG Regulations')) which will replace the 2005 GHG Regulations. We did not ask specific questions about every aspect of the draft 2012 GHG Regulations, but instead focussed the consultation questions on those areas where we are changing the UK's implementation. As such the consultation did not cover those parts of the 2005 GHG Regulations that we propose to retain in the 2012 GHG

[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

Regulations and which have not materially changed, as 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 ETS[6]. Similarly the consultation did not cover those areas of the revised ETS Directive where we are copying out directly.

Our aim in preparing these Regulations was 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. In doing so we took into account feedback gathered as part of the Environment Theme of the Red Tape Challenge, discussions with scheme participants via the UK Emissions Trading Group, and discussions with the Devolved Administrations and regulators.

About the consultation

This document is the Government response to the public consultation on Transposition of EU Directive 2009/29/EC revising EU Directive 2003/87/EC (URN 12D/069)[7]. On 8 May 2012 we published the consultation document containing the details of our proposals. Alongside we published a number of supporting documents for information[8]. These were:

- An impact assessment
- Draft statutory instrument
- Transposition table

The consultation sought views from across the UK and wider (as aircraft operators outside the EU are subject to the EU ETS) on all aspects of our proposals. The consultation closed on 31 July 2012. In total we received 23 responses from a variety of organisations.

In addition we received a response from the Environment Agency, in its capacity as a statutory consultee under section 2(4)(a) of the Pollution Prevention and Control Act 1999. Whilst we have worked with the Environment Agency and other regulators in preparing the 2012 GHG Regulations, we welcome these additional comments on areas which need refining in order for the EU ETS to be properly and efficiently administered and regulated in the UK.

We would like to thank all those who responded.

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

---

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

7 http://www.decc.gov.uk/assets/decc/11/consultation/transposition-eu-directive/5218-transposition-eu-directive-consultation.pdf

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

Format of this response

This document does not attempt to respond individually to every comment received during the consultation period but responds to significant issues that respondents raised. However, all points raised during the consultation have been taken into account when considering whether changes to the policy were required. Section 2 of this document contains the summary of responses to each of the questions asked in the consultation document. These questions were divided into two elements: the first section (questions 1 to 4) dealing with general proposals for structural changes to simplify EU ETS regulation in the UK; the second section (questions 5 to 30) covering the more detailed proposals contained within the draft 2012 GHG Regulations, present in the order in which they appeared. We have followed this structure in presenting this summary of responses.

Next steps

Taking these responses into account, we have revised the Greenhouse Gas Emissions Trading Scheme Regulations 2012 accordingly, and these were laid before the Houses of Parliament in early December 2012. The Regulations come into force on 1 January 2013.

Contact details

If you have any questions regarding this response please contact:

EU ETS Team
Department of Energy & Climate Change
Area 1A
3 Whitehall Place
London, SW1A 2AW
eu.ets@decc.gsi.gov.uk

2. Summary of responses and Government responses to these

Broad structural changes to simplify EU ETS regulation in the UK

Consultation Questions	
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?**

Summary of responses

Of the responses to these questions, there was overall support for the proposed approach of consolidating the existing regulations, bringing together into a single Statutory Instrument the requirements for aircraft and stationary operators, to reduce regulatory duplication. It was however pointed out that the simplification is being delivered by not requiring any additional regulatory conditions on the operator than the minimum set out in the Directive. The request was made that all operators be treated equitably; but where there are differences in treatment, these be set out clearly to avoid confusion. One respondent had concerns with the way the Regulations cross refer to the Directive, which it was felt would make it more difficult for UK participants to scrutinise the regulations for risks. It was suggested that the requirements also be transposed into the Regulations to create a more self-contained document. There was also complete support for our approach in moving the detailed mechanics to Schedules, although several respondents requested that references to the relevant parts of the Schedules are clearly referenced within the main body, to aid with navigation and ensure that the detail is accessible for all.

Government response

We recognise that we are limited by the Directive in the level of simplification we are able to deliver. In preparing the 2012 GHG Regulations we have ensured that we are not adding further unnecessary levels of administrative burden to operators other than that needed to allow proper implementation and regulation of the EU ETS in the UK. In finalising the Regulations we have sought to ensure that, where possible, we have made them simple to navigate. As has been highlighted in responses to question 12, we have made the necessary changes to ensure that where differences of treatment for different operators occurs, this is made clear in the Regulations.

In preparing the 2012 GHG Regulations we followed Government guidance on transposition[9]. This sets out the approach known as copy out – the implementing legislation adopts the same wording as that of the Directive or cross-refers to the relevant Directive provision. For the most part we chose to cross-refer to the relevant provisions in the Directive and associated EU legislation. As explained in the consultation, the EU ETS is implemented by a number of Directives, Decisions and Regulations, which require some national level legislation to ensure EU legislation has the desired legal effect domestically. By cross-referencing the appropriate EU-level legislation we are reducing the need to amend UK Regulations should the EU legislation be itself amended.

Consultation Question	
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?**

Summary of responses

There was support for the proposal to standardise where possible the timescales for regulators, and agreement that it would improve certainty for industry. The request was made that the standard response times be a maximum, not a target, to ensure swift processing of applications etc. and that they be applied to both formal and informal communication between the operator and the regulator. A request for acknowledgement of receipt of submitted documentation to be implemented, to confirm the commencement of the two month determination period. It was highlighted that timescales in relation to the New Entrant Reserve have not been applied in a uniform manner, and a request that in determining applications the largest GHG reductions be dealt with as a priority. One response suggested that the administrative burden could be further reduced by removing the requirement to enter monitoring and reporting procedures into ETSWAP. Another response suggested that a shorter timescale of one month or less would be helpful to ensure aircraft operators receive timely responses.

