

Explanatory Memorandum to the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021, and the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022¹.

This Explanatory Memorandum has been prepared for the Minister for Climate Change by the Directorate of Climate Change, Energy and Planning and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021, and the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022.

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Minister for Climate Change

16 December 2021

¹ When published in draft form as part of the associated consultation, this Order was titled The Greenhouse Gas Emissions Trading Scheme (Amendment No. 2) Order 2021. The amended title reflects the intention to send the Order to the Privy Council to be made in 2022, not 2021.

PART 1

1. Description

- 1.1 The UK Emissions Trading Scheme (“ETS”) was established by the Greenhouse Gas Emissions Trading Scheme Order 2020 (“the principal Order”) as a UK-wide greenhouse gas emissions trading scheme, to encourage cost-effective emissions reductions from the power, industry and aviation sectors. It was designed jointly by the Governments of the UK, Scotland and Wales and the Northern Ireland Executive. It contributes to the UK’s emissions reduction targets and net zero goal, as well as the emissions reduction pathway we have in Wales.
- 1.2 The legislation underpinning the UK ETS is being delivered incrementally, through a series of statutory instruments. The timing and order of this series has been designed to ensure that specific legal provisions are introduced as they become operationally necessary. All legislation required to establish the scheme was made in 2020. There are, however, outstanding legal provisions required, which, whilst not essential for the establishment of the UK ETS on the 1st January 2021, are considered necessary for effective operation of the scheme.
- 1.3 These Orders in Council create the outstanding legal provisions and address a small number of technical and operational issues identified during the development of the scheme.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

- 2.1 Part 3 of Schedule 3 to the Climate Change Act 2008 (“CCA”) states that an emissions trading scheme that applies to England, Scotland, Wales and Northern Ireland – such as in this case – must be established by Order in Council. The appropriate procedure for an Order in Council is prescribed by section 48 to the CCA. As the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 confers enforcement powers on a new category of person; creates a new offence; and extends the circumstances in which a civil penalty may be applied, the affirmative procedure will be used.
- 2.2 As the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 does not contain any provisions which would be caught by section 48(3) of the CCA, the negative procedure will be used.
- 2.3 As the Orders in Council will be subject to UK Parliamentary scrutiny, it is not considered reasonably practicable for this instrument to be made or laid bilingually.
- 2.4 The Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 revokes and re-makes amendments made by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020. The Greenhouse

Gas Emissions Trading Scheme (Amendment) Order 2020 amended Articles 44, 65 and 75 of the principal Order in relation to enforcement powers. The Joint Committee on Statutory Instruments reported the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 on the grounds that there is a doubt as to whether it is *intra vires* in one respect, namely that the amendments were contained in an instrument subject to the negative, rather than the affirmative, resolution procedure (see the Fortieth Report of Session 2019-21). The effect of Articles 7, 11, 12 and 14 of the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 is that the amendments made by the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 are revoked and are re-made by an Order that is subject to the affirmative resolution procedure.

3. Legislative background

- 3.1 The principal Order set up the UK ETS to be operational from 1 January 2021, and runs for ten scheme years. The scheme works by requiring operators of certain industrial installations and certain aircraft operators to monitor, report on, and surrender “allowances” equivalent to their greenhouse gas emissions in each scheme year. Some operators and aircraft operators receive an allocation of allowances free of charge, details of which are published in allocation tables. Allowances are held in accounts in the UK ETS registry, and there is a cap on the number of allowances that may be created. For installations that meet the eligibility criteria, there are two opt-out schemes, one for “hospital or small emitters” (“HSE”), the other for “ultra-small emitters” (“USE”). Such installations are not required to surrender allowances.
- 3.2 Key provisions included in the principal Order covered the scope of the scheme, monitoring and reporting requirements, the cap and the trajectory (the rate at which the cap declines), and the roles of the regulators in monitoring and enforcing the rules of the scheme.
- 3.3 Both the principal Order and the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 were made under section 44 of the CCA. The Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 and the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 are also being made under that power.
- 3.4 As noted above, the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 is being made under the negative resolution procedure, and the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 is being made under the affirmative resolution procedure.

4. Purpose and intended effect of the legislation

4.1 The purpose of the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 and the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2022 is to improve the operation of the UK ETS for both participants and regulators.

