This Statutory Instrument has been made in consequence of defects in S.I. 2020/1265 and 2020/1557 and is being issued free of charge to all known recipients of those Statutory Instruments.

STATUTORY INSTRUMENTS

2023 No. 1387

CLIMATE CHANGE

The Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 2) Order 2023

Made - - - - *13th December 2023*

Coming into force *1st January 2024*

At the Court at Buckingham Palace, the 13th day of December 2023

Present,

The King's Most Excellent Majesty in Council

This Order is made in exercise of the powers conferred by sections 44, 54 and 90(3) of, and Schedule 2 and paragraph 9 of Schedule 3 to, the Climate Change Act 2008(**a**).

In accordance with paragraph 10 of Schedule 3 to that Act, before the recommendation to His Majesty in Council to make this Order was made—

(a) the advice of the Committee on Climate Change was obtained and taken into account; and

(b) such persons likely to be affected by the Order as the Secretary of State, the Scottish Ministers and the Welsh Ministers considered appropriate were consulted.

In accordance with paragraph 11 of that Schedule, a draft of the instrument containing this Order was laid before Parliament, the Scottish Parliament and Senedd Cymru and approved by resolution of each House of Parliament, the Scottish Parliament and Senedd Cymru.

Accordingly, His Majesty, by and with the advice of His Privy Council, makes the following Order:

(**a**) 2008 c. 27. The amendment made to paragraph 30 of Schedule 2 of that Act by S.I. 2022/500 is not relevant to this Order.

PART 1

Preliminary

Citation

1. This Order may be cited as the Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 2) Order 2023.

Commencement

2.—(1) This Order comes into force on 1st January 2024 immediately after the Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2023(**a**) comes into force.

(2) But if this Order is made on or after 1st January 2024, it comes into force on the day after the day on which it is made.

Extent

3. This Order extends to England and Wales and to Scotland.

PART 2

Greenhouse Gas Emissions Trading Scheme Order 2020 amended

Greenhouse Gas Emissions Trading Scheme Order 2020 amended

4. The Greenhouse Gas Emissions Trading Scheme Order 2020(**b**) is amended in accordance with this Part.

Article 34C amended (allocation tables: updates)

5.—(1) Article 34C is amended as follows.

(2) After paragraph (1)(i) insert—

"(j) Article 2b(6) of the Free Allocation Regulation(**c**) (electricity generators that state they will not produce electricity for sale for consumption outside the installation but subsequently do so).".

Article 34K amended (aviation: entitlement to free allocation in 2021-2025 allocation period)

6.—(1) Article 34K is amended as follows.

(2) In paragraph (a) omit the "and" at the end of the paragraph.

(3) In paragraph (b) for "operator," substitute "operator; and".

(4) After paragraph (b) insert—

"(c) in relation to allowances allocated for the 2024 or 2025 scheme year, to the extent that the number of allowances does not exceed the person's aviation emissions for the scheme year,".

(**a**) S.I. 2023/850.
(**b**) S.I. 2020/1265, amended by S.I. 2020/1557, 2021/1455, 2022/454, 2022/1173, 2022/1336 and 2023/850.
(**c**) EUR 2019/331, amended by S.I. 2020/1557, 2021/1455, 2022/1173, 2023/850 and this Order. Article 4(1) of S.I. 2020/1265 defines "Free Allocation Regulation" as Commission Delegated Regulation (EU) 2019/331 of 19 December 2018, as it forms part of domestic law. Article 2b is inserted by article 14 of this Order.

Article 34S amended (return of allowances: installations)

7.—(1) Article 34S is amended as follows.

(2) In paragraph (1)(b) after "article 34C(1)(b) to (f)" insert "or (j)".

Article 34T amended (return of allowances: aviation)

8.—(1) Article 34T is amended as follows.

(2) In paragraph (1)(b)—

(a) in the opening words for "either" substitute "any of the following applies";

(b) in paragraph (i) omit the "or" at the end of the paragraph;

(c) after paragraph (ii) insert—

"(iii) in relation to allowances allocated for the 2024 or 2025 scheme year, the number of allowances allocated to the person for the scheme year exceeds the person's aviation emissions for the scheme year.".

(3) In paragraph (3)—

(a) in sub-paragraph (a) omit the "or" at the end of the sub-paragraph;

(b) in sub-paragraph (b) after "aircraft operator" insert "; or";

(c) after sub-paragraph (b) insert—

"(c) in relation to allowances allocated for the 2024 or 2025 scheme year, exceed the person's aviation emissions for the scheme year for which the allowances are allocated.".

