

Net Zero, Energy and Transport Committee

32nd Meeting, 2022 (Session 6)

Tuesday 6 December 2022

Cover note for:

- The Greenhouse Gas Emission Trading Scheme Amendment (No. 2) Order 2022 (SI 2022/1173)
- The Producer Responsibility Obligations (Packaging Waste) Amendment (Scotland) Regulations 2022 (SSI 2022/310)

Note by the Clerk

Procedure for Negative Instruments

1. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

2. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

The Greenhouse Gas Emission Trading Scheme Amendment (No. 2) Order 2022 (SI 2022/1173)

Title of Instrument:	The Greenhouse Gas Emission Trading Scheme Amendment (No. 2) Order 2022 (SI 2022/1173)
Type of Instrument:	Negative
Laid Date:	16 November 2022
Circulated to Members:	18 November 2022
Meeting Date:	6 December 2022
Minister to attend meeting:	No
Motion for annulment lodged:	No
Drawn to the Parliament's attention by the Delegated Powers and Law Reform Committee?	No
Reporting deadline:	9 January 2023

Recommendation

1. The Committee is invited to consider any issues which it wishes to raise on the Order.

Background

2. This instrument seeks to amend the current legislation pertaining to the [UK Emissions Trading Scheme \(UK ETS\)](#). The UK ETS is a UK-wide regime established following EU-exit to replace the UK's participation in the EU ETS scheme. It applies to "energy intensive industries, the power generation sector and aviation."

3. The main changes are—

- a. Allowing the omission of the year 2020 from calculations on free allocations based on activity levels;
- b. Offering a one-off window between January and March 2023 for operators of hospitals and small emitters to re-enter the scheme;
- c. Updates Global Warming Potential values (GWPs) to align with the Intergovernmental Panel on Climate Change Fifth Assessment Report as agreed at COP24 and 26;

- d. Introduce powers allowing the UK ETS Authority to publish UK ETS compliance data “including information on emissions, allowances and other data to support transparency”;
- e. Allows the UK ETS Authority to make changes to the number of allowances from the “flexible share”; and
- f. Updates UK ETS verifier accreditation requirements.

4. Subject to Parliamentary approval, the Order would come into effect on 1st January 2023. The instrument is laid in the Scottish Parliament, UK Parliament and Senedd Cymru with the intention of it being made at the Privy Council early next year.

5. An electronic copy of the Order is available at: <https://www.legislation.gov.uk/ukxi/2022/1173/contents/made>

6. Copies of the UK Government Explanatory Note and Scottish Government Policy Note are included in **Annexe A**.

Purpose

7. This instrument makes various technical and operational amendments to the 2020 Order. In particular, the provisions in this instrument enable changes to free allocation based on activity levels that do not include the 2020 COVID year; provides a window for Hospitals and Small Emitters (HSEs) to re-enter the main scheme; updates Global Warming Potential values (GWPs) to meet international obligations; introduces legal obligations for publishing compliance data about the scheme; updates the EN ISO 14065 accreditation required by verifiers; and makes several other minor operational amendments.

Delegated Powers and Law Reform Committee consideration

3. At its [meeting on 29 November 2022](#), the Committee considered the instrument and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

4. In its [report subsequently produced on the instrument](#), the DPLR Committee’s also welcomed that the instrument seeks to correct a cross referencing error which was identified by the Committee at its meeting on 18 January 2022, in relation to a previous amending instrument, SI 2021 1455.

5. [Read the Official Report – 29 November 2022](#)

Annexe A

UK Government Explanatory Note

EXPLANATORY NOTE

(This note is not part of the Order)

The United Kingdom Emissions Trading Scheme (the “UK ETS”) was established by the Greenhouse Gas Emissions Trading Scheme Order 2020 (the “UK ETS Order”). The UK ETS runs for ten “scheme years” beginning with 2021, split into two five-year “allocation periods”. Operators of certain industrial installations and certain aircraft operators are required to monitor, submit verified reports on, and surrender “allowances” equivalent to, their greenhouse gas emissions in each scheme year. Allowances (which are tradable) are held in accounts in the UK ETS registry, and there is a cap on the number of allowances. Allowances are sold at auction, but some operators of installations and aircraft operators receive an allocation of allowances free of charge. Free allocation for installations may change from year to year depending on the installation’s activity level. For installations that meet the eligibility criteria, there are two opt-out schemes, one for “hospital or small emitters”, the other for “ultra-small emitters”.

