

Common Framework Report: The Greenhouse Gas Emissions Trading Scheme Order 2020 as part of the UK Emissions Trading Scheme

October 2020

1. Background

The draft Order

1. On 15 July 2020, Lesley Griffiths MS, Minister for Environment, Energy and Rural Affairs (the Minister) laid before the Senedd a draft of the Greenhouse Gas Emissions Trading Scheme Order 2020 (the draft Order).¹ It was accompanied by an Explanatory Memorandum,² a written statement³ and a letter to Senedd committees.⁴
2. The draft Order is a composite statutory instrument between the four governments to establish a single UK-wide Emissions Trading Scheme. It followed on from a consultation exercise in 2019 and implements the shared policy set out in a joint Government Response published on 1 June 2020.⁵
3. The draft Order establishes a new emissions trading scheme to be known as the UK Emissions Trading Scheme (“UK ETS”), and will be the successor in the UK

¹ [The Greenhouse Gas Emissions Trading Scheme Order 2020](#).

² Welsh Government, [Explanatory Memorandum to The Greenhouse Gas Emissions Trading Scheme Order 2020](#), 15 July 2020

³ Welsh Government, [Written statement: Legislating for a UK Emissions Trading Scheme](#), 15 July 2020

⁴ [Letter from Lesley Griffiths MS, Minister for Environment, Energy and Rural Affairs to Mike Hedges MS, Chair Climate Change, Environment and Rural Affairs Committee 15 July 2020](#)

⁵ [The Future of UK Carbon Pricing A joint consultation of the UK Government, the Scottish Government, the Welsh Government and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland](#), May 2019; Welsh Government, [Written Statement: Government Response - The future of UK carbon pricing](#), 1 June 2020.



to the EU Emissions Trading System (“EU ETS”). The UK ETS will cover greenhouse gas emissions from:

- power and heat generation;
- energy intensive industries; and
- aviation.

4. The draft Order is made in exercise of powers conferred by the *Climate Change Act 2008* and contains 77 articles, divided into 9 Parts and 11 Schedules.

5. Part 1 includes definitions used throughout the draft Order, the activities covered by the scheme and the different greenhouse gases covered by the scheme, the participants in the scheme and who is to be the scheme’s regulator (for different purposes).

6. Part 2 introduces the scheme and establishes a review requirement, and sets out other elements of the scheme relevant to both operators of installations, and to aircraft operators.

7. Parts 3 and 4 make specific provision in respect of operators of installations and aircraft operators.

8. Part 5 contains provision allowing the regulators to charge for the performance of their regulatory functions under the draft Order.

9. Part 6 contains provision enabling the regulators to monitor compliance with the draft Order, including through inspections and the exercise of powers of entry.

10. Part 7 contains provision about enforcement, including a range of civil penalties that may be imposed in respect of specified breaches of the draft Order or of permit conditions.

11. Part 8 (which is supplemented by Schedules 9 and 10) contains provision about appeals in relation to decisions made by the regulator about applications and in respect of notices given under the draft Order.

12. Part 9 makes provision in respect of information notices, Crown application and makes transitional provision (article 77 with Schedule 11).

Context

13. On 24 June 2020, the Senedd consented to clause 93 of the UK Government's Finance Bill, relating to charging for allocating allowances under an emissions reduction trading scheme. Our report on the Bill agreed that the Senedd's consent was required.⁶

14. In her letter to us of 15 July 2020, the Minister explained that:

“The Senedd recently gave its consent to powers enabling the auctioning of emissions allowances contained in the UK Government's Finance Bill. The UK Government will be bringing secondary legislation forward in due course, to establish the detailed arrangements for auctioning.

The UK ETS is part of the Common Framework Programme overseen by the Joint Ministerial Committee on EU Negotiations (JMC(EN)) and has been developed using principles it set out in October 2017. A Framework Outline Agreement will set out the rationale for establishing the framework, the decision-making and governance arrangements. This will be accompanied by a concordat between the Ministers from all four governments. I will share these documents with the Committee for scrutiny as they are finalised and before they are presented to the JMC(EN).”⁷

15. In 2017, the Welsh, UK and Scottish governments agreed⁸ that they would need to establish common frameworks in some areas that are currently governed by EU law, but that are otherwise within the competence of the devolved governments or legislatures. They agreed that frameworks would respect the devolution settlements and the accountability of the devolved legislatures.