4.2 The territorial extent of these Orders is England, Wales, Scotland and Northern Ireland. Both Orders impact on industry, the power sector and aviation.

4.3 The main changes are summarised below:

The Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021

Hospital or small emitter capacity increases

4.4 Article 25 amends Schedule 7 to the principal Order, which concerns hospitals and small emitters. It inserts paragraphs 19A-19G, to allow installations currently within the HSE opt-out scheme to apply to increase their emissions targets if their emissions are anticipated to increase following capacity growth. It is intended to address the dis-incentivisation of business growth by static and invariable emissions targets.

4.5 Article 25 also amends Schedule 7 to provide that where a verifier is used to verify reportable emissions, the operator is exempt from the requirement to submit a report under Article 69(4) of the Commission Implementing Regulation (EU) 2018/2066 (the “Monitoring and Reporting Regulation 2018”).

Aviation biofuels

4.6 Article 5 and Article 22 amend the interpretation section of, and Schedule 4 to, the principal Order. The amended paragraph 27 of Schedule 4 substitutes Article 54 of the Monitoring and Reporting Regulation 2018 as it applies to the UK ETS. This amendment provides that if a biofuel meets the “sustainability criteria” under the Renewable Transport Fuel Obligations Order 2007, the “emission factor” is zero. It also makes provision for the biomass fraction of mixed fuels to be determined by using purchase records. This is as an interim policy measure while the wider biofuels use policy is being developed.

Emissions monitoring plans (EMPs)

4.7 Articles 7-9 amend Articles 28-30 of the principal Order to allow a person who has not yet become an aircraft operator to be able to apply for an emissions monitoring plan, in addition to existing aircraft operators. Compliance with the EMP would not begin until the person becomes an aircraft operator, so this provision would not result in the person being

under any new obligations or at risk of penalties by proactively applying for an EMP.

Aviation free allocation entitlement

4.8 Articles 15-17 amend Articles 34J, 34N and 34R to the principal Order. Alongside Article 29, these amendments will resolve an error in the methodology for calculating the UK ETS aviation free allocation entitlement for applicants who qualify as fast growers under the EU ETS.

Registry amendments including limitation of liability

4.9 Article 27 inserts paragraph 8A into Schedule 5A to the principal Order, which concerns the UK ETS registry. This amendment exempts the UK ETS authority and the registry administrator from liability in damages when undertaking functions under Schedule 5A. The exclusion from liability does not apply to acts or omissions in “bad faith”, which is intended to cover acts that are fraudulent or malicious, or to claims under the Human Rights Act 1998.

4.10 Article 27 inserts paragraph 25 into Schedule 5A to the principal Order. This amendment enables a registry account holder to apply for an account to be suspended.

4.11 Article 27 amends paragraph 6A in Schedule 5A to the principal Order. This amendment requires the regulator to ensure that operators’ and aircraft operators’ reportable emissions are recorded in the registry following submission to the regulator at the end of the reporting year.

4.12 Finally, Article 27 inserts paragraph 22(6) into Schedule 5A to the principal Order. This amendment enables the registry administrator to reverse free allocations of allowances where there is an error in the allocation.

Regulator approval of monitoring plans/monitoring methodology plans

4.13 Articles 20-22 amend Articles 70 and 72 of, and paragraph 8 of Schedule 4 to, the principal Order. These amendments enable the regulator to reject an installation’s monitoring plan and for the operator of the installation to appeal that rejection.

4.14 Articles 24 and 25 amend paragraph 3 of Schedule 6 to, and paragraphs 9, 24 and 26 of Schedule 7 to, the principal Order. Schedules 6 and 7 concern permits and HSE. These amendments enable the regulator to refuse to issue a permit unless a monitoring plan has been approved, or the monitoring plan complies with the Monitoring and Reporting Regulation