Government response

We welcome the support for our proposal to standardise where possible the timescales for regulators. The standard timeframe set out in the 2012 GHG Regulations covers all applications, reports and notices submitted to the regulator, and is not specific to permit applications. In addition to the timeframes set out in the Regulations, the Environment Agency has its own set of standards[10] as part of its customer charter which apply to communications they receive. ETSWAP (the Environment Agency's web-based, greenhouse gas emissions planning, reporting and management tool) will provide an automatic acknowledgement of receipt. This will assure operators of receipt of their documentation by the regulator.

[9] http://www.bis.gov.uk/assets/biscore/better-regulation/docs/t/11-775-transposition-guidance.pdf
[10] http://www.environment-agency.gov.uk/aboutus/customercharter/35599.aspx

Applications are determined on a case by case basis. Where the regulator requires further information from the operator, the time taken to determine the application may be longer. The increased use of ETSWAP for submitting all applications, with specific fields that have to be completed by the operator before they can submit the application, should help to ensure that applications are determined as speedily as possible.

We believe that the two month response time is a suitable compromise between the 13 week maximum timeframe required by the Penfold Review for the Environment Agency to determine applications, and the amount of time the regulator needs to process applications etc.

It has not been possible to ensure complete uniformity in setting timescales across the Regulations, as there are specific deadlines and processes set out in the Free Allocation Decision which, were we to apply the standard two month timeframe, would not then easily fit within the compliance cycle. In some circumstances the Commission has to approve allocations before they can be finalised. We are not able to put a duty on the Commission to complete the approval process within a specified timescale. We have therefore had to reach a suitable compromise on timescales for submissions relating to free allocation processes.

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?**

Summary of responses

Of those responses received there was support for the proposed approach to transposition, as set out in the consultation document. A request was made that, with the advent of the new environmental regulator in Wales in 2013, transposition and implementation in Wales results in identical regulatory conditions on operators.

Government response

The 2012 GHG Regulations will apply across the United Kingdom. All UK ETS regulators meet on a regular basis to discuss implementation of the EU ETS in the UK to ensure application of a consistent UK-wide approach. This will continue in phase III of the EU ETS and will include representatives from the single environmental body for Wales.

Detailed provisions in the draft 2012 GHG Regulations

Part 1 - General

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

Summary of responses

We received a range of responses on the provisions set out in Part 1 of the draft Regulations. In response to the definitions as set out in Regulation 3, two responses raised specific concerns about the definition of 'reportable emissions'. This also relates to the penalty for under-reporting emissions ,as set out under question 20 below.

Both responses felt that the definition was ambiguous and not consistent with the ETS Directive, particularly in relation to the surrender of allowances, and could result in an operator being penalised even when they have surrendered appropriately verified emissions. It was also stated that the definition does not take into account the verification procedures set out in the Monitoring and Reporting Regulation[11] (MRR) and the Verification Regulation[12].

A second definition which raised concerns was that of 'operator', it being felt that the definition does not take into account the changes in EUA allocation processes between Phase II and Phase III for combined heat and power (CHP) plant. A specific example was described, where a CHP operator may have operation and maintenance contracts with industrial clients, who, if subject to carbon leakage, may receive a free allocation of allowances, when the CHP operator is in fact responsible for all compliance obligations associated with the permit (including surrendering of allowances) but is not itself in receipt of the free allocation.

One respondent requested that the definition of a hospital site include clinical science or university buildings or even laundries that provide a service indirectly or directly to those healthcare facilities providing clinical care to patients. Another respondent highlighted the need for the definition of 'regulator' to account for the separate Welsh environmental body.

In addition to the responses on the definitions there was also a request for clarification on the meaning of 'time to time' with regard to the review, and a suggestion that the timing of the review be scheduled for the midway point of phase III. There was also a request for more frequent government contact with industry on the impact of the Regulations following implementation.

Government response

As regards the definition of "reportable emissions", it is the Government's view that this is the appropriate definition given the underlying aims of the Directive, which is to ensure that all relevant emissions of greenhouse gases are monitored and reported, and accounted for by means of the surrender of allowances. There may be cases where even a properly verified emissions report may sometimes under-report the total amount of emissions. However, if this comes to light the proper approach is to make this information available to the regulator, who will be able to correct the report by making a more accurate determination of emissions. The overriding aim must be to produce a verified report of "total emissions", as required by Article 12 of the Directive. A particular issue arises in relation to automatic imposition of the €100/tonne penalty in respect of emissions that were under-reported, and therefore not fully accounted for by allowances surrendered before the 30 April deadline. That issue is addressed under Question 20 below. As regards the procedures for monitoring and verification, the 2012 GHG Regulations include requirements to monitor the annual reportable emissions in

[11] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:181:0030:0104:EN:PDF
[12] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:181:0001:0029:EN:PDF

accordance with the MRR, and to prepare and submit to the regulator a verified report of those emissions in accordance with the MRR and the Verification Regulation. These two Regulations cover in detail the requirements for monitoring, reporting and verifying in Phase III.

