

**EXPLANATORY MEMORANDUM TO**  
**THE GREENHOUSE GAS EMISSIONS TRADING SCHEME REGULATIONS 2012**

**2012 No. 3038**

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change 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 These Regulations complete transposition of Directive 2009/29/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community. They also consolidate and replace previous instruments transposing Directive 2003/87/EC ('the EU ETS Directive'), and implement to the extent necessary a number of directly applicable European Commission Regulations adopted under the EU ETS Directive as so amended ('the revised Directive').

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

3.1 These Regulations are made in exercise of the powers conferred by both section 2(2) of the European Communities Act 1972 and section 2 of the Pollution Prevention and Control Act 1999. A combination of these powers is needed as s.2 of the 1999 Act is the appropriate domestic power, but it does not extend to Northern Ireland. It is, therefore, necessary to exercise the powers in section 2(2) of the 1972 Act as well as those in section 2 of the 1999 Act.

4. **Legislative Context**

4.1 The EU ETS Directive established a system for greenhouse gas emission allowance trading within the European Community (now the European Union).

4.2 In January 2007, the European Commission published two Communications entitled 'An Energy Policy for Europe' and 'Limiting Global Climate Change to 2 Degrees Celsius' which set out the Commission's proposals for action by the EU to prevent anthropogenic climate change from irrevocable consequences, centring around a proposal for the EU to autonomously reduce its own emissions by at least 20% below 2005 levels by 2020. Following on from these proposals, in January 2008 the European Commission published proposals to revise Directive 2003/87/EC.

4.3 On 23 April 2009 the Council of the EU and the European Parliament adopted Directive 2009/29/EC amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community. It came into force on 25 June 2009, and Member States have to fully transpose it into national legislation by 31 December 2012.

4.4 The revised Directive is designed to be more environmentally ambitious in order to deliver greater emissions reductions whilst also increasing scarcity in the carbon market. It includes a centralised, EU-wide cap on emissions with an annually declining trajectory which will deliver an overall reduction of 21% below 2005 emissions by 2020. It also includes provisions for the introduction of new sectors and gases, and harmonised rules on free allocation with a move toward greater auctioning of allowances. These rules are designed to ensure a more consistent approach to implementation of the EU Emissions Trading System (EU ETS) across the EU.

4.5 On 19 November 2008 the Council of the EU and European Parliament adopted Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (the 'Aviation Directive'). The EU ETS Directive is currently transposed into UK law by the Greenhouse Gas Emissions Trading Scheme Regulations 2005 (SI 2005/925) and (in respect of the Aviation Directive) by the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (SI 2010/1996).

4.6 A transposition note is attached as an annex to this Memorandum.

## **5. Territorial Extent and Application**

5.1 This instrument extends to all of the United Kingdom, and also applies to certain installations within the area of the United Kingdom Continental Shelf.

## **6. European Convention on Human Rights**

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## **7. Policy background**

7.1 The establishment of a system for greenhouse gas emission allowance trading within the European Community in 2005 by the EU ETS Directive was a major milestone in the global efforts to tackle climate change. It was one of the key policies introduced by the European Union to help meet the EU's greenhouse gas emissions reduction target of 8% below 1990 levels under the Kyoto Protocol. It works on a 'cap and trade' basis, where Member States are required to set an emissions cap for all the sectors covered by the EU ETS.

7.2 The rationale behind emissions trading is that it enables emission reductions to take place where the cost of the reduction is lowest, thus lowering the overall costs of combating climate change. More abatement will be undertaken by operators with lower abatement costs, therefore reducing the overall costs of meeting the emissions target (cap) set by any trading scheme. It also ensures that emissions reduction targets are met by setting a cap. This is unlike other systems, such as taxation, where the amount of emissions reductions is uncertain.

7.3 The Regulations require all operators under the EU ETS to monitor and report their emissions for each year. By the following 30 April they are required to surrender allowances to account for their annual emissions. One tonne of carbon dioxide equivalent is equal to one EU allowance (EUA). Operators receive a partial free allocation of allowances. They may surrender all or part of their free allocation to cover their emissions, and have the flexibility to buy additional allowances or to sell any surplus allowances generated from reducing their emissions below their allocation. Failure to surrender enough allowances will result in a civil penalty for the operator of €100 for each tonne of carbon dioxide equivalent that is not covered by an allowance.

