



Department
for Environment
Food & Rural Affairs

Consultation

Introducing civil penalties for infringements of the Fluorinated Greenhouse Gases Regulation

October 2017



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Introduction

This consultation is published by the Department for Environment, Food and Rural Affairs and the Scottish Government. It seeks views on the introduction of a new civil penalties scheme to replace the existing penalty regime for infringements of the EU Fluorinated Greenhouse Gases Regulation (EU No 517/2014). It runs until 24 November 2017. The government and Scottish government will consider whether to change any aspect of these proposals in light of the responses and evidence received. We are encouraging contributions from all interested parties.

Background

Fluorinated gases (F-gases) are used in refrigeration, air-conditioning, insulation foams, electrical switchgear equipment, aerosol sprays, medical inhalers, solvents, fire extinguishers, and a number of other specialist applications. F-gases include various chemicals that fall into four groups: hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF₆) and nitrogen trifluoride (NF₃).

Many F-gases were introduced during the 1990s as replacements for chlorofluorocarbons (CFCs) and other chemicals which damage the ozone layer. Although F-gases do not damage the ozone layer, they are powerful greenhouse gases (GHG) with global warming potentials¹ (GWPs) that range from hundreds to many thousands of times higher than carbon dioxide (CO₂). Emissions of F-gases, therefore, have the potential to make a significant contribution to climate change.

The EU introduced legislation in 2006², which was subsequently strengthened in 2014. The 2014 EU F-Gas [Regulation](#)³ requires a 79% cut in HFCs (the main group of F-gases) available for purchase in the EU by 2030. The regulation allocates annual quota limits for the quantity of HFCs that a producer or importer can place on the EU market and then reduces those quotas in steps between 2015 and 2030. In addition, the Regulation bans certain F-gases in specified applications and strengthens obligations on leak checks, repairs, recovery and training of those who install or service equipment containing F-gases. In combination, the 79% cut in HFC usage, along with the measures to reduce other F-gas emissions are projected to cut total F-gas emissions from the equivalent of 17 million tonnes of CO₂ a year in 2015 (about 3% of total UK GHG emissions) to 3.2 million tonnes by 2035, representing an 81% cut compared to 2015.

The EU F-Gas Regulation is directly applicable in UK law but domestic legislation is used to provide the powers for UK enforcement bodies to enforce the requirements and to apply penalties for infringements. The Fluorinated Greenhouse Gases Regulations 2015 provide

¹ Global Warming Potential (GWP) is a relative measure that compares heat trapped in the atmosphere by a certain gas in relation to heat trapped by the same mass of carbon dioxide over the same period of time. The GWP of CO₂ is defined as 1.

² EU F-Gas Regulation (842/2006)

³ The new EU F-Gas Regulation (517/2014) was agreed by the European Parliament and European Council in April 2014 and applied in the UK from 1 January 2015.

the enforcement and penalty provisions in England, Scotland and Wales and in relation to offshore installations in marine areas⁴. They extend to Northern Ireland only in so far as they deal with import and export controls and trade with any place outside the UK (within the meaning of paragraph 20 of Schedule 3 to the Northern Ireland Act 1998). Northern Ireland has separate Regulations for all other F-gas provisions not covered by the scope of the GB Regulations.

In England, the Environment Agency takes the lead as the primary enforcing authority. In Wales it is Natural Resources Wales and in Scotland the Scottish Environment Protection Agency. Other enforcement bodies include local authorities, port health authorities, HM Revenue and Customs (HMRC), UK Border Force, the UK Secretary of State and Welsh and Scottish Ministers.

Enforcement work includes:

- investigating and addressing cases of non-compliance;
- operating a helpline service to respond to queries from businesses affected by the EU F-Gas Regulation to help them comply;
- undertaking specific campaigns to raise awareness of compliance issues and increase levels of compliance with the 2015 F-Gas Regulations.

Non-compliance can lead to enforcement action. Currently this could include the issuing of an enforcement notice which requests a non-compliant organisation or individual to correct its actions. If they do not comply, criminal court action can result, leading to a fine. For the most serious offences, a company may be taken directly to court without first issuing an enforcement notice.