Given the timing of these Regulations, it has not been possible to make provision for the new single environmental body for Wales. However, the Regulations will be amended to take into account the functions that this new regulator will have from 1st April 2013.

Under the Free Allocation Decision, where an EU ETS installation produces heat and sends it to another EU ETS installation, it is the consumer of the heat that receives the allocation. The basis behind this is that the consumer of the heat is better placed to be more efficient and reduce their heat requirements – this is likely to have an impact on the emissions from the heat generating site, but not necessarily. The heat generator simply gives the consumer the heat they ask for.

However, it is right that the operator that produces the emissions is responsible for reporting those emissions, and the operator can only be based on who has control over the operation of the installation. The two parties can make a private agreement between themselves as to whether the heat consumer gives the emitter some allowances, but that should not affect how the regulations are written and something the Government should not be involved in. This issue may result in companies trying to redefine who the “operator” is, but this will depend on any agreements they have on who is responsible for operating plant. Our view is that the Free Allocation Decision should have no bearing on how we define the operator responsible for reporting the emissions. In addition, there are some instances in the UK where one EU ETS heat producer supplies multiple heat consumers, so clearly it would not be possible to attribute specific emissions to specific heat consumers.

With regard to carbon leakage status, the heat consumer receives an allocation for heat they consume irrespective of whether it is at risk of carbon leakage or not. The carbon leakage status simply affects the quantity of free allowances allocated and any change from carbon leakage to non-carbon leakage in the future will also simply affect the quantity of free allowances.

The definition of a hospital has been amended slightly to recognise the range of partnership and outsourcing arrangements that might be in place at a hospital. This aims to ensure that these types of arrangements are not discriminated against where the facilities associated with the hospital are carrying out medical research or teaching or are providing services integral to the functioning of the core hospital.

With regard to the review of the Regulations, the 5 year point is the latest that any review should take place, and should we wish to use any review outcome to feed into a Commission review, we can bring the date forward.

As part of our planning for implementation of Phase III of the EU ETS we are considering how we seek feedback from industry and the regulators on the implementation of the Regulations.

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?

Summary of responses

Of the responses received that referred to the use of ETSWAP as the method for submitting applications and reports, there were requests for appropriate support for users; and for the system to include pre-populated fields where the information has already been submitted.

Clarification was requested over draft Schedule 3 paragraph1(2). We also received comments on the provisions in draft Schedule 3, paragraph 2, which cover the determination of applications. These questioned the provision whereby if the regulator fails to determine an application within the specified period, the applicant may give the regulator notice that they treat it as being refused. It was felt that this did not give the regulator the incentive to meet the timescale specified, and would not give the applicant scope to appeal or challenge the process.

It was also suggested that date of receipt of application should be determined when the application is received, and not as in the current draft 2012 GHG Regulations, when payment of the fee is completed.

Government response

A helpdesk for the EU ETS already exists with the Environment Agency and will continue to provide advice and support for operators through Phase III of the EU ETS. When logged into ETSWAP, context-sensitive help is available for each different web page in the system. ETSWAP will provide pre-population of fields, where appropriate.

In the draft Regulations Schedule 3, paragraph 1(2) stated that “for the purpose of this paragraph, an application includes a proposed plan required to be submitted as part of the application”. This means that where the term “application” was used in draft Schedule 3(1), it also means “application and proposed plan” where relevant. It does not require each application to be accompanied by a plan. As this issue was only raised by one respondent we do not believe that there is any problem with the clarity of the drafting, therefore we have not made any changes to this wording. Draft Schedule 3, paragraph 2 also continues the practice set out in the 2005 GHG Regulations and is consistent with other environmental legislation (e.g. Environmental Permitting Regulations 2010). Draft Schedule 3, paragraph 2 does allow for the timeframe to be extended if agreed in writing with the operator, to ensure both sides are clear about the timescale for determination. The objective here is to ensure a dialogue between the regulator and the operator in instances where unforeseen circumstances may prevent applications from being determined within the standard two month period. If the regulator does not determine an application within the agreed timeframe we are providing the operator with the option of treating their application as having been refused, rather than letting the process drag on for an unknown period. This will enable the operator to appeal, as there is a right of appeal for people aggrieved by a deemed refusal of an application. We believe that this provides the regulator with the incentive to determine applications within the specified timeframe, but should this not be the case, the regulator and operator have the ability to agree an alternative timeframe, or the operator may bring the application to an end and take forward an appeal.

The 2012 GHG Regulations state that an application submitted electronically is determined to have been received once payment is received. This is a deliberate choice to ensure that there is an incentive on operators to pay the relevant fee promptly. Were a fee to remain unpaid, the regulator would instigate recovery of fee procedures against the operator.

Part 2 – Stationary installations

Chapter 1 – Permits (in conjunction with Schedule 4)

Consultation Questions	
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?**

Summary of responses

There was general agreement to the way the provisions are drafted, including presenting the more technical detail of permitting procedures in Schedules. Specific points requested that cross referencing between the main Regulations and the Schedules be improved to assist in finding the relevant information quickly, with the suggestion that the Schedules be published as a separate Statutory Instrument, to enable future modification without re-opening the legislation. In addition there was a request for clarification on the 5-year review of permits.

In general responses agreed that the provisions give legal effect to EU legislation in the UK, whilst minimising burdens on EU ETS operators and regulators. Regulator discretion in applying penalties was welcomed. One respondent highlighted their disagreement with the way we have interpreted 'reportable emissions' (as covered in the response to question 5 above).