- Consolidation

7.4 The Regulations consolidate, with amendments, and replace previous sets of implementing regulations (SI 2005/925 and SI 2010/1996) and their amending instruments.

## **8. Consultation outcome**

8.1 The consultation period ran from 8 May – 31 July 2012. 23 responses were received from a mixture of stationary and aircraft operators, consultants, industry associations, large power companies and Government bodies.

8.2 There was overwhelming support for proposals to consolidate existing legislation into one single statutory instrument, aligning the provisions for aircraft operators with those for stationary installations, to move to a regime consisting only of civil penalties, and move to an appeals system in England and Wales where the First-tier Tribunal is the appeal body (the appeal bodies in Scotland and Northern Ireland will remain unchanged from existing arrangements). A number of issues raised during consultation, including interpretation of particular elements of the Directive and specific drafting issues, have been addressed in the final legislation and through the Government summary of consultation responses. This has been published on the DECC website [http://www.decc.gov.uk/en/content/cms/emissions/eu\\_ets/eu\\_ets.aspx](http://www.decc.gov.uk/en/content/cms/emissions/eu_ets/eu_ets.aspx).

## **9. Guidance**

9.1 The regulator has prepared a compliance manual to assist operators in complying with the EU ETS, and has guidance available on its website to assist in the permit application process. DECC and the regulator have as far as possible notified stakeholders

of the new procedures that will be introduced by these Regulations through emailed newsletters, stakeholder workshops and updating respective websites where appropriate.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is predominantly limited to operators on whom the Regulations place direct obligations.

10.2 The impact on the public sector is predominantly limited to operators on whom the Regulations place direct obligations.

10.3 Two Impact Assessments are attached to this memorandum, one covering the Regulations and the approach to transposition of the EU ETS Directive and one on the small emitters and hospital opt out scheme. These will be published alongside the Explanatory Memorandum on the OPSI website.

## **11. Regulating small business**

11.1 The legislation applies to small business in so far as they meet the activity or capacity thresholds for regulation under the EU ETS Directive.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to address the disproportionate burdens of the EU ETS on small emitters by providing an Opt-out Scheme for small emitters and hospitals. Article 27 of the EU ETS Directive contains provisions for Member States to choose to exclude small emitters (with annual greenhouse gas emissions of less than 25,000 tCO<sub>2</sub> and, where the installation undertakes combustion activities, thermal input below 35MW) and hospitals. There is no scope under the ETS Directive to directly target and reduce the burden on small businesses.

11.3 The basis for the final decision on what action to take to assist small business includes both the Impact Assessment prepared for this policy and consultation with relevant stakeholders. The Opt-out Scheme has been designed to meet Article 27 requirements in consultation with relevant stakeholders and aims to offer a simple alternative to the EU ETS which reduces the regulatory burden on opted-out small emitters whilst maintaining incentives for emissions reductions. We estimate that the scheme will offer savings to industry of up to £39 million over the period 2013-2020. More than 240 eligible operators have chosen to opt-out under this Scheme.

## **12. Monitoring & review**

12.1 The Regulations include provisions requiring the Secretary of State to review the operation and effect of the Regulations and set out the conclusions of the review in a published report within 5 years of them coming into force, and within every 5 years after that.

### **13. Contact**

Ben McKie at the Department of Energy and Climate Change Tel: 0300 068 5485 or email: [ben.mckie@decc.gsi.gov.uk](mailto:ben.mckie@decc.gsi.gov.uk) can answer any queries regarding the instrument.

**Transposition Table: Directive 2003/87/EC as amended by Directive 2009/29/EC, establishing a scheme for greenhouse gas emission allowance trading within the Community (EU Emissions Trading System Directive).**

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2003L0087:20090625:EN:PDF>

This note describes, in table form, how the Articles of the EU ETS Directive have been transposed into UK legislation via the Greenhouse Gas Emissions Trading Scheme Regulations 2012.