Following the 2016 EU referendum, the UK is preparing to leave the EU. Until the exit negotiations and process are concluded, the UK remains a full member of the EU and all the rights and obligations of EU membership remain in force. During this period the government will continue to negotiate, implement and apply EU legislation. The arrangements which apply in relation to EU legislation after the UK has left the EU will depend on the outcome of negotiations.

Purpose of the consultation

The purpose of this consultation is to gather views on the proposal to introduce civil penalties from April 2018 in England, Scotland and in relation to offshore hydrocarbon installations in marine areas. These penalties would, in many cases, replace court action under the current enforcement regime. Civil penalties would not be introduced in Wales and Northern Ireland, as those devolved administrations have decided not to adopt civil penalties at the moment.

Business and environmental stakeholders have voiced concerns about whether the current penalty measures provide sufficient deterrent against non-compliance. In particular, an enforcement notice carries no financial penalty and if the recipient then complies, no further action is usually taken. While criminal prosecutions can carry substantial penalties, they are used relatively infrequently, in part because they can be resource-intensive and

⁴ As defined in regulation 4 of the 2015 Regulations.

costly to pursue. Some may feel, therefore, that there is little risk or little to lose from not complying. Furthermore, the Government's policy is to avoid the creation of unnecessary or disproportionate criminal sanctions when implementing EU or international obligations.

The proposed civil penalties are designed to address these issues. They would enhance deterrence by being simpler to apply and by increasing the likelihood of a financial penalty for infringements of the EU F-Gas Regulation. The option to issue an enforcement notice would still be available, but all but one of the criminal offences in the current 2015 F-Gas Regulations would be replaced by a civil penalty.

The criminal offences which would be removed and be subject instead to civil penalties include:

- the prohibition on placing certain products and equipment on the market;
- the requirement to ensure quantities of F-gas placed on the market do not exceed quota;
- the prohibition on placing equipment not accounted for within the quota system on the market;
- requirements to document what is placed on the market and to draw up declarations of conformity;
- failure to comply with requirements to remove or dispose of unlawfully imported products;
- failure to comply with an enforcement notice; and
- intentionally obstructing people enforcing the Regulations, providing them with false information, failing to assist them or failing to produce a document or record when required to do so.

The deliberate release of F-gases would remain as a criminal offence but there would still be the option to apply a civil penalty in such cases instead.

Detailed proposal for civil penalties

Civil penalties could be issued in England by the Environment Agency or the Secretary of State and in Scotland by the Scottish Environment Protection Agency or Scottish Ministers. The Secretary of State could also issue civil penalties to operators of offshore hydrocarbon installations in marine areas throughout the UK.

The civil penalties regime would work in broadly the same way as that used already by the Environment Agency for enforcing the EU Emissions Trading Scheme, the Carbon Reduction Commitment Energy Efficiency Scheme and the Energy Savings Opportunity Scheme.

Penalties would range in scale from £1,000 to £200,000 based on the seriousness of the infringement and the size of the business. Penalties could also be given to individuals. Before issuing a penalty the Regulator would issue a letter of intent, notifying the recipient of the alleged infringement and of the intention to issue a penalty. The recipient would

then have 28 days to respond, explaining if he or she believed a penalty was not justified or setting out any mitigating circumstances. The Regulator would then decide whether to issue the penalty as initially proposed, reduce the amount or not issue it at all. Recipients of a penalty would have 28 days in which to pay.

There would be four groups of penalty with maximum thresholds of £200,000, £100,000, £50,000 and £10,000, depending on the seriousness of the breach. The actual civil penalty imposed could then be decreased from each of these thresholds depending on the size of the business, the level of culpability associated with the breach and any other mitigating factors. The lists below show which maximum threshold would apply to which type of infringement.

Maximum of £200,000

This threshold would apply to the most serious cases of non-compliance, for example where there was a significant environmental impact or the potential to undermine the phase down of HFCs, such as:

- the intentional release of F-gases to the atmosphere;
- any breaches of the quota limits for placing HFCs on the market; and
- failure to comply with an enforcement notice.