This Order amends the UK ETS Order, Commission Delegated Regulation (EU) 2019/331 (the “Free Allocation Regulation”) and Commission Implementing Regulation (EU) 2019/1842 (the “Activity Level Changes Regulation”). Articles 24 and 25 of the UK ETS Order provide that Commission Implementing Regulation (EU) 2018/2066 (the “Monitoring and Reporting Regulation 2018”) and Commission Implementing Regulation (EU) 2018/2067 (the “Verification Regulation 2018”) have effect for the purposes of the UK ETS, with modifications, and this Order also makes further modifications.

The main changes made by this Order are as follows. Where necessary for free allocation for installations, allowances may be created from the flexible share (40,984,970 allowances) in addition to the annual cap (see amendment to article 20 of the UK ETS Order).

Publishing 16 New values for the global warming potentials (in tonnes of carbon dioxide equivalent) of certain greenhouse gases covered by the UK ETS are adopted for the 2023 and subsequent scheme years (see new paragraph 38B of Schedule 4 to the UK ETS Order).

From 1 July 2024, verifiers of emission reports must be accredited to a new standard. New applicants for accreditation as verifiers must satisfy the new standard immediately, but until 30 June 2024 the verification opinions of verifiers accredited to either the old or the new standard may be accepted (see amendments to paragraphs 4(b) and 5 and substituted paragraphs 37 and 55 of Schedule 5 to the UK ETS Order).

Verifiers of aircraft operators’ emission reports may, with the approval of the regulator, carry out “virtual” site visits whether or not force majeure prevents a

physical site visit (see amendments to paragraph 24 of Schedule 5 to the UK ETS Order).

Hospital or small emitters for the 2021-2025 allocation period may voluntarily exit the opt-out scheme and join the main scheme for the 2024 and 2025 scheme years (see new paragraph 23A of Schedule 7, and amendments to paragraphs 1 and 2 of Schedule 8A, to the UK ETS Order).

Where a “new entrant” installation to the UK ETS is an “electricity generator”, an application for free allocation in respect of measurable heat produced by means of high-efficiency cogeneration may not be made unless the installation has been operating (and has demonstrated the energy savings required for eligibility) for a full calendar year (see amendment to Article 5 of the Free Allocation Regulation).

The decision about whether free allocation for installations should be adjusted as part of the activity level changes process where questions of energy efficiency arise under Article 6(1) or (2) of the Activity Level Changes Regulation will be made by the UK ETS authority, rather than the regulator (see amendments to Article 6a of the Activity Level Changes Regulation).

For free allocation for the 2022 scheme year, operators of installations whose allocations would otherwise be reduced by the activity level changes process may apply for average activity levels (on which changes to free allocation are based) to be determined by reference to activity levels in 2019 and 2021 instead of those in 2020 and 2021 (see new Articles 5a and 5b of the Activity Level Changes Regulation). Where such an application is made, the regulator may withhold free allocation for the 2023 scheme year until the application is determined (see amendment to article 34W of the UK ETS Order).

Information about accounts held in the UK ETS registry (including details of emissions recorded in accounts and allowances surrendered), transfers of allowances between accounts and emissions of installations in the hospital and small emitters opt-out scheme is required to be published (see new paragraphs 31 to 34 of Schedule 5A, and new paragraph 22A of Schedule 7, to the UK ETS Order). Other scheme information may also be published (see new article 75BA of the UK ETS Order).