Article 34W amended (notice to withhold allowances)

9.—(1) Article 34W is amended as follows.

(2) After paragraph (1)(ga) insert—

"(gb) if the regulator is investigating for the purposes of Article 2b(4)(b) of the Free Allocation Regulation whether the installation has produced electricity for sale for consumption outside the installation;".

(3) In paragraph (2) for "paragraph (1)(a) to (ga)" substitute "paragraph (1)(a) to (gb)".

Schedule 2 amended (meaning of installation and regulated activity)

10.—(1) Schedule 2 is amended as follows.

Paragraph 3 amended (meaning of regulated activity, etc.)

(2) In paragraph 3 in table C in the 26th row in column 1 (which begins "Capture of greenhouse gases…") for "other installations" substitute "a regulated activity".

PART 3

Free Allocation Regulation amended

Free Allocation Regulation amended

11. Commission Delegated Regulation (EU) 2019/331 is amended in accordance with this Part.

Article 2 amended (definitions)

12.—(1) Article 2 is amended as follows.

(2) In paragraph 1—

(a) for point (20) substitute—

"(20) "electricity generator" must be construed in accordance with Article 2c;";

(b) after point (23) insert—

"(24) "relevant CHP electricity" has the meaning given in Article 2c(6).".

Article 2a amended (eligibility for free allocation)

13.—(1) Article 2a is amended as follows.

(2) In paragraph 1—

(a) omit point (a);

(b) in point (b)(i) omit "in the relevant period, calculated over the relevant period as a whole".

(3) In paragraph 2—

(a) in the opening words for "paragraph 1(b)(i)" substitute "this Article";

(b) in point (a)(ii) after "Article 5" insert "made after the end of the first full calendar year after the start of normal operation of a heat benchmark sub-installation".

(4) After paragraph 2 insert—

"3. An application for free allocation may be made in respect of an electricity generator in relation to measurable heat whether or not at the date of the application the electricity generator has produced measurable heat by means of high-efficiency cogeneration or has exported measurable heat for the purposes of district heating.

4. Paragraphs 5 and 6 apply where an application for free allocation is made in respect of an electricity generator in relation to measurable heat.

5. For the purposes of Chapter 3 of this Regulation and Articles 3a to 6a of the Activity Level Changes Regulation(**a**) (which relate to the calculation of free allocation), the installation must be treated as not including any heat benchmark sub-installation unless the heat benchmark sub-installation:

(a) in a case where the installation includes the heat benchmark sub-installation at the date of the application and the application is made under Article 4 or under Article 5 after the end of the first full calendar year after the start of normal operation of the sub-installation, produced measurable heat by means of high-efficiency cogeneration in the relevant period, calculated over the relevant period as a whole; or

(b) in any other case, produces measurable heat by means of high-efficiency cogeneration in any subsequent qualifying period, calculated over the subsequent qualifying period as a whole.

6. Where paragraph 5(b) applies, Article 3a of the Activity Level Changes Regulation applies to the heat benchmark sub-installation as if its start of normal operation, if before the beginning of the subsequent qualifying period, were at the beginning of the subsequent qualifying period.

7. In paragraphs 5 and 6, "subsequent qualifying period" means, in relation to a heat benchmark sub-installation, any period including at least one full calendar year of operation of the heat benchmark sub-installation that:

(a) ends with 31 December:

(**a**) EUR 2019/1842, amended by S.I. 2020/1557, 2022/1173, 2023/850 and this Order. Article 4(1) of S.I. 2020/1265 defines "Activity Level Changes Regulation" as Commission Implementing Regulation (EU) 2019/1842 of 31 October 2019, as it forms part of domestic law.

(i) in the case of an application under Article 4, in any scheme year ("year 2") beginning with the second scheme year after the baseline period;

(ii) in the case of an application under Article 5, in any scheme year ("year 2") beginning with the first scheme year for which a report on the activity level of the sub-installation in that year is required under Article 3 of the Activity Level Changes Regulation; and

(b) begins with 1 January in the scheme year preceding year 2 or, if the start of normal operation of the heat benchmark sub-installation is later, the start of normal operation of the sub-installation.

8. The following regulated activities are not eligible for free allocation:

(a) the capture of greenhouse gases from a regulated activity for the purpose of transport and geological storage in a storage site;

(b) the transport of greenhouse gases by pipelines for geological storage in a storage site;

(c) the geological storage of greenhouse gases in a storage site.".

