

EXPLANATORY MEMORANDUM TO
THE RECOGNISED AUCTION PLATFORMS REGULATIONS 2011

2011 No. 2699

**THE TERRORISM ACT 2000 AND PROCEEDS OF CRIME ACT 2002 (BUSINESS
IN THE REGULATED SECTOR) ORDER 2011**

2011 No. 2701

1. This explanatory memorandum has been prepared by HM Treasury and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

2.1 The purpose of the Recognised Auction Platforms Regulations 2011 (“the Regulations”) is to implement Articles 35, 36, and 43 of Commission Regulation (EU) 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances (O.J. L302/1. 18.11.2010) (“the Commission Regulation”) by providing for the authorisation and regulation of auction platforms auctioning such allowances, and for the extension of UK law implementing EU law on regulated markets in financial instruments and on market abuse apply to such auction platforms.

2.2 Article 55 of the Commission Regulation requires Member States to apply certain elements of their domestic measures implementing EU measures on money laundering and terrorist financing to the auctioning of emissions allowances, and the Regulations and Order make provision in that regard.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 None.

4. **Legislative Context**

4.1 Title III of Directive 2004/39/EC of the European Parliament and of the Council on markets in financial instruments of 21 April 2004 (OJ L145, p1, 20.4.2004) on regulated markets has been implemented in Part 18 of the Financial Services and Markets Act 2000 (the “2000 Act”), which provides for the regulatory regime governing recognised investment exchanges (which are “regulated markets” for the purposes of the markets in financial instruments), and related secondary legislation. The provisions of Directive 2003/6/EC of the European Parliament and of the Council on insider trading and market manipulation of 28 January 2003 (OJ L96, 12.4.2003, p16) have been implemented in Part 8 of the 2000 Act.

4.2 These Regulations permit recognised investment exchanges to seek recognition as recognised auction platforms, set out the recognition requirements which they must satisfy, modify Part 18 of the 2000 Act in its application to such auction platforms and give the Financial Services Authority powers to directions to such auction platforms to provide for their regulation in accordance with the Commission Regulation. They also apply Part 8 of the 2000 Act to recognised auction platforms with modifications.

4.3 Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (“the Third Money Laundering Directive”) is implemented in the UK by the Terrorism Act 2000 (c.11), the Proceeds of Crime Act 2002 (c. 29) and the Money Laundering Regulations 2007 (S.I. 2007/2157).

4.4 The Commission Regulation requires Member States to apply certain elements of their domestic measures implementing the Third Money Laundering Directive to the auctioning of emissions allowances.

4.5 The Regulations amend the Money Laundering Regulations 2007 so that the provisions of regulations 20 and 21, and Parts 4 and 5 of the 2007 Regulations apply to an auction platform auctioning emissions allowances. The Order amends Part 3 of the Terrorism Act 2000 (terrorist property) and part 7 of the Proceeds of Crime Act 2002 (money laundering).

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

6. European Convention on Human Rights

6.1 The Financial Secretary to the Treasury, Mark Hoban MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Business in the Regulated Sector) Order 2011 are compatible with the Convention rights.”

6.2 As the Regulations are subject to negative resolution procedure and do not amend primary legislation no statement is required.

7. Policy background

7.1 The Commission Regulation concerns the auctioning of emissions allowances under the EU Emissions Trading System (EU ETS).

7.2 The EU ETS is at the heart of UK Government policy to tackle climate change. The system covers sectors responsible for around half of the UK's carbon dioxide emissions. The EU ETS is expected to deliver annual carbon savings of 51MtCO₂ in 2020 - a reduction in the emissions of the power sector and heavy industry of 22 percent based on 2008 levels.

7.3 The EU ETS works on a ‘cap and trade’ basis. A cap is set on EU Member State’s emissions, which declines over time. Emissions allowances equal to each year’s cap are then issued and allocated to sectors covered by the system. Allowances can be allocated for free or auctioned by national governments.

7.4 The next phase (phase III) of the EU ETS begins in 2013. Phase III of the EU ETS will see a dramatic rise in the level of auctioning. The Commission Regulation sets out the European regulatory framework for auctioning emissions allowances in phase III.