In addition, this Order makes other minor amendments to provide further for the process for apportioning free allocation between transferring and new operators in the case of mergers or splits of installations; to clarify, and remove duplicate or unnecessary requirements from, the permitting regime for installations; to modify further the Monitoring and Reporting Regulation 2018 and the Verification Regulation 2018 to make corrections to, or remove unnecessary wording from, the original text; to provide for when an emission factor of zero may be claimed for tallow used at an installation; and to clarify when an emission factor of zero may be claimed for aviation biofuel. This Order also corrects an incorrect cross-reference in paragraph 4(3) of Schedule 8A to the UK ETS Order and amends Article 26 of the Free Allocation Regulation to provide correctly for the scheme year in which free allocation ceases where an installation ceases to operate.

A regulatory impact assessment of the effect that the UK ETS will have on the costs of business, the voluntary sector and the public sector is available from the Industrial Energy Directorate, Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London SW1H 0ET and is available alongside the UK ETS Order on www.legislation.gov.uk.

Scottish Government Policy Note

POLICY NOTE
THE GREENHOUSE GAS EMISSIONS TRADING SCHEME
(AMENDMENT) (NO. 2) ORDER 2022
SI 2022/1173

The above instrument is to be made in exercise of the powers conferred on all the four administrations (Scottish, UK, Welsh and Northern Ireland governments) by sections 44, 54 and 90(3), schedule 2 and paragraph 9 of schedule 3 of the Climate Change Act 2008. The Order in Council is subject to negative procedure.

Summary Box

This is a joint instrument between the four administrations (Scottish, UK, and Welsh Governments, and the Department for Agriculture Environment, and Rural Affairs, Northern Ireland (DAERA)). It amends the UK Emissions Trading Scheme (“UK ETS”) established by the Greenhouse Gas Emissions Trading Scheme Order 2020 (“the 2020 Order”).¹

This instrument makes various technical and operational amendments to the 2020 Order. In particular, the provisions in this instrument enable changes to free allocation based on activity levels that do not include the 2020 COVID year; provides a window for Hospitals and Small Emitters (HSEs) to re-enter the main scheme; updates Global Warming Potential values (GWPs) to meet international obligations; introduces legal obligations for publishing compliance data about the scheme; updates the EN ISO 14065 accreditation required by verifiers; and makes several other minor operational amendments.

Policy Objectives

The UK ETS was established by the four administrations (Scottish, UK and Welsh Governments, and the Northern Ireland Executive) in 2021, following the UK’s withdrawal from the EU. The UK ETS is managed and updated by the UK ETS Authority (“the Authority”), which is formed by the four administrations. Further information on the UK ETS is available in the Policy Note accompanying the 2020 Order².

This instrument will make changes to several operational procedures in the UK ETS. The main changes made by this instrument are:

¹ [The Greenhouse Gas Emissions Trading Scheme Order 2020 \(legislation.gov.uk\)](http://www.legislation.gov.uk)

² [Draft Greenhouse Gas Emissions Trading Scheme Order \(legislation.gov.uk\)](http://www.legislation.gov.uk)

- Amending the Activity Level Changes Regulation³, to allow the omission of the 2020 COVID year from the 2022 activity level changes calculations, only for those operators who can demonstrate significant discrepancies (15%) between reductions in output and emissions caused by the COVID-19 pandemic.
- Offering a one-off window between January and March 2023 for operators of HSEs in the 2021-2025 allocation period to re-enter the main UK ETS scheme from 2024 onwards.
- Updating GWPs set out in the Intergovernmental Panel on Climate Change's Fifth Assessment Report (AR5), as agreed at COP24 and COP26. The updated GWP figures will apply to nitrous oxide and two perfluorocarbons (PFCs). The updated GWP figures set out in the AR5 are lower than the previous figures, which means that fewer allowances will be required to be surrendered per tonne of either nitrous oxide or PFCs as they will now be equivalent to a lesser amount of CO₂.
- Introducing powers that allow the Authority to publish UK ETS compliance data, including information on emissions, allowances and other data to support transparency.
- Allowing the Authority to create up to the total number of allowances from the "flexible share" (40,984,970 allowances), in addition to the annual cap, ensuring that the flexible share is fit for purpose.
- Requiring UK ETS verifiers to be accredited to the updated version of EN ISO 14065 (EN ISO 14065:2020) by 1 July 2024, with transitional arrangements in place until then. The legislation currently references ISO 14065:2013.