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
Art 1 – General description of directive	N/A	No transposition required	N/A	N/A
Art 2 – Scope	N/A	No transposition required	N/A	N/A
Art 3 – Definitions	Some	Many definitions are directly referenced but for some additional clarification is required, e.g. the definition of ‘operator’ which in the Directive depends on national legislation.	Regulation 2 (SI 2005/925)	Regulation 3 – Interpretation
Art 3a-3c – Aviation	N/A	No transposition required	N/A	N/A

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
Art 3d – Method of Allocation of aviation allowances through auctioning	N/A	No transposition required. The EU Auctioning Regulation (Regulation 1031/2010) is directly applicable and sets out the rules for auctioning under the Emissions Trading System	N/A	N/A
Art 3e – Allocation and issue of allowances to aircraft operators	No	Not copied out because provision for a national application procedure is required	Part 2 SI 2009/2301 and Part 2 SI 2010/1996	Regulation 30 and Schedule 7 – Allocation of aviation allowances
Art 3f – Special reserve for certain aircraft operators	No	Not copied out because provision for a national application procedure is required	Part 3 SI 2010/1996	Regulation 30 and Schedule 8 – Allocation of aviation allowances
Art 3g – Aircraft operator monitoring and reporting plans	No	Not copied out because provision for a national application procedure is required	Regulations 18 and 19 (SI 2010/1996)	Regulations 31 to 34 – Monitoring and reporting aviation emissions
Art 3h – Scope	N/A	No transposition required	N/A	N/A
Art 4 – Requirement for operators of installations to	No	Regulations directly refer to the list of activities included in the Directive.	Regulation 7 (SI 2005/925)	Regulation 9 (and definition of “regulated activity” in Regulation 3) –

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
hold a greenhouse gas emissions permit before undertaking listed activities				requirement for permit to carry out regulated activities
Art 5 – Information required in a permit application	Some	<p>Many elements of this Article have been copied out (to provide a list of things for inclusion in a permit), but the Regulations also specify additional minor details (e.g. the name and address of the operator requesting the permit) that are not provided for in the Directive.</p> <p>This additional information requirement will be of benefit to operators as it ensures the regulator has the full and correct contact details, which will prevent delays if the regulator needs to contact the operator.</p>	Regulation 8 (SI 2005/925)	Regulation 10 and Schedule 4 paragraph 1 – Applications for and grant of permits
Art 6 – Conditions for and contents of greenhouse gas emissions permits	Some	<p>Many conditions of permits have been copied from the Directive, but the Regulations also specify timelines for submission of this information to the regulator, and set out the format in which this information should be submitted. This will provide greater clarity to industry and</p>	Regulation 10 (SI 2005/925)	Schedule 4 paragraph 2 – content of a greenhouse gas emissions permits



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		limit the number of questions they have to ask the regulator before submitting information (and therefore reduce the overall burden of the process for operators).		
Art 7 – Requirement for operators to inform the competent authority of changes to installations	Yes	This has been included as a permit condition.	Regulation 12 (SI 2005/925)	Schedule 4 paragraph 2 (7) – content of greenhouse gas emissions permits
Art 8 – Coordination with the Pollution Prevention and Control Directive	N/A	This is not covered in this transposition. UK Regulators are the competent authorities for both the EU ETS and PPC and make the necessary administrative arrangements to reduce the burden on industry	N/A	N/A
Art 9 – Community-wide quantity of allowances set by commission	N/A	No transposition required – only applicable to European Commission	N/A	N/A
Art 9a – Community-wide quantity of allowances. Some data collection requirements for Member	N/A	No transposition required. This was completed in 2009 under SI 2009/3130 which is revoked by this legislation.	SI 2009/3130	N/A

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
States				
Art 10 – Rules for auctioning allowances	N/A	No transposition required. The EU Auctioning Regulation (Regulation 1031/2010) is directly applicable and sets out the rules for auctioning under the Emissions Trading System	N/A	N/A
Art 10a – Free allocation rules	No	This Article is directly implemented by Decision 2011/278/EU and so in general does not need transposition. In order to give that Decision legal effect we have had to include provisions, e.g. to ensure consistency between definitions (for example cessation of operations is referred to as cessation of regulated activities).	N/A	Regulation 16 and Schedule 6 – Allocation and adjustment of free allowances
Art 10b – Measures to support sectors at risk from carbon leakage	N/A	No transposition required – only applicable to European Commission	N/A	N/A

