

**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 60(6) 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 60(6) 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 (5),

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

2.2 If an installation’s reportable emissions in a scheme year for which the installation is an ultra-small emitter exceed 2,499 tonnes of carbon dioxide equivalent, the operator must notify the regulator by 31 March the following year.

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.

The regulator must then give a notice to the operator and the operator must hold a permit from 1 January in the year following the year the notice is given. The permit may be a greenhouse gas emissions permit or, if the installation is eligible, a hospital or small emitter permit.

2.3 Article 60(1) of the UK ETS Order provides that an operator is liable to a civil penalty where:

“(a) an installation’s reportable emissions in a scheme year (the “excess year”) for which the installation is an ultra-small emitter exceed the maximum amount; and

(b) the operator of the installation fails to give notice to the regulator under paragraph 6 of Schedule 8 on or before 31st March in the following year (the “default year”) or at all.”

2.4 Article 60(2) to (5) sets out the penalty calculation as follows:

“(2) The civil penalty is the sum of-

(a) £2,500; and

(b) $CA + ((RE - FA) \times CP)$ for each scheme year (or part of a scheme year) falling within the penalty period (if any), where –

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

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

FA is—

(a) where—

(i) an application in respect of the installation was made under the Free Allocation Regulation for free allocation in the same allocation period as the penalty year is in;

(ii) the UK ETS authority informed the regulator under Article 15a(4) of that Regulation that the application was valid; and

(iii) paragraph 7(5) of Schedule 8 does not apply (ultra-small emitter becoming hospital or small emitter),

the number of tonnes of carbon dioxide equivalent represented by the final annual number of allowances that would have been allocated

under Part 4A in respect of the installation for the scheme year (or part of the scheme year) if the installation had not been included in the ultra-small emitter list for 2021-2025 or, as the case may be, the ultra-small emitter list for 2026-2030, disregarding any adjustment to free allocation that might have been made under the Activity Level Changes Regulation;

(b) in any other case, zero;

CP is the carbon price for the scheme year.

(2A) For the purpose of determining the value of FA under paragraph (2)(b) in a case where part of a scheme year falls within the penalty period, the final annual number of allowances that would have been allocated under Part 4A in respect of the installation for that part of the scheme year is the final annual number of allowances that would have been allocated in respect of an installation for the scheme year multiplied by D/Y , where—

D is the number of days in the scheme year in the penalty period;

Y is the number of days in the scheme year.

(3) The penalty period is the period –

(a) beginning on 1st January in the year following the default year; and

(b) ending on the earlier of the following -

(i) the day before the day on which a permit for the installation comes into force; and

(ii) the last day of the same allocation period as the excess year is in.

(4) But there is no penalty period if –

(a) 1st January in the year following the default year is not the same allocation period as the excess year; or

(b) a permit for the installation is in force on that date.

(5) When setting the amount of the civil penalty to be imposed, the regulator may increase the amount calculated under paragraph (2)(b) 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 carrying out a regulated activity that was not authorised by the relevant permit.”

3. Direction as to calculations under article 60(2)

3.1 The element of the civil penalty in article 60(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.

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

3.2.1 avoided charges, and

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

3.3 In relation to avoided charges, 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, if applicable, registry administration).

3.4 In relation to avoided monitoring, reporting, verification and administration costs, the regulator must base its estimates on the figures in Annex I. The figures are different depending on whether the operator should have held a greenhouse gas emissions permit or a hospital or small emitter permit during the period of non-compliance. 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.

3.5 In relation to its calculation of RE, the regulator is directed to estimate the reportable emissions of the installation from the date the operator should have held a permit up until the day before the operator is granted a permit (or the last day of the allocation period, if earlier).

4. Direction as to exercise of functions under article 60(5)

4.1 The regulator may increase the amount calculated under article 60(2)(b) 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 60(5) is designed as a punitive amount, to be added to the total costs avoided element of the civil penalty.

4.2 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:

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

4.2.2 £2,500.

4.3 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.

5. Entry into force

5.1 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 a series of 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 figures set out below are 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 year were, in relation to:

- greenhouse gas emissions permits - £17,700
- hospital or small emitter permits - £3,900

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.