The instrument also makes several minor technical and operational amendments, which are the following:

- Allowing new entrants to the UK ETS that are classified as electricity generators to apply for free allocations (FAs), on the basis that they produce measurable heat by means of co-efficiency generation, after they can provide a full calendar year of activity level data.
- Allowing electricity generators that have not exported measurable heat produced through high-efficiency cogeneration, but start to do so in the following scheme years, to be eligible for FAs once they can demonstrate that they meet the eligibility criteria.
- Setting out rules for the treatment of allocations in the case of full or partial permit transfers.

³ Commission Implementing Regulation (EU) 2019/1842, as it forms part of domestic law.

- Allowing verifiers of aviation activities to conduct remote/virtual site visits if an appropriate risk assessment has been carried out and any precautionary conditions, such as Regulator's approval, have been met.
- Removing the requirement to have a description of installation in the monitoring plan to avoid duplication – as such a description is already required for permits.
- Removing the guarantee of origin required for the Monitoring and Reporting Regulations (MRR) as this requirement is already covered by other regulations (i.e. the Free Allocation Regulation) or is not relevant for the UK.
- Requiring regulators to notify the Authority when they decide not to adjust operators' FAs based on their activity level changes.
- Allowing operators using Category 1 and 2 tallow⁴, for onsite generation of heat energy, to use the default greenhouse gas savings criteria set out in the Renewable Energy Directive 2009.
- Clarifying that when operators surrender permits or permits are revoked, the permit continues to require operators to submit an activity level report relating to activity levels in the year before the cessation of the permit, but operators are not required to submit such report in the year of the cessation.
- Removing the bioliquids permit condition, which requires operators to inform regulators that the sustainability criteria have been fulfilled if the use of bioliquids has an emissions factor of zero.

Lastly, a small proportion of the statutory instrument introduces corrections related to:

- An incorrect cross-reference in paragraph 4 of schedule 8A of the 2020 Order which we cannot amend via a correction slip.
- the MRR 2018, to reflect correct values for net calorific value and conversion factor and oxidation factor for scrubbing (urea).

This instrument is made according to the same Order in Council process as the 2020 Order, and is made in accordance with the negative procedure. It will be laid in all four legislatures after being made at the Privy Council in November.

A further instrument, subject to the affirmative procedure, was laid in the Scottish Parliament, UK Parliament and Senedd Cymru on 21 September 2022. It introduces further amendments to expand the scope of the UK ETS to include flights between from Great Britain to Switzerland, to recalculate entitlements to FAs to take account of the new category of historic aviation activity, and to permit applications for a free allocation of allowances based on this historic aviation activity by persons who have

⁴ [UK ETS: Monitoring and reporting biomass in installations \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/114444/uk-ets-monitoring-and-reporting-biomass-in-installations.pdf)

not previously applied for a free allocation of allowances. The affirmative instrument is due to be in force in December 2022.

Consultation

Amendments to the 2020 Order to be made by this instrument were jointly consulted on by the four administrations between 25th March and 17th June 2022. Alongside the consultation, the four nations jointly sought the advice of the Committee on Climate Change (CCC) on the public consultation. Advice was commissioned from the CCC on the consultation proposals.

The first part of the Government Response to the consultation, which only includes the amendments mentioned above, was published on 2nd September 2022, and full details of the consultation and response can be found at: [Developing the UK Emissions Trading Scheme \(UK ETS\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/developing-the-uk-emissions-trading-scheme-uk-ets)

The second part of the Government Response, which will contain the remaining proposals included in the consultation, is expected to be published early next year. The consultation was divided into two parts as a small number of proposals require implementation via legislation ahead of the 2023 scheme year, which are those included in the early Government Response.