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
Art 10c – Derogation for new EU entrants	N/A	UK not eligible	N/A	N/A
Art 11 – National Implementation Measures	N/A	No transposition required. This was completed in 2009 (SI 2009/3130), which is repealed by this legislation. Issuance of allowances is covered under the directly applicable EU Registries Regulations (920/2010 & 1193/2011).	SI 2009/3130	N/A
Art 11a and 11b – Use of project credits (from Kyoto Protocol projects) in the EU ETS	No	This Article contains provisions from the Directive that are complex and are a mixture of obligations for Competent Authorities and operators. Copy out is not appropriate – we need to ensure the obligations on operators are clearly defined to ensure compliance.	Regulation 27A (SI 2005/925)	Not addressed in these Regulations, expected to be dealt with by EU Registry Regulations.
Art 12 – Transfer, surrender and cancellation of allowances	No	Some of these requirements do not need transposing since they are covered by the directly applicable EU Registries Regulations (920/2010 & 1193/2011).  That part of the Article which is not given effect by the Registries Regulations only	Regulation 26 (SI 2005/925)	Regulation 41 read with Schedule 4, paragraph 2(4) – surrender of allowances: operators of installations Regulation 42 – surrender of allowances: UK aircraft operators

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		<p>specifies a general framework, leaving the detail of implementation to Member States. This legislation makes it a condition of the permit that operators surrender allowances. If this was not specified there would be no obligation for operators to surrender allowances, and the integrity of the system would be damaged.</p>		<p>Part 9 – The Union Registry and the UK Registry</p>
<p>Art 13 – Validity of allowances</p>	<p>N/A</p>	<p>No transposition required. This is covered by Article 57 of the directly applicable EU Registries Regulation (920/2010).</p>	<p>N/A</p>	<p>N/A</p>
<p>Art 14 – Monitoring and reporting of emissions</p>	<p>No</p>	<p>This article places an obligation on Member States to ensure operators provide monitoring data to the regulator.</p> <p>This obligation has been passed on to operators by inclusion of a permit condition (or emissions plan condition in the case of aircraft operators). This will benefit operators by clearly setting out their obligations in monitoring and reporting emissions, and ensure compliance. EU monitoring and reporting Regulations are directly applicable.</p>	<p>Regulations 10, 28, 29, 30 (SI 2005/925)</p>	<p>Part 3, Chapter 4 – Monitoring and reporting aviation emissions Schedule 4, paragraph 2(3) – Content of a greenhouse gas emissions permits</p>

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
Art 15 – Verification and accreditation	No	<p>This Article places an obligation on Member States to ensure the verification of data submitted to the regulator, but does not specify how Member States shall ensure this takes place.</p> <p>This obligation has been passed on to operators by making it a condition of the permit (or of the emissions plan in the case of aircraft operators). This will benefit operators by making clear the requirement for properly verified data. A power has been provided (as required by the Directive) for the national registry administrator to prevent the transfer of allowances from accounts of operators who have not had their emissions data verified.</p>	Regulation 10 (SI 2005/925)	<p>Regulation 36 – Emission plan conditions</p> <p>Schedule 4, paragraph 2 – Content of a greenhouse gas emissions permit</p> <p>Regulation 80 – The Union Registry</p> <p>Regulation 81 – The UK Registry</p>
Art 16 – Penalties.	No	The Directive states that Member States must lay down the rules on penalties but (with the exception of the €100/tonne penalty for excess emissions) provides no detail on how Member States should	Part 7 (SI 2005/925)	Part 7 – Civil penalties