Government response

In finalising the 2012 GHG Regulations we have endeavoured to ensure that information can be found as quickly as possible where cross references are used – and have included a table of contents to assist readers in navigating the Regulations. Presenting the Schedules as a separate piece of legislation, in the form of a separate Statutory Instrument would not be practicable, as we would then be cross referencing between two separate pieces of legislation, when our aim in consolidating existing regulations is to reduce the number of Regulations that implement the EU ETS in the UK. To provide clarity for both operators and regulators we have included in the final Regulations a requirement that permits set out notification requirements to ensure that as many of these as possible can be found in one place. Article 6(1) of the ETS Directive requires regulators to review greenhouse gas emissions permits at least every five years, and make any amendments as appropriate. We are therefore transposing this requirement into national law through the Regulations.

Consultation Question	
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 the regulator to respond, appropriate?**

Summary of responses

All the responses agreed that the provisions give legal effect to EU legislation in the UK whilst minimising burdens on EU ETS operators and regulators. There was support for the proposed changes to timescales – they were felt to be appropriate.

Government response

We are pleased that our proposals are felt to be appropriate, and we have retained these provisions in the final version of the 2012 GHG Regulations.

EU Monitoring and Reporting Regulations: the treatment of biofuels and bioliquids

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[13] to the use of bioliquids by stationary installations under the EU ETS?**

Summary of responses

There were a range of views expressed in responses to this question. There was strong agreement that the EU ETS should not become a sink for unsustainably sourced bioliquids. There was support expressed for extending the application of sustainability criteria under the Renewable Energy Directive (RED) to the use of bioliquids under the EU ETS, with the need for Regulations and Directives to be applied consistently across applicable sectors being cited as the reason for this. There was also the request from a number of respondents that any changes do not lead to double regulation for installations covered by both the EU ETS and the Renewables Obligation. There was also support for the proposed approach to await further guidance from the Commission, and offers to help develop practicable reporting systems and sustainability criteria. There was also concern expressed about the application of RED criteria to aviation biofuels – that applying sustainability criteria may result in delays in market development of biofuels, and that, given the international nature of aviation fuels, producers outside the EU are being required to meet the EU RED standard when there may already be similar standards within their own country which they are meeting.

[13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=Oj:L:2009:140:0016:0062:en:PDF

Government response

We welcome these responses. As discussed in the consultation document, as the MRR expressly requires the use of biofuels for aviation to be assessed in accordance with the sustainability criteria set out in the RED it is therefore directly applicable in UK law. On the other hand, the treatment of bioliquids in stationary installations requires express implementation in UK law, to ensure compliance with our obligations under the RED. We will have therefore included in the final 2012 GHG Regulations a requirement for installation permits to place an obligation on operators to satisfy the regulator that the sustainability criteria set out in the RED have been fulfilled where an emission factor of zero is reported in respect of the use of bioliquids. The regulator will have powers to determine emissions where an operator is unable to satisfy them that sustainability criteria have been met. Should further guidance be forthcoming from the Commission we shall consider whether this position needs reviewing.

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

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

Summary of responses

In general there was agreement that the provisions for excluded installations do give legal effect to the UK's Opt-out Agreement Scheme[14]. One respondent noted that there is a lack of clarity on the key criteria and competencies for those who will conduct opt-out verification, and requested that there be consistency between the EU ETS and the opt-out. There was a request for consideration to be given to the appropriate notification requirements for excluded installations that cease to meet the criteria required of an excluded installation, to providing regulators with the correct powers to calculate or determine the allocation of allowances for any excluded installations that return to the EU ETS, and whether these operators would be able to apply to the NER. A question was raised about whether the issuing of a termination notice (as set out in paragraph 7 of draft Schedule 5) was a necessary step. Clarification on the role of the Registry administrator in these processes was also requested. There was a request for the monitoring and reporting conditions and record keeping requirements for excluded installation permits to be aligned with those for GHG permits. It was highlighted that there was no detail in the draft 2012 GHG Regulations regarding the requirements of an application for an increase in emissions targets for excluded installations. .

Government response

[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

[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

Verification for opted out installations will be carried out by regulators through the risk based auditing programme, as such ensuring the personnel carrying out opt-out verification have the correct competences will be managed as part of the overarching requirements by Government on regulators that they are competent in carrying out their duties. However, where operators choose to have their annual emissions verified by a third party then verification must be in accordance with the EU Accreditation and Verification Regulation.

We are considering the need to issue directions to regulators on the risk based auditing programme which would address more specific elements of verification methodology such as materiality thresholds. We have considered the appropriate notification requirements for installations that cease to meet the criteria required of excluded installations and have amended the Regulations accordingly. The process for terminating excluded installation status has also been refined and includes notification to the operator that they will re-enter the EU ETS from the beginning of the following year.

The level of free allocation given to excluded installation that re-enter the EU ETS will be based on the level determined in the NIMs but will need to take into account any significant changes in capacity since 30 June 2011. Given the complexity of the provisions that will be required to determine these allocations and that no installation will re-enter the EUETS until 2014 further informal consultation will be carried out later with a view to putting forward amending provisions in early 2013. The allocation will be taken from the UK's auction pot and not from the New Entrant Reserve. Powers required by the Registry administrator in this process are already set out in the draft regulations and the Registry Regulations 2011.

