

**A Direction issued by the Secretary of State to
the Environment Agency, and
the Secretary of State
under section 52 of the Climate Change Act 2008¹
pursuant to article 50(4) of the Greenhouse Gas Emissions Trading Scheme
Order 2020**

1. Interpretation

1.1 In this Direction:

- 1.1.1 “UK ETS Order” means the Greenhouse Gas Emissions Trading Scheme Order 2020²,
- 1.1.2 a reference to the “regulator” is a reference to the Environment Agency and the Secretary of State, in accordance with articles 9 and 10 of the UK ETS Order, and
- 1.1.3 “relevant national authority” means the Secretary of State, in accordance with section 47 of the Climate Change Act 2008³.

2. Purpose

2.1 This is a Direction to the regulator under section 52 of the Climate Change Act 2008. The purpose of the Direction is to fulfil the requirements of article 50(4) of the UK ETS Order, namely:

“The regulator must –

- (a) estimate CA and RE under paragraph (2); and
- (b) exercise the regulator’s functions under paragraph (3),

in accordance with a direction given by the relevant national authority under section 52 of CCA 2008.”

2.2 Article 50(1) of the UK ETS Order provides that, where a regulated activity that is not authorised by a permit is carried out at an installation in a scheme year, the

¹ Section 52(1) of the Climate Change Act 2008 states that the Secretary of State (as the relevant national authority) may give directions to the administrator of a trading scheme. The term ‘administrator’ is defined in section 55 of the Act by cross-reference to paragraph 21 of Schedule 2 to the Act, which states that regulations may specify who is an ‘administrator’. Article 9(3) of the Greenhouse Gas Emissions Trading Scheme Order 2020 specifies that the bodies listed in article 9(1) as ‘regulators’ of a trading scheme, are also ‘administrators’ for the purposes of paragraph 21 of Schedule 2 to the Climate Change Act 2008. The ‘regulators’ listed in article 9 include the Environment Agency and the Secretary of State (article 9(1)(b) and (d)).

² S.I. 2020/1265.

³ 2008 c. 27.

operator of the installation is (after the end of the scheme year) liable to a civil penalty. Article 50(2) and (3) sets out the civil penalty calculation. It is:

“(2) Subject to paragraph (3), the civil penalty is $CA + (RE \times CP)$, where—

CA is an estimate of the costs avoided by the operator in the scheme year as a result of carrying out the regulated activity without the authorisation of a permit;

RE is an estimate of the installation’s reportable emissions in the part of the scheme year during which a regulated activity that was not authorised by a permit was carried out;

CP is the carbon price for the scheme year.

(3) When setting the amount of the civil penalty to be imposed, the regulator may increase the amount calculated under paragraph (2) by a factor designed to ensure that the amount of the civil penalty exceeds the value of any economic benefit that the operator has obtained as a result of failing to comply with article 26.”

3. Types of non-compliance

3.1 Under article 26 of the UK ETS Order:

“No person may carry out a regulated activity at an installation in a scheme year unless the operator of the installation holds a greenhouse gas emissions permit...for the installation that authorises the regulated activity to be carried out.”

3.2 An operator is liable to a civil penalty under article 50(1) if:

3.2.1 it does not hold a permit for an installation, or

3.2.2 it holds a permit but certain parts of the installation are not covered by the permit.

4. Direction as to calculations under article 50(2)

4.1 The element of the civil penalty in article 50(2) is designed to cover the total costs avoided by the operator as a result of carrying out a regulated activity without a permit. The regulator is directed to calculate this element of the civil penalty on an annual basis and for these annual totals to be added together as the basis of the total costs avoided.

4.2 The regulator is directed to assess the following costs in their calculation of CA:

4.2.1 avoided charges, and

4.2.2 avoided monitoring, reporting, verification and other administrative costs.

4.3 In relation to avoided charges:

4.3.1 the regulator must calculate the annual subsistence fees that would have been payable by the operator in each year of non-compliance (including for regulatory activity and registry administration), or

4.3.2 if the operator is liable to a civil penalty due to the circumstances referred to in paragraph 3.2.2, no subsistence fees will have been avoided.

4.4 In relation to avoided monitoring, reporting, verification and administration costs, the regulator must base its estimates on the figures in Annex I. If necessary, the amount may be pro-rated to take account of the number of days the operator carried out a regulated activity without a permit in any one year.

4.5 In relation to its calculation of RE, the regulator is directed to estimate the reportable emissions of:

4.5.1 the installation from the start date of regulated activities up until the day before the operator is granted a permit, or

4.5.2 if the operator is liable to a civil penalty due to the circumstances referred to in paragraph 3.2.2, the part of the installation which is not covered by the permit from the start date of regulated activities at that part of the installation up until the day before the missing parts are included in the permit.

4.6 In calculating CA and RE, the regulator is directed not to take into account the value or number of any allowances that might have been allocated free of charge to the installation under Part 4A of the UK ETS Order in respect of the period of non-compliance if an application for free allocation had been made and approved.

5. Direction as to exercise of functions under article 50(3)

5.1 The regulator may increase the amount calculated under article 50(2) by a factor designed to ensure that the amount of the civil penalty exceeds the value of any economic benefit that the operator has obtained as a result of operating without a permit. This element of the penalty under article 50(3) is designed as a punitive amount, to be added to the total costs avoided element of the civil penalty.

5.2 When setting the amount of the civil penalty to be imposed, the regulator may add to the total costs avoided element of the civil penalty the higher of:

5.2.1 an amount equal to 10% of the total costs avoided element of the civil penalty, or

5.2.2 £2,500.

5.3 For these purposes, the reference to the total costs avoided element of the civil penalty is a reference to that amount before any reduction is applied by the regulator under article 48 of the UK ETS Order.

6. Entry into force

6.1 This Direction comes into force on 6 October 2023.

Signed by:

A handwritten signature in black ink, consisting of a large, stylized initial 'C' followed by several loops and a long horizontal stroke extending to the right.

Name

Secretary of State for Energy Security and Net Zero

Date

05/10/2023

ANNEX I

The figure set out below is derived from the research 'Assessment of costs to UK participants of compliance with Phase III of the EU Emissions Trading Scheme' published by the Department for Business, Energy and Industrial Strategy in August 2016.

In 2016, the average monitoring, reporting, verification and other administrative costs for each scheme year were £17,700.

This figure must be multiplied by an inflation factor and applied for each scheme year during which the operator carried out a regulated activity without a permit.

The inflation factor is $CPI2/CPI1$ or 1, whichever is greater, where—

CPI2 is the consumer prices index for March in the scheme year during which the operator carried out a regulated activity without a permit;

CPI1 is the consumer prices index for March 2016.

In this Annex, consumer prices index means:

- (a) the all items consumer prices index published by the Statistics Board, or
- (b) if that index is not published for a month, any substituted index or index figures published for that month by the Statistics Board.

If the operator is liable to a civil penalty due to the circumstances referred to in paragraph 3.2.2 of the Direction, there are likely to be no avoided monitoring, reporting, verification and other administrative costs as a result of the breach.