Articles 2b and 2c inserted

14. After Article 2a insert—

"Article 2b

Free allocation in 2026-2030 allocation period: applications by incumbent installations that will not produce electricity for sale for consumption outside the installation

1. Despite Article 2a(1)(b), an application under Article 4 for free allocation in the 2026-2030 allocation period may be made in respect of an installation that is an electricity generator as if the restriction referred to in Article 2a(1)(b) did not apply, provided that the application is accompanied by a statement by the operator of the installation that the condition in paragraph 2 will be met.

2. The condition is that the installation will not produce any electricity (other than relevant CHP electricity) for sale for consumption outside the installation in the period beginning with the date of the application and ending with 31 December 2030 (the "relevant period").

3. Where such an application is accompanied by the statement referred to in paragraph 1:

(a) the regulator must assess the statement and any evidence provided and include the statement, evidence and regulator's assessment in the information sent to the UK ETS authority under Article 15a(3) for assessment by the UK ETS authority under Article 15a(4);

(b) if the UK ETS authority considers that the condition in paragraph 2 will be met, for the purposes of determining the application, the application must be treated as made in respect of an installation that is not an electricity generator (and to which the restriction in Article 2a(1)(b) does not apply);

(c) if the UK ETS authority does not consider that the condition in paragraph 2 will be met, the UK ETS authority must inform the regulator, and the regulator must inform the operator of the installation.

4. Paragraphs 5 to 8 apply where:

(a) an application under Article 4 for free allocation in the 2026-2030 allocation period in respect of an electricity generator is treated as made in respect of an installation that is not an electricity generator in accordance with paragraph 3(b) and is assessed as valid under Article 15a(4); and

(b) the regulator considers at any time (including on receipt of a report under Article 3 of the Activity Level Changes Regulation) that the installation has produced electricity (other than relevant CHP electricity) for sale for consumption outside the installation in the relevant period.

5. The regulator must:

(a) determine the historical activity level (if any) of each sub-installation of the installation that the regulator considers would have been determined under this Regulation or the Activity Level Changes Regulation if the application had been treated as made in respect of an electricity generator (and to which the restriction in Article 2a(1)(b) applies);

(b) calculate the preliminary and final annual number of allowances (if any) to be allocated in respect of the installation, and of each sub-installation of the installation, for each scheme year in the 2026-2030 allocation period beginning with the relevant scheme year, that the regulator considers would have been calculated under this Regulation and the Activity Level Changes Regulation if the application had been treated as made in respect of an electricity generator (and to which the restriction in Article 2a(1)(b) applies);

(c) send evidence of the matters referred to in paragraph 4(b) and the determination and calculation referred to in points (a) and (b) of this paragraph to the UK ETS authority.

6. If the UK ETS authority considers that the installation has produced electricity (other than relevant CHP electricity) for sale for consumption outside the installation in the relevant period, the UK ETS authority must:

(a) approve the final annual number of allowances to be allocated in respect of the installation, for each scheme year in the 2026-2030 allocation period beginning with the relevant scheme year, making any corrections to the historical activity levels or preliminary or final annual number of allowances that the UK ETS authority considers appropriate;

(b) inform the regulator accordingly.

7. The regulator must give notice to the operator of the installation of the final annual number of allowances approved.

8. For the purposes of Article 5 of the Activity Level Changes Regulation, the reference in paragraph 3 of that Article to the initial allocation must be read as including a reference to the initial allocation that would have been approved if the application had been treated as made in respect of an electricity generator (and to which the restriction in Article 2a(1)(b) applies).

9. Where paragraph 4(a) applies to an installation, unless the final annual number of allowances is recalculated and approved under paragraphs 5 and 6, despite the amendment made to Article 3(2) of the Activity Level Changes Regulation by article 22 of the Greenhouse Gas Emissions Trading Scheme (Amendment) (No. 2) Order 2023, the activity level report required by Article 3 of the Activity Level Changes Regulation must contain the information referred to in section 1.4(e) of Annex 4 to this Regulation.

10. In this Article, "relevant scheme year", in relation to an installation, means:

(a) if the installation first produces electricity (other than relevant CHP electricity) for sale for consumption outside the installation in the period beginning with the date of the application and ending with 31 December 2026, the 2026 scheme year;

(b) if the installation first produces electricity (other than relevant CHP electricity) for sale for consumption outside the installation on or after 1 January 2027, the scheme year in which the installation first produces such electricity.