The monitoring and reporting and record keeping requirements for excluded installations will be modified to bring them further into line with those for GHG permits but will remain different in some respects to reflect the existence of the de minimis rule, the requirement to self-verify emissions and for hospitals to keep records to show the proportion of heat supplied to an establishment that is not a hospital.. The regulation will be amended to include appropriate details for applications for an increased target following a capacity extension.

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

Consultation Questions	
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?**

Summary of responses

There was, in general, agreement that the provisions give legal effect to EU legislation in the UK. There were a number of comments and requests for clarification on the processes involved

in the free allocation process. These included how the provisions permit the adjustment of allocations if and when the cross sectoral correction factor is applied

It was highlighted that the provisions in Schedule 6 include a number of administrative requirements which appear to apply to all operators, and not merely those in receipt of a free allocation of allowances. Several respondents requested clarification on how the provisions in Schedule 6 will apply to those operators who do not receive a free allocation. The lack of uniformity in the timescales for applications to the NER was highlighted as a possible cause of operator uncertainty, and it was noted that operators need reassurance that the Commission has approved the list of opted-out installations. There was also a request for the process for any split of allocation to an installation as a result of a partial transfer to be clarified, so as to ensure that a baseline is established, so that any future increases in capacity by one or either of the sub-installations can be easily established and any additional allocation of allowances be determined. It was also noted that whilst there are powers for the regulator to request the registry administrator to withhold allowances from an installation in certain circumstances, this did not extend to partial cessations. It was requested that the powers were extended to include partial cessations, to ensure installations do not receive allowances to which they are not entitled.

In general there was agreement to our proposal for an obligation being placed on the operator to surrender any over-allocation of allowances. However there were questions over whether the provisions should apply where there are temporary capacity reductions / expansions; a request for the procedural thresholds for amending allocations to be the same for decreasing or increasing capacity; and for clarification of the provisions in Schedule 6 to take into account temporary closures (e.g. for essential maintenance) and installations not in receipt of a free allocation of allowances. There was also a request for this obligation to be extended to aircraft operators, to ensure fairness and consistency.

Government response

We have noted the fact that draft Schedule 6 contained provisions which may apply to installations that do not receive a free allocation of allowances, as well as those installations who are in receipt of a free allocation. We have amended Schedule 6 to make clear which provisions apply to all installations, and which provisions apply only to those who receive a free allocation of allowances. We have also clarified the process for handling splits in allocation where partial transfers take place to ensure that a suitable baseline is available for any future changes to the installations. The current list of allocations (the NIMs) is provisional, as it has not yet been approved by the European Commission. It is for the Commission to apply any cross sectoral correction factor, once it has reviewed all the NIMs of all Member States. Any changes to the UK NIMs required by the Commission will be done during the review of the UK NIMs, and a revised list will be published as soon as possible after the Commission has completed all reviews and addressed any cross sectoral correction issues. We have clarified the process for updating the UK NIMs in the final Regulations.

The list of UK installations who have indicated they wish to opt-out of the EU ETS has been approved by the Commission The list of installations that have been approved as excluded has been published and operators have been notified of the decision. No further provisions are necessary in the Regulations.

As set out in our response to Question 3, there are specific deadlines and processes set out in the Free Allocation Decision which mean we have had to reach a suitable compromise on the

timescales relating to the free allocation process. Following the consultation we have revised the drafting in Schedule 6 to provide greater clarity on the processes, set out in the Free Allocation Decision, that must be followed in determining and adjusting free allocations. Whilst the timescales may lack uniformity, the fact that they are set out in the 2012 GHG Regulations does in our view provide a degree of clarity as to the process.

We welcome the support for our proposal to place an obligation on operators to return any over-allocated allowances, and will extend this to cover aircraft operators, to ensure consistency and fairness. Article 22 of the Free Allocation Decision is clear that where installations run on a seasonal basis or are kept in reserve or standby they are not covered by the provisions for cessation of operations, and we have transposed this in to Schedule 6. We are not able to go further than the provisions set out in the Free Allocation Decision regarding temporary closures, which allow for a 6 month period closure which can be extended to 18 months with the agreement of the regulator.

Part 3 – Aviation

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

Summary of responses

Of the responses received it was noted that although Article 15 of the Monitoring and Reporting Regulation provides that significant changes to a tonne-kilometre data monitoring plan require the approval of the regulator, the 2012 GHG Regulations do not give powers to the regulator to issue a variation of a “benchmarking plan”. Such a power would enable the regulator to help ensure an aircraft operator receives the free allocation to which it is entitled. The requirement to consult on emissions plan conditions was highlighted as an unnecessarily onerous requirement and inconsistent with the approach taken for permit conditions for stationary installations. It was suggested that this requirement be removed and replaced with a right of appeal for UK administered operators against the provisions of an emissions plan whenever conditions are varied.

Government response

We agree with the proposal to give the regulator the power to issue a variation of a benchmarking plan, to ensure they are able to fulfil their obligations under the Monitoring and Reporting Regulation. We also agree with the proposal to remove the requirement for consulting on emission plan conditions and replace with a right of appeal, and have amended the 2012 GHG Regulations accordingly.