7.5 The policy objective of Articles 35, 36, and 43 of the Commission Regulation is to ensure a robust, pan-European, regulatory framework applies to the auctioning of emissions allowances. The Regulations implement this framework in the UK, by enabling recognised investment exchanges to apply to become recognised auction platforms, and providing for the requirements which such auction platforms will have to satisfy. They also ensure that the existing provisions in Part 8 of the 2000 Act on market abuse apply appropriately in relation to auction platforms, and apply the UK regime on money-laundering to auction platforms by:

- providing that an auction platform is a “relevant person” for the purposes of regulations 20 and 21 of the 2007 Regulations, and must have in place policies and procedures in order to prevent activities related to money laundering and terrorist financing, and take appropriate measures to train employees in that regard.
- making provision for the purposes of Parts 4 (supervision) and 5 (enforcement) of the 2007 Regulations, so that the powers of the relevant supervisory authority (the Financial Services Authority) and enforcement authorities may be exercised in relation to a platform.
- providing that the Financial Services Authority may impose a civil penalty on an auction platform which breaches the anti-money laundering and terrorist financing requirements of the Commission Regulation and the requirements of the 2007 Regulations to which it is subject.
- providing that an auction platform which breaches the anti-money laundering and terrorist financing requirements of the Commission Regulation and the requirements of the 2007 Regulations to which it is subject commits an offence.

7.6 The Order amends the definition of a business in the regulated sector for the purposes of Part 3 of the Terrorism Act 2000 (terrorist property) and Part 7 of the Proceeds of Crime Act 2002 (money laundering) by adding the activity of auctioning certain emission allowances. Those Parts contain provisions relating to the reporting of suspicious activity, including requirements and offences specific to “the regulated sector”.

7.7 Public interest in these instruments has been limited to the few organisations directly affected by the changes. These are Regulated Investment Exchanges, of which there are currently six.

Consolidation

7.8 The Treasury does not have plans to consolidate the Financial Services and Markets Act 2000 at this time. Commercial publishers produce consolidated versions of the Act, and of secondary legislation made under it, both in electronic and hard copy versions. A review of the Money Laundering Regulations 2007 is currently underway and amendments to the legislation will be considered as part of that review.

8. Consultation outcome

8.1 As the scope of these changes is narrow and the interest highly specialised, it was decided, in line with the Code of Practice on consultations, to consult stakeholders on an informal basis. The informal consultation document was published on HM Treasury's website and sent directly to all six Recognised Investment Exchanges. Stakeholders were given five weeks to respond.

8.2 Three written responses were received and two meetings held. All responses were supportive of the approach being taken. There were some specific drafting suggestions proposed which were included where appropriate.

9. Guidance

9.1 The Financial Services Authority will produce guidance for recognised auction platforms.

10. Impact

10.1 An Impact Assessment is attached to this memorandum and will be published alongside the Explanatory Memorandum on the OPSI website.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Treasury is required to review the operation and effect of the Regulations and the Order within five years from the date on which they come into force, and publish a report.

13. Contact

Radhanath Housden at HM Treasury Tel: 020 7270 4796 or email: Rad.housden@hmtreasury.gsi.gov.uk can answer any queries regarding the instrument.

IMPLEMENTING COMMISSION REGULATION 1031/2010 - A TRANSPOSITION NOTE

Commission Regulation 1031/2010 of 12 November 2010 on the timing, administration and other aspects of auctioning of greenhouse gas emission allowances

Abbreviations:

“2011 Regulations” means the Recognised Auction Platforms Regulations 2011

“2011 Order” means the Terrorism Act 2000 and Proceeds of Crime Act 2002 (Business in the Regulated Sector) Order 2011