⁶ Legislation, Justice and Constitution Committee, [The Welsh Government's Legislative Consent Memorandum on the Finance Bill](#), June 2020. Clause 93 of the Bill became section 96 of the Finance Act 2020

⁷ Letter from Lesley Griffiths MS, Minister for Environment, Energy and Rural Affairs to Mike Hedges MS, Chair Climate Change, Environment and Rural Affairs Committee 15 July 2020

⁸ The principles for the agreement of common frameworks were set out in: [Joint Ministerial Committee \(EU Negotiations\) Communique](#), 16 October 2017

16. On 9 September 2020, the UK Government introduced the United Kingdom Internal Market Bill.⁹ It followed publication of a UK Government White Paper in July 2020,¹⁰ to which the Committee responded in August 2020.¹¹ The White Paper explained the intended relationship between the Bill and common frameworks. It advised that:

“The Common Frameworks programme is the mechanism most advanced in its development to address regulatory coherence. Common Frameworks are designed to support the functioning of the Internal Market, the management of common resources and the UK’s ability to negotiate, enter into and ratify trade and other international agreements.

[...] Frameworks on their own cannot guarantee the integrity of the entire Internal Market. As they tend to be sector-specific, they do not address the totality of economic regulation or the cumulative effects of divergence, i.e. the consequences of regulatory difference in one sector that affects other sectors. Finally, they do not fully address the question of how best to substitute the wider EU ecosystem of institutions and treaty rights had on the UK Internal Market.

The UK Internal Market legislation discussed in this White Paper complements Frameworks by providing a baseline level of regulatory coherence across a wider range of sectors.”¹²

UK ETS Common Framework Summary document

17. Just prior to our evidence session with the Minister on 14 September 2020, the Minister wrote to us attaching the UK ETS Common Framework Summary document (summary framework document).¹³ Her letter notes that:

⁹ [United Kingdom Internal Market Bill 2019-21 \[Bill 177\]](#)

¹⁰ [Department for Business, Energy and Industrial Strategy, UK Internal Market](#), July 2020

¹¹ [Letter to The Rt Hon Alok Sharma MP, Business Secretary and The Rt Hon Simon Hart MP, Secretary of State for Wales, UK internal market White Paper and consultation](#), 7 August 2020

¹² White Paper, paragraphs 20-22)

¹³ [Letter from Lesley Griffiths MS, Minister for Environment, Energy and Rural Affairs](#), 10 September 2020 enclosing the UK ETS Common Framework Summary document

“This document was developed by the four Governments collectively and has been made available to scrutiny committees in each of the legislatures.

The Summary document should answer your questions on the content of the negative Order in Council, as well as the other pieces of legislation associated with the operation of the scheme. It also addressed the development and timescales for the full Framework Outline Agreement and Concordat. The JMC(EN) is likely to endorse the documents via correspondence, therefore, we intend to make the documents available for provisional endorsement as soon as possible so we can then receive input from our legislatures before returning for final endorsement from the JMC(EN).”

18. The UK ETS includes different legislative and non-legislative elements. The summary framework document states that the draft Order establishes the UK ETS scheme and that a further negative procedure Order will be made in November 2020. Two statutory instruments in reserved areas will also be required. The summary framework document also states that a non-legislative agreement (a UK/Devolved Administration governance concordat) “will set out the principles underpinning the ongoing oversight and governance of the system by Officials and Ministers from the four administrations, including decision-making and dispute resolution processes.”

19. The summary framework document also states:

“In 2019, the UK Government and devolved administrations (DAs) undertook a public consultation seeking views on the UK's future carbon pricing policy. This consultation set out policy positions for a UK-wide Emissions Trading System (UK ETS), whilst noting that fall-back options included a carbon emissions tax, or remaining in Phase IV of the EU ETS.”

20. The governments have set out a model for the scrutiny of common frameworks.¹⁴ This states that the governments will provide a summary of a draft outline framework to their legislatures with an offer of a technical briefing. After Ministers agree a provisional outline framework at the Joint Ministerial

¹⁴ Letter from Jeremy Miles MS, Counsel General to David Rees MS, Chair of External Affairs and Additional Legislation Committee, 10 March 2020 and Annexes

Committee, this will be laid before legislatures and committees will be able to make formal recommendations. Ministers will jointly make any changes before agreeing the final framework.

Purpose of this report

21. In accordance with our remit under Standing Order 21, we reported on the technical and merits points of the draft statutory instrument on 28 September 2020.¹⁵

22. The purpose of this report therefore is to consider the broader constitutional aspects of the draft Order as part of a common framework resulting from the UK's exit from the EU.

2. Committee consideration

23. The Minister explained the rationale for the approach of using a UK ETS:

“We need to ensure that there is a continued financial incentive to reduce emissions from sectors such as industry and power once we leave the European Union. So, there were three broad options: we could remain in the EU ETS; we establish a UK-wide scheme; or, of course, we have a scheme of our own in Wales. Remaining in the EU ETS was a feasible option. I think it was certainly attractive to scheme participants when we consulted people like that, because of continuity and competitiveness, for instance, and it also obviously provided and established a large and active carbon market. However, the UK Government wouldn't agree to that on sovereignty grounds, and Wales obviously couldn't remain in the EU ETS on its own because we're part of the UK. Establishing a UK-wide trading scheme that could then be linked to the EU system offered a good-size market, it maintained a level playing field between Welsh operators and those elsewhere in the UK, and it provided a role for Welsh Government and, of course, the Senedd in governing and influencing the scheme. In particular, with