Part 4 – Surrender of allowances

Use of project credits

Consultation Question	
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?**

Summary of responses

Whilst the majority of respondents agreed that the provisions include the flexibility to modify the current quantitative limits there were concerns about the flexibility of the definition of project credits (in that by specifically excluding credits from projects involving the destruction of HFC-23 and nitrous oxide from adipic acid production, should the Commission further restrict the use of project credits in the future these regulations would need to be amended). There were also concerns raised about the levels of project credits set out in the Regulations that both aircraft operators and stationary installations may surrender. In both cases the Directive provides a minimum level of project credits that may be surrendered, which in the UK Regulations has been used as the maximum level. There were concerns that this may put UK operators at a disadvantage, and that the maximum permissible levels be instead used, to ensure a level playing field with operators in other Member States. Additionally the request was made that the Regulations reflect that different types of installations may be allowed different amounts of project credit use. The comment was also made that it is not clear how the Regulations implement the exchange of credits for allowances as provided for in Article 11a of the Directive.

Government response

Since the consultation on the 2012 GHG Regulations, the European Commission have issued proposals to adopt measures imposing qualitative and quantitative restrictions on the use of project credits as part of a package of measures to amend the 2011 Registries Regulation. We expect that the amended Registries Regulation will come into force in the first quarter of 2013. Therefore all references to the direct surrender of project credits have been removed from the 2012 GHG Regulations as we expect that restrictions on the use of project credits will be facilitated through the Union Registry rather than at the national level.

Surrender of allowances

Consultation Questions	
16.	**Do you have views on how to best 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).**

Responses

Of the responses to question 16, on how to best implement Article 16(3) with respect to the application of the €100 per tonne penalty, the majority of responses agreed that the provisions need to be aligned. As to how this could best be achieved, there was more of a difference in opinion in responses, with just over half of respondents indicating that the aviation regulations be aligned with the provisions for stationary installations. A variety of reasons were given for this view, including that the ETS Directive appears to give no choice in the matter; that without a decisive penalty there is little incentive for operators to continually improve their processes; and to prevent non-compliant operators from having a competitive advantage over those operators who do comply.

Government response

We have therefore aligned provisions for stationary installations and aircraft operators so that the penalty continues to apply for each year the operator fails to comply. We need to have a sufficiently dissuasive penalty to provide an incentive for operators to comply with the system, and to ensure that non-compliant operators do not receive any competitive advantage over those who do comply with the system.

Part 5 – Enforcement etc.

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

Summary of responses

In general there was agreement to the provisions in Part 5, which covers the use of enforcement notices and the power of the regulator to determine reportable emissions in certain cases, as set out in the Regulations. There was disagreement with Regulation 46 which stated that the regulator may serve an enforcement notice on a person they consider is likely to contravene a relevant provision – the argument being that enforcement notices should not be served on assumptions. It was pointed out that there is no indication of the magnitude of the fee that could be recovered by the regulator, and a suggestion made that a ‘minimum time to comply’ clause be included to give operators a timeframe in which they would need to take action in the event that they were non-compliant.

Government response

In providing the regulator with the power to serve an enforcement notice on a person they consider is likely to contravene a relevant provision we are being consistent with other environmental legislation, such as the Environmental Permitting Regulations 2010[15]. This is to ensure that any possible non-compliance is prevented before it occurs. We have refrained from putting a limit on the magnitude of fee that the regulator can recover, as this will depend on the amount of resource they will have to put into making a determination of emissions.

Regulation 46(1)(d) in the draft Regulations stated that the enforcement notice will include the period within which the person served must comply, and Regulation 46(2) stated that the person must comply within this timeframe. We have not included a standard time here, as it will depend on the type of contravention of the Regulations as to how quickly an operator can become compliant. Our overarching aim throughout the Regulations is to ensure that non-compliant operators are brought back into compliance as quickly as possible.

Part 6 - Information

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

Summary of responses

In general there was agreement to the provisions in Part 6. Three issues were raised – the first concerned the confidentiality of information with regard to draft Regulations 48 and 49(b), and that any information provided to the Commission should be provided in aggregate form, without identifying individual airlines. The second concerned the requirement for a person to provide information to the regulator even if that information is not in their possession. It was felt that this Regulation is not clear in circumstances where operators do not have and cannot access the relevant information. The third concerned the vagueness of exceptions to disclosure of information in draft Regulation 49(a), as they may not provide adequate protection of commercially sensitive information.

Government response

Part 6 is only concerned with the provision and disclosure of information within the UK, so concerns about information being provided to the Commission are unfounded. Draft Regulations 49(2) and 49(3) provide for information gathered under these Regulations by the relevant UK body to be shared with other Government bodies for preparing and publishing national energy and emissions statistics, including publishing a national inventory. This information will only be provided in aggregate form at the sector level.

Draft Regulation 48(3) requires a person to provide information which it is reasonable to require them to compile, even if it is not in their possession or would not otherwise come into their possession. We cannot cover every circumstance where this may occur so have had to keep the requirement quite open. It is important to note the word “reasonable”. If the person feels that a request to provide information is unreasonable, they can appeal against the information

[15] http://www.legislation.gov.uk/uksi/2010/675/regulation/36/made

notice, although in the first instance they should raise their concerns with the regulator to avoid drawing out the issue longer than necessary.

We believe that the exceptions where information is to be disclosed or published are set out clearly in the 2012 GHG Regulations. In addition all information provided to the authority or the regulator under the 2012 GHG Regulations is covered by the Data Protection Act 1998[16], the Freedom of Information Act 2000[17], the Freedom of Information (Scotland) Act 2002[18], and the Environmental Information Regulations 2004[19], which govern the storage, use and disclosure of information.