Guidance

UK ETS guidance has been published and is available at: <https://www.gov.uk/government/publications/participating-in-the-uk-ets/participating-in-the-uk-ets>. Guidance will be updated regularly, and updates will take account of relevant changes to legislation.

Impact Assessments

The impact on business, charities or voluntary bodies of the amendments to the Activity Level Changes Regulation due to the impact of COVID in 2020 are set out in the analytical annex to the early, joint Government Response: <https://www.gov.uk/government/consultations/developing-the-uk-emissions-trading-scheme-uk-ets>

The impact of the other provisions in this instrument are not covered in this analytical annex, as they are technical amendments with no substantial direct impacts to be assessed. Therefore, the Cabinet Secretary for Net-Zero, Energy and Transport confirms that no BRIA is necessary to complement the analytical annex, as very limited impact upon business, charities or voluntary bodies is foreseen by the technical and operational changes being introduced by this Statutory Instrument.

The overall level of climate ambition in the UK ETS is unchanged by the proposals in this Statutory Instrument. 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.

Scottish Government
Directorate for Energy and Climate Change

November 2022

Other documents

- [UK Government 2020 Impact Assessment on Future of Carbon Pricing](#)

The Producer Responsibility Obligations (Packaging Waste) Amendment (Scotland) Regulations 2022 (SSI 2022/310)

Title of Instrument: [The Producer Responsibility Obligations \(Packaging Waste\) Amendment \(Scotland\) Regulations 2022 \(SSI 2022/310\)](#)

Type of Instrument: Negative

Laid Date: 11 November 2022

Circulated to Members: 18 November 2022

Meeting Date: 6 December 2022

Minister to attend meeting: No

Motion for annulment lodged: No

Drawn to the Parliament's attention by the Delegated Powers and Law Reform Committee? No

Reporting deadline: 19 December 2022

Recommendation

1. The Committee is invited to consider any issues which it wishes to raise on the Regulations.

Background

6. Producers of packaging materials have a responsibility to recycle a proportion of the materials they produce and put on the market to achieve recycling targets.

7. This responsibility comes from Great Britain wide regulations ([Producer Responsibility Obligations \(Packaging Waste\) Regulations 2007 \(S.I. 2007/871\)](#)).

8. This instrument amends these regulations to “set an overall recycling target as well as material-specific recycling targets for 2023 on obligated producers in Scotland in relation to glass, plastic, aluminium, steel, paper/board and wood”.

9. The current targets expire at the end of 2022. The targets in these regulations are being set as an interim measure (by the Scottish Government and other UK administrations) in anticipation of the creation of “[Extended Producer Responsibility](#)” for packaging. According to Zero Waste Scotland, the concept of extended producer responsibility is—

“...about ensuring that producers bear responsibility for the environmental impacts of products they place on the market, and are incentivised to reduce these impacts. At the heart of this lies the opportunity to consider the whole lifecycle of a product.”

10. In anticipation of further action in this area, these Regulations maintain the 2022 targets for 2023 until new legislation and targets are in place.

11. An electronic copy of the Regulations is available at:
<https://www.legislation.gov.uk/ssi/2022/330/contents/made> .

12. A copy of the Scottish Government’s Explanatory and Policy Notes are included in **Annexe A**.

Purpose

13. To amend the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (“the 2007 Regulations”) to set the targets for recycling packaging waste that obligated producers must meet for 2023.

Delegated Powers and Law Reform Committee consideration

14. At its [meeting on 22 November 2022](#), the Committee considered the instrument and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

15. [Read the Official Report – 22 November 2022](#)

Annexe A

Scottish Government Explanatory Note

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (S.I. 2007/871). Those Regulations impose on producers obligations to recycle packaging waste in order to attain overall recycling and material-specific recycling targets.