2018. This is to ensure that monitoring plans and monitoring methodology plans are adequate in all cases.

Application of EU law to the UK ETS

- 4.15 The principal Order makes provision for free allocation of allowances to emit greenhouse gases (see Part 4A), and Schedule 1 to the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 amends the application of Commission Delegated Regulation (EU) 2019/331 (the “Free Allocation Regulation”) to the UK ETS. The Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 will insert new provisions into the principal Order, which will govern the free allocation of allowances to former HSE and former USE (see Article 34HA, inserted by Article 14, and Schedule 8A, inserted by Article 27). These new provisions will also amend the application of the Free Allocation Regulation to the UK ETS (see Article 30).
- 4.16 The principal Order makes provision for the application of the Monitoring and Reporting Regulation 2018 to the UK ETS (see Article 24, Part 4 and Schedule 4). The Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 will make further amendments to the application of the Monitoring and Reporting Regulation 2018 to the UK ETS (see Article 22).
- 4.17 Schedule 2 to the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2020 amends the application of Commission Implementing Regulation (EU) 2019/1842 (“the Activity Level Changes Regulation”) to the UK ETS. The Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 will make further amendments to this Regulation (see Schedule 8A, inserted by Article 27).

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Civil penalty for failure to return allowances

- 4.18 Article 10 inserts Article 64A into the principal Order. Article 64A enables a regulator to impose a civil penalty where a person fails to comply with a notice, issued under Article 34V of the principal Order, to return allowances.

Inspections

- 4.19 Article 5 amends Article 39 of the principal Order, which permits the regulator to carry out inspections of premises to monitor compliance. This

amendment extends the power to an “authorised person”. An “authorised person” is defined in Article 38(2) of the principal Order.

Powers of entry

4.20 Article 6 amends Article 40 of the principal Order, which confers powers of entry on a regulator and an authorised person. This amendment makes it an offence to intentionally obstruct either person in exercising these powers.

Failure to surrender allowances

4.21 Articles 9 and 13 amend Article 52 of, and Schedule 6 to, the principal Order. The amendments to Schedule 6 require the operator of an installation to surrender any deficit of allowances from previous scheme years when their permit has either been surrendered or revoked. The amendments to Article 52 ensure that the operator will not be liable to an “excess emissions penalty” for failing to do so.

5. Consultation

5.1 A six week consultation ran from 27 July 2021 to 7 September 2021 on the proposed amendments to the principal Order; and included copies of the two Orders in Council in draft. The consultation sought views on the amendments, which are aimed at addressing a number of residual technical issues identified during the development of legislation relating to the scheme.

5.2 We received 7 responses to the consultation, none of which substantively affected the proposed policy intent of the amendments, nor the drafting of the legal text.

5.3 Following the published consultation, the UK ETS authority (Welsh Government, UK Government, Scottish Government, and Northern Ireland Executive) carried out targeted consultations in the form of roundtables to address subsequent amendments, which are now included in the Orders in Council.

5.4 Before making an Order in Council under section 44 of the CCA, the Welsh Ministers are required to obtain, and take into account, the advice of the Climate Change Committee (section 48(1)(a) CCA). They are also required to consult such persons affected by the draft legislation as they consider appropriate (section 48(1)(b) CCA).

5.5 Alongside the consultation, the Welsh Government, UK Government, Scottish Government, and Northern Ireland Executive jointly sought the

advice of the CCC on the public consultation. The CCC reviewed the consultation document and had no comments on the content.

5.6 The consultation documents and a summary of the responses are available at: <https://www.gov.uk/government/consultations/uk-emissions-trading-scheme-proposed-amendments>

6. Regulatory Impact Assessment (RIA)

6.1 These Orders are not regulatory provisions, but instead make technical amendments to update subordinate legislation. As the amendments do not alter the policy (or its impact) in any significant way or how it is applied in a given situation, an RIA is not required. This is in line with the policy set out in the Welsh Ministers' code of practice for carrying out regulatory impact assessments for subordinate legislation.

6.2 It should also be noted that the overall level of climate ambition in the UK ETS is unchanged by the proposals. There is no overall impact on the monetised costs and benefits to businesses. There is no change to the supply of allowances or the expected emissions from emitters. There is also no expected change to the general administrative burden for emitters.

6.3 In terms of other impacts, these provisions are also designed to address a number of specific circumstances for regulators and the registry administrator, including options to apply penalties specifically if operators or aircraft operators fail to return allowances. Again, these are not expected to generally apply, but might take effect in specific circumstances.

6.4 Although not required by Government policy, a regulatory impact assessment of the effect of the UK ETS on the costs of business, the voluntary sector and the public sector was produced and is available alongside the principal Order on www.legislation.gov.uk.