Part 7 – Civil Penalties

Penalty for not surrendering allowances

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?**

Summary of responses

Of the responses to question 20 received there was in general support for the regulator to exercise discretion in applying the penalty for under-reporting, where a genuine error had been made. This was seen to be a key driver in developing an open and honest relationship between operators and regulators, and encourage greater compliance (and lessen operator exposure to penalties).

Several issues were raised in responses in relation to the application of penalties. There was concern (also raised under questions 5 and 8) about the materiality threshold not being taken into account in the definition of reportable emissions, particularly in relation to the surrender of allowances, and that the definition itself is ambiguous, which could cause problems for operators surrendering allowances. It was suggested that if the operator submits an amended report and surrender additional allowances the €20/tonne penalty should not apply, and that as aviation is new to the EU ETS aircraft operators should not be penalised for accidental underreporting. Concerns were raised over the ability to detain and sell aircraft.

Government response

We welcome the support for our proposal for a more nuanced approach to the penalty for under-reporting emissions. As covered in the Government response to Question 5, we have provided a definition of annual reportable emissions which we consider is consistent with the

[16] http://www.legislation.gov.uk/ukpga/1998/29/contents
[17] http://www.legislation.gov.uk/ukpga/2000/36/contents
[18] http://www.legislation.gov.uk/asp/2002/13/contents
[19] http://www.legislation.gov.uk/uksi/2004/3391/contents/made

ETS Directive, and have included permit conditions (in Schedule 4) to require that emissions are monitored and reported in accordance with the Monitoring and Reporting Regulation and the Verification Regulation (and similar requirements apply in respect of aviation emissions) . Since the Verification Regulation covers materiality levels and, as an EU Regulation, is directly applicable, we have not specifically referred to this in the 2012 GHG Regulations.

As regards the application of the €100/tonne (or a lesser) penalty in under-reporting cases, the legal position may in the longer term have to be clarified by the UK courts, or even by a ruling from the EU Court of Justice. In the meantime, the Government intends to implement the revised Directive in the manner which appears best to promote its overall purposes. It is the Government's view that it is not appropriate to impose the €100/tonne penalty solely because the operator has failed to surrender sufficient allowances by 30 April to cover all of its reportable emissions in the previous year. The €100/tonne penalty should apply automatically only where insufficient allowances have been surrendered to cover all the emissions reported by that date. Although other views are possible, it does not seem to us that the Directive should be interpreted as requiring liability for innocent under-reporting, merely because the operator has missed a surrender deadline that is necessarily fixed in terms of the reporting cycle. However, even where the Directive does not require a specific penalty to be imposed, Member States are required to ensure that suitable penalties are in place to ensure proper compliance with the system. We intend therefore to provide for a range of penalties in the under-reporting situation. The €100/tonne penalty will still apply where the operator has failed to notify the regulator of a known inaccuracy in the report, but a discretionary €20/tonne penalty will be able to be applied in other circumstances. This will encourage the accurate and honest reporting of emissions.

When setting penalty levels we did consider having no penalty attached where an operator submits an amended report and surrenders additional allowances, however we felt that there needed to be some deterrent to make this provision effective. Regulator discretion will still apply to this penalty. We do not believe that aircraft operators should be given special treatment as aviation has been in the EU ETS for a short time. Phase III sees the inclusion of new sectors and gases with operators completely new to the system participating fully, whereas aircraft operators will have had two years of monitoring emissions and additionally faced lower penalties for the first year of their inclusion in the EU ETS.

Levels of other penalties

Consultation Questions	
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?**

Summary of responses

There was complete agreement to our proposed approach to establish a regime in the UK comprised of civil penalties only. The suggestion was made that the “nuanced” approach proposed with regard to the penalty for under-reporting emissions (addressed in question 20 above) be extended so that the regulator took a similar approach for most other offences. Respondents also agreed that the Regulations give legal effect to the penalty regime described in the consultation document. The suggestion was made that a clause be included to specify a minimum time period in which the operator has to comply once notified of any failure to surrender or make payment of a civil penalty.

We received a mix of responses to question 23. Just over half agreed that the penalty levels were proportionate. There was a request that the penalties be subject to the full discretion provided for in Regulation 54, and a request for DECC to review and compare UK penalty levels with those of other Member States, to ensure consistency. Concerns were raised that one failure can lead to multiple penalties (for example failing to monitor emissions would also lead to a failure to report emissions), and comments on the penalties for opted out installations – with one respondent saying the penalty for exceeding an emissions target for small emitters is harsh, and a second respondent saying that the penalties for under-reporting emissions and failing to notify the regulator that they no longer satisfy the excluded installation eligibility criteria are potentially too low.

Government response

As explained in the consultation document, we are adopting a more nuanced approach to the penalty for under-reporting than the approach set out in the 2005 GHG Regulations. We therefore provided more detail on this approach in the consultation document than on our approach for the other civil penalties set out in the draft 2012 GHG Regulations.

Regulator discretion in imposing penalties is one of the key changes we have included the 2012 GHG Regulations, with the aim of encouraging greater compliance (and hence lessening operator exposure to penalties). This discretion applies to all penalties set out in the 2012 GHG Regulations, other than the €100/tonne penalty for non-surrender, and gives the regulator the discretion to refrain from imposing a civil penalty; reduce the amount of a penalty (including any daily penalties); extend the time for payment; withdraw a penalty notice; or modify the notice by substituting a lower penalty. As set out in the Regulations, penalty notices will include both the total penalty amount due and the date by which that amount must be paid.