These Regulations set an overall recycling target as well as material-specific recycling targets for 2023 on obligated producers in Scotland in relation to glass, plastic, aluminium, steel, paper/board and wood.

A full impact assessment of the effect that this instrument (in combination with similar instruments in England and Wales) will have on the costs of business, the voluntary sector and the public sector is available from the Producer Responsibility Unit at the Department for Environment, Food and Rural Affairs, Seacole Building, 2 Marsham Street, London, SW1P 4DF.

Scottish Government Policy Note

POLICY NOTE

THE PRODUCER RESPONSIBILITY OBLIGATIONS (PACKAGING WASTE) AMENDMENT (SCOTLAND) REGULATIONS 2022 SSI 2022/330

The above instrument was made in exercise of the powers conferred by section 50 and schedule 4 of the Environment Act 2021. The instrument is subject to the negative procedure.

Policy Objectives

The 2007 Regulations apply to Great Britain. This instrument amends the 2007 Regulations for Scotland only; similar amending instruments to set the same level of targets are being made in relation to England and Wales by the UK Government. Northern Ireland has separate Regulations and will make similar changes in parallel.

The 2007 Regulations impose producer responsibility obligations on producers of packaging to recycle a proportion of the packaging they place on the market to support achievement of overall recycling targets. Obligated producers are required to obtain evidence from accredited reprocessors and exporters to demonstrate that they have met these recycling targets.

Obligated producers are businesses that: manufacture raw materials for packaging; convert materials into packaging; fill packaging; sell packaging to the final user; lease out packaging; or import packaging or packaging materials into Great Britain.

Businesses are exempt if they handle 50 tonnes or less of packaging, and/or have a turnover of £2 million or less.

The current recycling targets expire at the end of 2022. This instrument sets the recycling targets that obligated producers will have to meet in 2023 and is required to ensure that obligated producers continue to have producer responsibility obligations.

Along with the other UK administrations, the Scottish Government is bringing forward a suite of reforms to the packaging producer responsibility system with the intention of creating Extended Producer Responsibility (EPR) for packaging. The four administrations consulted on proposals for packaging EPR from March-June 2021 and published a government response setting out their policy intentions on 26 March 2022.⁵ Packaging EPR is intended to be in place from 2024 onwards.

The new packaging EPR legislation will set the recycling targets for producers once it comes into force. As this instrument is essentially an interim measure, designed to ensure that producers continue to have producer responsibility obligations for packaging until packaging EPR is established, the UK and Devolved Administrations consider that it is appropriate to maintain the targets for 2023 at the same level as for 2022. Packaging EPR, once in place, will drive an increase in the quantity and quality of recycling collected across the UK.

Consultation

As set out above, these targets are being set for 2023 as an interim measure before packaging EPR comes in from 2024. Recycling targets for 2023 were included in the public consultation on EPR carried out jointly by the UK and Devolved Administrations. The Scottish Government is amending the 2007 Regulations in relation to Scotland and introducing recycling targets for 2023 in line with the responses to the consultation received from producers, key materials organisations, trade bodies, and other stakeholders in the course of this consultation. The targets have been agreed between the UK and the Devolved Administrations.

Impact Assessments

As this instrument is aligned with provisions being introduced by the other UK administrations on the basis of a UK-wide consultation and attendant Impact Assessment, the Scottish Government does not consider it necessary to carry out Scottish-specific impact assessments for this instrument. An impact assessment for packaging EPR was published alongside the government response on 26 March 2022.⁶

Financial Effects

As this instrument is aligned with provisions being introduced by the other UK administrations on the basis of a UK-wide consultation and attendant impact assessment (see above), the Scottish Government does not consider it necessary to carry out a Scottish-specific Business and Regulatory Impact Assessment (BRIA).

⁵ [EPR Consultation Government response March 2022 \(publishing.service.gov.uk\)](#)

⁶ [EPR Impact Assessment March 2022 \(publishing.service.gov.uk\)](#)

Scottish Government
Directorate for Environment and Forestry
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