Article 2c

Meaning of "electricity generator" and "relevant CHP electricity"

1. In this Regulation, "electricity generator" must be construed as follows.

2. In relation to a deemed application for free allocation in the 2021-2025 allocation period or an application for free allocation in the 2021-2025 allocation period under Article 5, "electricity generator" means an installation:

(a) that on or after 1 January 2005 produced electricity for sale for consumption outside the installation; and

(b) at which the regulated activity referred to in column 1 of the first entry in table C in Schedule 2 to the UK ETS Order (combustion of fuels) and no other regulated activity (apart from one referred to in Article 2a(8)) is carried out.

3. In relation to an application for free allocation in the 2026-2030 allocation period under Article 4 or 5, "electricity generator" means an installation:

(a) that in the relevant period produced electricity for sale for consumption outside the installation; and

(b) at which the regulated activity referred to in column 1 of the first entry in table C in Schedule 2 to the UK ETS Order (combustion of fuels) and no other regulated activity (apart from one referred to in Article 2a(8)) is carried out.

4. For the purposes of paragraph 3(a), electricity produced for sale for consumption outside the installation in the relevant period must be ignored if:

(a) it is relevant CHP electricity; or

(b) it represents no more than 5% of the total electricity (not including relevant CHP electricity) produced at the installation in the relevant period.

5. In paragraphs 3 and 4, "relevant period" means:

(a) in relation to an application for free allocation under Article 4, the baseline period;

(b) in relation to an application for free allocation under Article 5, the period beginning with the start of normal operation and ending with the last day of the year before the year in which the application is made.

6. In this Regulation, "relevant CHP electricity" means, in relation to an installation, electricity produced at the installation by cogeneration at a cogeneration unit certified under the standard applying from time to time for the purposes of the Combined Heat and Power Quality Assurance Programme(**a**) that produces electricity for consumption at the installation (and may also produce electricity for sale for consumption outside the installation).".

Article 5 amended (application for free allocation by new entrants)

15.—(1) Article 5 is amended as follows.

(2) Omit paragraph 3a.

Article 10 amended (division into sub-installations)

16.—(1) Article 10 is amended as follows.

(2) In paragraph 5(b)—

(**a**) Details of the Combined Heat and Power Quality Assurance Programme are available at https://www.gov.uk/guidance/combined-heat-power-quality-assurance-programme. The current and previous standards can be accessed at https://www.gov.uk/government/publications/chpqa-standard. Copies may be inspected at the Department for Energy Security and Net Zero, 3-8 Whitehall Place, London SW1A 2JP.

(a) after "product benchmark sub-installation," omit "or";

(b) after "other EU ETS or UK ETS installations" insert "or any regulated activity non-eligible for free allocation (see Article 2a(8))".

Article 15a amended (assessment of applications for free allocation by operators of incumbent installations)

17.—(1) Article 15a is amended as follows.

(2) In paragraph 6—

(a) omit point (a);

(b) in point (b) omit "otherwise".

Article 18a amended (assessment of applications and final allocation at installation level for new entrants)

18.—(1) Article 18a is amended as follows.

(2) In paragraph 12—

(a) omit point (a);

(b) in point (b) omit "otherwise".

Article 25 amended (mergers and splits)

19.—(1) Article 25 is amended as follows.

(2) After paragraph 9 insert**—**

"9a. Paragraph 9(b) does not apply to a new installation:

(a) in the case of a split, if the installation before the split was an electricity generator;

(b) in the case of a merger, if any installation before the merger was an electricity generator.".

Annex 4 amended (parameters for baseline data collection)

20.—(1) Annex 4 is amended as follows.

Section 1 amended (general installation data)

(2) In section 1.4 (eligibility for free allocation)—

(a) in point (b)(i) for "other installations" substitute "a regulated activity";

(b) after point (c) insert—

"(d) Where all the electricity (if any) reported under section 2.5(d) is sold, a statement to that effect or, in any other case, the total amount of electricity produced at the installation sold for consumption outside the installation;

(e) Where electricity was produced at the installation by cogeneration at a cogeneration unit certified under the standard applying from time to time for the purposes of the Combined Heat and Power Quality Assurance Programme:

(i) evidence of the certification;

(ii) the total amount of electricity produced by cogeneration at the unit;

(iii) if the unit produced electricity for consumption at the installation, evidence of this;

(f) Where the operator of an installation that is an electricity generator wants free allocation in relation to measurable heat produced by means of high-efficiency cogeneration within the meaning of Article 2a, evidence that measurable heat has

been produced by such means in the relevant period or, as the case may be, the subsequent qualifying period referred to in that Article.".