Maximum of £100,000

This threshold would apply where the impacts were likely to be less severe, but emissions of F-gases were still likely to occur, or the effectiveness of the quota system could be significantly hindered, such as:

- The measures for minimising emissions or leakage of F-gases;
- The requirements for recovering F-gases from equipment;
- The requirements for people handling F-gases to be trained and certified;
- The prohibition on certain uses of sulphur hexafluoride; and
- The requirements to register for and verify quota usage.

Maximum of £50,000

This threshold would apply to breaches which, in themselves, may not lead to significant emissions of F-gases but which hinder the monitoring of F-gas use, such as:

- Failure to label F-gases or products containing them correctly;
- Failure to comply with the requirements for declarations of conformity for importing products containing F-gases; and

- Failure to keep records of F-gases used in equipment or F-gas sales.

Maximum of £10,000

This threshold would be used for more minor breaches which could be corrected such as not reporting within the prescribed deadline on F-Gas production, import, export, destruction and feedstock usage.

Cost recovery

In addition to the civil penalty, the enforcing authority could also seek to recover its costs in investigating the infringement and issuing the penalty.

Appeals in England and in the UK marine areas

A person receiving a civil penalty or cost recovery notice in England, or an operator of an offshore hydrocarbon installation in marine areas throughout the UK, would be able to appeal against it, within 28 days of receipt, to the First-tier Tribunal (General Regulatory Chamber) of the Courts and Tribunals Service. The grounds for an appeal would be that the penalty was based on an error of fact, wrong in law, unreasonable for any other reason, wrong for any other reason or that the amount was unreasonable. The First-tier Tribunal could affirm the penalty, direct that it be withdrawn or impose an alternative civil penalty notice as it thought fit. A decision made by the First-tier Tribunal could be appealed in respect of a point of law to the Upper Tribunal. More [information on the First-tier Tribunal](#) is available.

Appeals in Scotland

In Scotland appeals against penalties or cost recovery notices from the Scottish Environment Protection Agency can be made to Scottish Ministers. Scottish Ministers may determine the appeal themselves or appoint a third party to determine it. Appeals against penalties issued by Scottish Ministers would be heard by the Sheriff's Court.

Previous stakeholder engagement

The proposal to introduce civil penalties was raised informally with industry and environmental stakeholders at Defra's F-Gas Stakeholder Forum meeting in March 2016.

Impact assessment

The new civil penalties regime will impose no costs on businesses which are compliant with the EU F-Gas Regulation.

Costs will be faced by non-compliant businesses in respect of the penalties themselves and any associated cost recovery notice as well as related administration and legal costs

of responding to notices from the enforcement agencies or appealing against a penalty or cost recovery notice.

There will be administrative costs for enforcing authorities in respect of issuing notices of intent and penalties and responding to any appeals against penalties. There will also be costs for the First-tier Tribunal in England and for Scottish government departments in establishing an appeals system and hearing appeals. These costs to government will be partially or fully offset by the revenue from penalties, which is returned to the Exchequer, and from cost recovery notices. There will also be savings for enforcement authorities and the courts system from no longer having to pursue criminal prosecutions for most infringements.

The principal benefit of the new penalties scheme is an expected increase in compliance with the EU F-Gas Regulation to help level the playing field for compliant businesses and to achieve a reduction in F-Gas emissions, with corresponding climate change benefits.

Other amendments to the domestic legislation

In addition to introducing civil penalties, the government intends to make other, more technical changes to the 2015 GB Fluorinated Greenhouse Gases Regulations.

Since the 2015 Regulations came into force, the European Commission has adopted five Implementing Regulations to support the main EU F-Gas Regulation. These cover the format for the labels which must be put on products containing F-gases, specific requirements for the certification of F-gas handlers, the format for Member States to notify the Commission of certification provisions and the details of the declaration of conformity for importers of products containing F-gases. Although these Commission Regulations are already directly applicable in UK law, the GB Regulations must be amended to make reference to them in order for our enforcing authorities to be able to enforce their provisions.