Article	Full text of the provision	Relevant domestic provision
Article 35	<p>4. An auction platform auctioning two-day spot or five-days futures shall only be appointed after the Member State where the candidate regulated market and its market operator are established has ensured in good time, and in any event prior to the opening of the first bidding window that the national measures transposing the provisions of Title III of Directive 2004/39/EC apply to the auctioning of two-day spot or five-days futures to the extent relevant.</p> <p>An auction platform auctioning two-day spot or five-days futures shall only be appointed after the Member State, where the candidate regulated market and its market operator are established, has ensured in good time, and in any event prior to the opening of the first bidding window, that the competent national authorities of that Member State are able to authorise and supervise them in accordance with the national measures transposing Title IV of Directive 2004/39/EC to the extent relevant. ...</p> <p>6. The competent national authorities referred to in paragraph 5 of this Article shall maintain effective market oversight and take the necessary measures to ensure that the requirements referred to in that paragraph are complied with. To that effect, they shall be able to exercise directly, or with the assistance of other competent national authorities designated pursuant to Article 48(1) of Directive 2004/39/EC, the powers provided for in the national measures transposing Article 50 of that Directive with regard to the regulated market and its market operator referred to in paragraph 4 of this Article.</p> <p>The Member State of each competent national authority referred in paragraph 5 shall ensure that the national measures transposing Articles 51 and 52 of Directive 2004/39/EC apply in relation to the persons responsible for failure to comply with their obligations under Title III of Directive</p>	<p>2011 Regulations, regulation 1, 7, 8, 12 – 23, and Schedules 2 and 3.</p> <p>2011 Regulations, regulation 1, 2, 3, 4, 5, 9.</p> <p>2011 Regulations, regulation 3,4, 5, 7 and Schedule 2</p>

	2004/39/EC as transposed into the national legal order of the Member State of their establishment pursuant to paragraph 4 of this Article.	
Article 36	<p>Market abuse regime applicable to financial instruments within the meaning of Article 1(3) of Directive 2003/6/EC</p> <p>1. For the purposes of this Regulation, where two-day spot or five-days futures are financial instruments within the meaning of Article 1(3) of Directive 2003/6/EC, that Directive shall apply to the auctioning of those auctioned products.</p> <p>2. Where two-day spot or five-days futures are not financial instruments within the meaning of Article 1(3) of Directive 2003/6/EC, the provisions of Articles 37 to 43 of this Regulation shall apply.</p>	2011 Regulations, regulation 6, 10 and Schedule 1
Article 43	<p>2. The competent national authorities referred to in paragraph 1 of this Article shall have the powers provided for in the national measures transposing Article 12 of Directive 2003/6/EC.</p> <p>3. Member States shall ensure that the national measures transposing Articles 14 and 15 of Directive 2003/6/EC apply in relation to the persons responsible for failure to comply with Articles 37 to 42 of this Regulation in relation to auctions carried out in their territory or abroad.</p>	<p>2011 Regulations, regulation 6 and Schedule 1</p> <p>2011 Regulations, regulation 6, 10 and Schedule 1, paragraph 1(g), 2(a)</p>
Article 55	<p>1. The competent national authorities referred to in Article 37(1) of Directive 2005/60/EC shall monitor and take the necessary measures to ensure compliance of an auction platform auctioning two-day spot or five-day futures with the customer due diligence requirements of Article 19 and Article 20(6) of this Regulation, the monitoring and record keeping requirements of Article 54 of this Regulation and the notification requirements of the paragraphs 2 and 3 of this Article.</p> <p>The competent national authorities referred to in the first subparagraph shall have the powers provided for in the national measures transposing Article 37(2) and (3) of Directive 2005/60/EC.</p> <p>An auction platform auctioning two-day spot or five-day futures may be held liable for infringements of Article 19, Articles 20(6) and (7) and 21(1) and (2), and Article 54 of this Regulation and paragraphs 2 and 3 of this Article. The national measures transposing Article 39 of Directive 2005/60/EC shall apply in this regard.</p> <p>3. The information referred to in paragraph 2 shall be forwarded to the FIU of the Member State in whose territory the auction platform concerned is situated.</p> <p>The national measures transposing the</p>	<p>2011 Regulations, regulation 11</p> <p>2011 Regulations, regulation 11</p>

	<p>compliance management and communication policies and procedures, referred to in Article 34(1) of Directive 2005/60/EC, shall designate the person or persons responsible for forwarding information pursuant to this Article.</p> <p>4. The Member State in whose territory an auction platform auctioning two-day spot or five-day futures is situated shall ensure that the national measures transposing Articles 26 to 29, 32, Article 34(1) and Article 35 of Directive 2005/60/EC apply to the auction platform concerned.</p>	<p>2011 Regulations, regulation 11; 2011 Order, articles 2 and 3</p>
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