Section 2 amended (detailed annual data for each year in the baseline period)

(3) In section 2.2 (annual emissions per sub-installation)—

(a) in the heading after "sub-installation" insert ", etc.";

(b) after "sub-installation" insert "and the quantity of emissions not attributable to any sub-installation".

Annex 7 amended (data monitoring methods)

21.—(1) Annex 7 is amended as follows.

Section 10 amended (rules for determining emissions at sub-installation level for the purpose of updating benchmark values)

(2) In section 10.2 (attributed emissions to sub-installations) in the third paragraph for "and for flaring other than safety flaring" substitute ", for flaring other than safety flaring and for a regulated activity non-eligible for free allocation (see Article 2a(8))".

PART 4

Amendments to other legislation

Activity Level Changes Regulation amended

22.—(1) Commission Implementing Regulation (EU) 2019/1842 is amended as follows.

(2) In Article 3(2) (reporting requirements) after "except 1.3(c)" insert "and 1.4(e)".

Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021 amended

23.—(1) The Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021(**a**) are amended as follows.

(2) In regulation 12(1A)(b) (cost containment mechanism)—

(a) for "and (f)" substitute ", (f) and (j)";

(b) for "and errors" substitute ", errors and electricity generators that state they will not produce electricity for sale for consumption outside the installation but subsequently do so".

Ceri King
Deputy Clerk of the Privy Council

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, report 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 that may be created. Allowances are sold at auction,

(**a**) S.I. 2021/484, amended by S.I. 2021/513, 2021/561, 2021/917 and 2023/994.

but some operators of installations and aircraft operators receive an allocation of allowances free of charge.

This Order amends the UK ETS Order, Commission Delegated Regulation (EU) 2019/331 (the "Free Allocation Regulation"), Commission Implementing Regulation (EU) 2019/1842 (the "Activity Level Changes Regulation") and the Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021.

Free allocation for aviation

Where an aircraft operator's free allocation for the 2024 and 2025 scheme years exceeds the aircraft operator's emissions for the year, the aircraft operator may be required to return any excess allowances: see amendments to articles 34K and 34T of the UK ETS Order.

Free allocation for "electricity generators"

A number of changes are made to free allocation for installations that generate electricity for sale as well as carrying out activities that are eligible for free allocation: see amendments to articles 34C, 34S and 34W of the UK ETS Order, new Articles 2b and 2c, and amendments to Articles 2, 2a (except for the omission of paragraph 1(a) and for new paragraph 8), 5 and 25, of, and new section 1.4(d) to (f) of Annex 4 to, the Free Allocation Regulation and the amendments to the Activity Level Changes Regulation and the Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021. Installations that are classed as "electricity generators" (as defined in the Free Allocation Regulation) do not benefit from free allocation to the same extent as other installations, receiving free allocation only in relation to "measurable heat" produced by means of "high-efficiency cogeneration" or exported for district heating.

From the 2026-2030 allocation period, electricity generated for sale before 1 January 2019; electricity representing no more than 5% of total electricity generated; and electricity generated at a CHP plant certified under the CHP Quality Assurance Programme that generates electricity for the purposes of the installation as well as for export will be ignored in determining whether an installation is an electricity generator. In addition, installations that have generated electricity for sale in excess of the 5% limit between 2019 and 2023 but do not generate any electricity for sale (other than from such a CHP plant) until the end of the allocation period may benefit from free allocation to the same extent as other installations. Finally, provision is made for electricity generators to be able to satisfy the conditions for free allocation in relation to measurable heat produced by means of high-efficiency cogeneration part-way through, as well as at the beginning of, an allocation period.

Carbon capture, transport and storage

It is made clear that the "regulated activity" of capturing greenhouse gases includes their capture from regulated activities at the same installation at which the capture takes place as well as from regulated activities at other installations; and that an installation that carries on the regulated activity of capturing, transporting or storing greenhouse gases (none of which is eligible for free allocation) is not precluded from applying for free allocation in respect of other activities carried out at the same installation: see amendments to Schedule 2 to the UK ETS Order and to Articles 2a (the omission of paragraph 1(a) and the insertion of new paragraph 8), 10, 15a and 18a of, and sections 1.4(b) and 2.2 of Annex 4, and section 10 of Annex 7, to, the Free Allocation Regulation. It is also made clear that an installation may be an "electricity generator" whether or not capture activities, etc. are carried out at the installation.

An impact assessment is available from the Industrial Decarbonisation and Emissions Trading Directorate, Department for Energy Security and Net Zero, 3-8 Whitehall Place, London SW1A 2JP and is available alongside this Order on www.legislation.gov.uk. The assessment covers free allocation for aviation and for electricity generators.

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