In addition to enabling these new EU Regulations to be enforced, the new GB Regulations will:

- Enable the Defra Secretary of State to appoint certification and attestation bodies without having to specify the names of the organisations in the Regulations themselves, making it quicker to appoint new bodies. It will also enable the Secretary of State to recover the costs of approving new certification bodies from the applicants.
- Clarify how the Regulations apply in certain cases and the specific powers of certain enforcement authorities.
- Update some names and definitions.

To improve enforcement, we are exploring options for HMRC to share data with relevant regulators.

These amendments are classed as technical as they do not have significant further impacts on businesses, beyond the original EU requirements which already apply.

A full list of the amendments to the GB Regulations included in the accompanying draft statutory instrument is listed in the Annex.

Tell us what you think

Who will be interested in responding?

This is a public consultation and it is open to anyone with an interest to provide comments. It should be of particular interest to those operating in the sectors of refrigeration, air-conditioning, insulation foams, electrical switchgear equipment, aerosol sprays, medical inhalers, solvents and fire extinguishers. It may also be of interest to environmental groups. The proposed new civil penalties will apply in England, Scotland and to offshore hydrocarbon installations in marine areas throughout the UK.

Having your say

If you wish to respond, please submit your comments by 24 November 2017.

You can respond in one of three ways:

- a. Online by completing a questionnaire at: <https://consult.defra.gov.uk>
- b. e-mail to: fgas@defra.gsi.gov.uk
- c. Post to:

Stratospheric Ozone and Fluorinated Gases Team
Department for Environment, Food and Rural Affairs
Area 2A, Nobel House
17 Smith Square
LONDON SW1P 3JR

Our preferred method is the online questionnaire because it is the most efficient way for us to collate and analyse responses.

Unless you specifically request your response to be treated confidentially, your response, including your name or the name of your organisation may be made publicly available.

Consultation questions

Q1: Do you support the introduction of civil penalties? Please explain the reasons for your answer.

Q2: Are you content with the proposals for how the system would work and with the proposed level of penalties? What, if any, changes would you propose?

Q3: Are you content with the proposed appeals processes? What, if any, changes would you propose?

General information

- We are interested in collecting the following information from those responding to the consultation:
 - Your name
 - Whether you are responding on behalf of an organisation or a business
 - If so, what organisation or business do you represent?
 - Which sector/sectors do you represent?
 - Stationary refrigeration, air conditioning and heat pumps
 - Mobile refrigeration, air conditioning and heat pumps
 - Aerosols
 - Foams
 - High voltage switchgear
 - Other (please specify)
 - If you are representing a business, how many employees work in the company?
 - Up to 10
 - Between 11 and 50
 - Between 51 and 250
 - More than 250

Next steps

We plan to publish the government response to the consultation and lay the legislation in Parliament in January 2018 or as soon as practicable thereafter. Guidance on complying with the Regulations will be updated to reflect the changes.

Annex: Summary of changes to the 2015 GB Regulations

In addition to introducing civil penalties, the government intends to make a number of technical changes to the 2015 GB Fluorinated Greenhouse Gases Regulations. The main changes to the Regulations are summarised below. The Regulation numbering refers to the 2015 Regulations.

- **Regulation 1:** Amendment to the citation, commencement, application and extent of the Regulations to clarify the scope of the Regulations, in particular their application offshore.
- **Regulation 2:** Additions, amendments and clarifications to various definitions. This includes those associated with the introduction of civil penalties, including definition of a civil penalty, enforcement cost recovery notice and relevant enforcing authorities. Other changes reflect departmental changes in Northern Ireland and provide clarification on enforcement duties in Scotland.
- **Regulation 3:** Removal of references to old EU Commission Regulations which are no longer in force and insertion of new definitions and references for the replacement Regulations so that they can be enforced.
- **Regulation 4:** Clarification of how the Regulations apply to offshore installations such as those that are engaged in hydrocarbon-related activities or which are between contracts (for example in transit from one location to another, while cold stacked or while sheltering from the weather).
- **Regulation 5A:** Insertion of a new Regulation prescribing how notices must be served by enforcing authorities.
- **Regulation 7:** Clarification of the scope of Customs Officers' powers in relation to placing on the market as well as the importation of products to ensure the EU Regulation is properly enforced.
- **Regulations 8, 19A:** Amendments to enable the Secretary of State to appoint certification, attestation and evaluation bodies without them having to be specifically named in the Regulations and requires information to be published about such bodies.
- **Regulations 9, 13, 18, 19, 25:** Addition of references to the new Commission Regulations so that they can be fully enforced.
- **Regulations 10, 12, 14, 16:** Removal of references to certification, attestation and evaluation bodies to enable the Secretary of State to appoint them directly without them having to be specifically named in the Regulations.
- **Regulation 20:** Further provisions for the exercise of enforcement powers and updates to reflect departmental changes in Northern Ireland.