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		implement. Without penalties the system would be unworkable and could not have its policy intent. This legislation establishes a system of penalties, which have been reviewed (informally consulting industry as part of this review), to ensure that effective, proportionate and dissuasive penalties are in place.		
Art 17 – Making info available to the public	N/A	No transposition required. This is covered by Directive 2003/4/EC on public access to environmental information. Existing UK regulations implement this through the Environmental Information Regulations 2004 (SI 2004/3391).	N/A	N/A
Art 18 – Competent Authority	No	This Article requires Member States to designate the competent authorities for implementing various aspects of the Directive.	Regulations 2, 6, 27(15), 32(14) (SI 2005/925)	Regulation 2 defines the “regulators” responsible for most functions under the Directive, and Regulations 2 and 20 define the corresponding “authority”. In addition, Regulation 8 designates competent authorities for the purpose of the relevant

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				directly-applicable Commission Regulations.
Art 18a – Administering Member State for aircraft operators	Some	Direct reference is made to the list of aircraft operators drawn up by the Commission under Article 18a(3), supplemented by a power to make additional designations that are required by the Directive (which similarly refers directly to the criteria in Article 18a(1)). Provision is also made to prevent the double regulation of Gibraltar operators.	Regulations 2, 2A and 2B (SI 2010/1996 as amended by SI 2011/765)	Regulations 20 and 22 to 25
Art 18b – Assistance from Eurocontrol	No	No transposition required – only applicable to European Commission.	N/A	N/A
Art 19 – Registries	No	The EU Registries Regulations (920/2010 & 1193/2011) are directly applicable.  Limited transposition was required to update references to this, to ensure competent authorities are correctly identified in national legislation and to ensure that where the Regulations provide for action to be taken against non-compliant operators, the	Regulation 26 (SI2005/925) (as amended by SI 2011/2911)	Part 9 – The Union Registry and the UK Registry Regulation 8(1) to (5) (Commission Regulations: designations)

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		consequence of non-compliance is clearly set out.		
Art 20 – Designation of central EU registry administrator	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 21 – Reporting by Member States	N/A	No transposition required. Administrative arrangements will be made with the regulators to ensure required data is collected.	N/A	N/A
Art 21a – Support of capacity-building activities	N/A	No transposition required.	N/A	N/A
Art 22 – Amendments to Directive annexes	N/A	No transposition required.	N/A	N/A
Art 23 – Comitology committee and rules	N/A	No transposition required.	N/A	N/A



Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
Art 24 – Procedures for unilateral (Member State) inclusion of additional activities	N/A	No transposition required.	N/A	N/A
Art 24a – Harmonised rules for emissions reductions projects	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 25 – Links with other emissions trading schemes	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 25a – 3 <sup>rd</sup> country measures to reduce the climate change impact of aviation	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 26 – Amendment to the Integrated Pollution Prevention and Control Directive	No	Implemented through the Environmental Permitting Regulations that transposed the IPPC Directive	SI 2010/675	N/A

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
Art 27 – Exclusion of small emitters	No	This Article provides Member States with the option to establish a scheme for small emitting installations and hospitals to opt out of the main scheme. This legislation establishes the UK scheme.	N/A	Regulations 10(2) and 15 and Schedule 5 – excluded installations
Art 28 – Adjustments applicable if there is a new international agreement on climate change	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 29 – Report on the functioning of the carbon market	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 29a – EU measures in the event of carbon price fluctuations	N/A	No transposition required – only applicable to European Commission.	N/A	N/A
Art 30 – Review and further development	N/A	No transposition required – mostly applicable to European Commission. This includes a reporting obligation on Member States linked to the Kyoto Protocol, but no	N/A	N/A

Article	Copy out (yes/no)	If no - justification	Previous National Provision	New National Provision
		transposition is required.		
Art 31 – Implementation	N/A	Relates to Directive as originally adopted. New implementation date of 31 December 2012 set by Article 1 of Directive 2009/29/EC.	Regulation 1 of SI 2003/3311	Regulation 1 provides that these Regulations come into force at the beginning of 1 January 2013 The required reference to Directive 2009/29/EC is made in the first paragraph of the Explanatory Note to these Regulations
Art 32 – Entry into force	N/A	No transposition required.	N/A	N/A
Art 33 – Addressees	N/A	No transposition required.	N/A	N/A