With 27 Member States setting their own penalties regime there is a wide range of different enforcement procedures – both criminal and civil. It is therefore difficult to harmonise. The UK is an active participant in the EU Compliance Forum, where regulators ensure as much consistency as possible in enforcing the ETS Directive

The level of the penalty for exceeding an emissions target for small emitters is a matter of policy and is key to ensuring the Opt-out Scheme delivers the required equivalence to the EU ETS. The approach to the penalty level has been agreed with the European Commission and will be set annually with reference to the price of emission allowances. Consideration has been given to the appropriate level of penalties for under-reporting emissions by excluded installations and failure to notify breach of excluded installation eligibility criteria and these are set out in the final Regulations.

Part 8 – Appeals

Consultation Questions	
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 that accompanied the consultation?**
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?**

Summary of responses

All responses to question 24 agreed that the First-tier Tribunal is the appropriate body to hear determine appeals against decisions relating to enforcement of the 2012 GHG Regulations. Comments received in response to question 25 confirmed the analysis set out in the Impact Assessment that the costs to operators for the different appeals processes considered are marginal. Respondents did confirm that the benefits they felt would be gained in using the First-tier Tribunal lay in the efficiency (and therefore more rapid response times) and flexibility of the system. Respondents to question 26 found the rules to be complicated and difficult for the layperson to understand, but in general it was agreed that the rules will suit the handling of these appeals. In response to question 27 the request was made that there be a standardised approach to appeals across the UK to ensure equitable treatment of operators.

Government response

We welcome the support for our proposal to appoint the First-tier Tribunal as the appeal body for appeals under the 2012 GHG Regulations in England and Wales. We will continue to work with the First-tier Tribunal to put the necessary arrangements in place. The role of the Tribunal will also extend to hearing appeals on registry matters, where the Environment Agency acts as registry administrator for the whole of the UK. In Scotland and Northern Ireland existing appeal arrangements will continue to apply.

Part 9 – The Union Registry

Consultation Question

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

Summary of responses

There was general agreement to the provisions in Part 9 as drafted. A number of specific comments were made on some of the provisions in the Registries Regulation 2011, which, it was suggested could be clarified in the 2012 GHG Regulations. These included a request for clarification on the timing of an aircraft operator's account being set to excluded status (which means they are therefore not able to receive allowances until the account status is set to open status again); and clarification on what changes should be made to the national aviation allocation table, in particular where an aircraft operator ceases operation.

Government response

We welcome the comments received in response to our question about the provisions relating to the Union Registry. A date has not be included in the 2012 GHG Regulations stipulating when to exclude aviation operators from the EU ETS, as discussions are still ongoing within the amendments to the 2011 Registries Regulation. The Government will assess whether a harmonised approach can be reached across the EU, before given further consideration to specifying a date in a future amendment to the 2012 GHG Regulations,

Other requests for clarity which were raised have been addressed within the 2012 GHG Regulations.

Part 10 – Supplementary

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

Summary of responses

Whilst the majority of responses agreed with the provisions in Part 10 as drafted, concerns were expressed over the provisions in draft Regulation 84 allowing for the seizure and sale of allowances as a means of recovering unpaid fees by an operator. It was felt that this may serve to increase the difficulties that led to an operator getting to this situation, and that by the regulator selling allowances on the market at an acceptable price could interfere with fundamental aspects of a free market economy. If regulators selling allowances were speculating on prices they could be perceived to lack the necessary transparency and independence required for the objective and efficient administration of the system. It was suggested that other options available to the regulator are used as an alternative, including the imposition of fines and the ban of operators in its airspace.

Government response

In aligning provisions for aircraft operators and stationary installations on how we handle the issue of unpaid fees we have chosen to align with the aviation provisions. Whilst there are indeed other sanctions available for use against the operator of a stationary installation which does not pay its fees (such as revoking the permit, which could then lead to further penalties such as operating without a permit, and failure to surrender sufficient allowances) the difficulty arises with aircraft operators who are mobile and could fail to pay fees and never return to the UK. Penalties are not kept by the regulator – any monies they receive as a result of a penalty go into the Consolidated Fund (the centrally administered Government fund). Regulator charges in the UK are set on a subsistence basis – they cover the costs of the regulator for enforcing the EU ETS, but do not provide a profit. Therefore any operator who does not pay its fees leaves the regulator without its subsistence fee – and fees may have to increase for those operators who comply with the system to compensate for those who refuse to comply. We have therefore chosen a mechanism to allow the regulator to recoup the costs owing to it without affecting other, compliant, operators.

Part 11 – Revocations, savings and transitional provisions

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

Summary of responses

Of the responses received to question 30 there was complete agreement with the Part 11 provisions as drafted.

Government response

We have retained the approach taken to these provisions in the final 2012 GHG Regulations, with further clarifications and drafting improvements.

Annex 1 – List of respondents

Aluminium Federation Limited

An international airline[20]

British Glass Manufacturers' Confederation

CJSC Aircompany “Polet”

Clouds Environmental Consultancy Ltd

ConocoPhillips (U.K.) Limited

DNV Certification Ltd

E.ON UK

International Power Plc

Oil & Gas UK

Planet & Prosperity

Planning Appeals Commission Northern Ireland

Rockwool Ltd

RWE Npower plc

Scottish Natural Heritage

UK Petroleum Industry Association

[20] Who have requested that their response remain confidential

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

URN 12D/351