- **Regulations 21, 24, 25:** Changes reflecting that there are several bodies that can act as enforcing authorities and to give enforcing authorities rather than authorised persons the power to issue information and enforcement notices.
- **Regulation 25:** Amendments to enable a civil penalty to be imposed for failure to comply with an enforcement notice.
- **Regulation 26:** Provision for the new procedure for an appeal against an enforcement notice issued by an enforcing authority with the power to impose civil penalties.
- **Regulation 27:** Reflects the introduction of civil penalties in England and Scotland.
- **Regulation 28:** Clarification of the definition of offshore installation to reflect regulation 4 and updates to reflect departmental changes in Northern Ireland.
- **Regulation 29:** Removal of most criminal offences in England and Scotland as they are being replaced by civil penalties.
- **Regulation 31A:** Amendments to put in place the new civil penalties regime for England and Scotland.
- **Schedule 1:** Removal of references to the names of certification and evaluation bodies for high voltage switchgear as these will now be appointed directly by the Secretary of State and published elsewhere.
- **Schedule 2:** Amendments to enable enforcement action to be taken in relation to the requirement that any undertaking that assigns certain tasks to another undertaking takes steps to ascertain that the latter holds the necessary certificates.
- **Schedule 3:** Provision for the enforcement of directly applicable requirements in Commission Regulations 2015/2066 and 2015/2067 on certification requirements and Commission Regulation 2016/879 on declarations of conformity.
- **Schedule 4:** Sets out the new civil penalties regime applicable in England and Scotland.
- **Schedule 5:** Provides for the appeals process for civil penalties, enforcement notices or enforcement cost recovery notices in England and Scotland.

The new European Commission Implementing Regulations:

- Commission Implementing [Regulation \(EU\) No 2015/2065](#) of 17 November 2015 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, the format for notification of the training and certification programmes of the Member States which repeals the Regulation (EC) No. 308/2008.
- Commission Implementing [Regulation \(EU\) 2015/2066](#) of 17 November 2015 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, minimum requirements and the conditions for mutual recognition

for the certification of natural persons carrying out installation, servicing, maintenance, repair or decommissioning of electrical switchgear containing fluorinated greenhouse gases or recovery of fluorinated greenhouse gases from stationary electrical switchgear, which repeals the Regulation (EC) No 305/2008.

- Commission Implementing [Regulation \(EU\) 2015/2067](#) of 17 November 2015 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, minimum requirements and the conditions for mutual recognition for the certification of natural persons as regards stationary refrigeration, air conditioning and heat pump equipment, and refrigeration units of refrigerated trucks and trailers, containing fluorinated greenhouse gases and for the certification of companies as regards stationary refrigeration, air conditioning and heat pump equipment, containing fluorinated greenhouse gases, which repeals the Regulation (EC) No 303/2008.
- Commission Implementing [Regulation \(EU\) 2015/2068](#) of 17 November 2015 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, the format of labels for products and equipment containing fluorinated greenhouse gases, which repeals the Regulation (EC) No 1494/2007.
- Commission Implementing [Regulation \(EU\) 2016/879](#) of 2 June 2016 establishing, pursuant to Regulation (EU) No 517/2014 of the European Parliament and of the Council, detailed arrangements relating to the declaration of conformity when placing refrigeration, air conditioning and heat pump equipment charged with hydrofluorocarbons on the market and its verification by an independent auditor.