¹⁵ [SL\(5\)583 – The Greenhouse Gas Emissions Trading Scheme Order 2020](#)

the preference for linking, this option was supported by respondents to our consultation.”¹⁶

24. She added that while a Wales-only scheme looked attractive from the perspective of having full control of climate policy, there would be a significant risk that, as a small market, it probably would not operate effectively.¹⁷

25. The summary framework document provided with the Minister’s letter of the 10 September 2020 states that the full Framework Outline Agreement and governance concordat will be made available for parliamentary scrutiny in late October or early November, after they have been agreed by the Joint Ministerial Committee (EU Negotiations). Given that the Plenary debate is currently scheduled for 3 November, we asked the Minister whether they would be made available for scrutiny before this date. She said:

“We certainly hope to. Officials are working with the UK Government and, obviously, the other devolved administrations to finalise the framework outline agreement and prepare the associated concordat. So, priority is absolutely being given to finalising the legislation to ensure the scheme can come into place from 1 January 2021. Timescales are really tight, but our aim is to provide that to the Senedd for the opportunity to have scrutiny ahead of the debate on the Order. If timescales do slip—and we certainly hope that's not the case—scrutiny of the frameworks can still continue beyond the debate.

... this Order does contain much of the detail on governance and regulatory duties for Welsh Ministers and NRW. That's not the case in a lot of frameworks, but it is in this. So, the concordat is a large part, really, of operationalising the governance requirements, and I'm sure Members are aware that both the Scottish Parliament and the House of Commons have both approved the Order ahead of receiving the FOA and the concordat, but I certainly hope to bring those forward before the vote on the Order.”¹⁸

¹⁶ Legislation, Justice and Constitution (LJC) Committee, RoP [5], 14 September 2020

¹⁷ LJC Committee, RoP [6], 14 September 2020

¹⁸ LJC Committee, RoP [87-88], 14 September 2020

26. We asked the Minister about the implications of the UK ETS common framework for the executive competence of the Welsh Ministers and the legislative competence of the Senedd. She replied by saying:

“[...] there's no change to legislative competence as such, but we're increasing the use of existing legislative competence. So, unlike the regulations on the EU ETS, which, as you're obviously aware, were made by the Secretary of State, these Orders are made collectively by Welsh Ministers and other devolved Ministers and the Secretary of State. So, we're all accountable, obviously, to our respective legislatures, unlike with the regulations for the EU system. So, I suppose, in reality, we had very little opportunity to fundamentally shape the EU ETS scheme design; we just provided comment to the UK Government they could either accept it or ignore it when they then did the negotiations with other member states. So, I would argue we've now got greater ability to exercise our legislative and executive competence.”¹⁹

27. The Minister said she was “deeply concerned” that the UK Government may implement a reserved Carbon Emissions Tax instead of the UK ETS.²⁰ She added:

“I'm very frustrated that the UK Government are refusing to state a clear preference for a linked ETS, and to rule out introducing a carbon emissions tax except as a last resort. Instead, it's chosen to consult on the tax. At the current time, all four legislatures have laid that UK ETS legislation. I think it's really unhelpful that they're consulting at the current time.”²¹

28. She went on to say:

“If we introduced a reserved carbon tax to replace a devolved trading scheme, it would be completely unacceptable for a variety of reasons, which I'm sure I don't have to spell out to you. Welsh Ministers would absolutely have no role in ensuring that any tax designed worked to reduce emissions in line with our climate ambitions, and, of course, it wouldn't even be accountable to the Senedd. It would completely

¹⁹ LJC Committee, RoP [95], 14 September 2020

²⁰ LJC Committee, RoP [106], 14 September 2020

²¹ LJC Committee, RoP [106], 14 September 2020

undermine the UK ETS legislation that's already been laid by the four of us, and, of course, it goes against the principles for common frameworks that was agreed by the JMC(EN) back in 2017.”²²

29. The Minister highlighted how “four ... Governments of different colours” have “worked really constructively together on this scheme, certainly at an official level and, I would say, at a ministerial level with BEIS”, noting what can be achieved with “co-operation and goodwill.”²³ However, she also acknowledged that she could not prevent the UK Government legislating for a reserved tax.²⁴

30. In terms of dispute resolution for the schemes, the Minister said:

“[...] we're currently finalising the dispute resolution proceedings, and they'll be set out in the concordat. So, the governance structure consists of several levels: you've got official level working groups, you've got the senior officials level board, and then you've got the ministerial quadrilaterals, and, of course, the final step, should ministers fail to agree, would be escalation to the JMC(EN). However, we are also required to seek advice from UK CCC ahead of legislation for trading schemes, so all four countries will receive the same independent evidence to support our decision. So, based on this, and the fact that statutory emissions reduction targets are what we need to work to, I'd anticipate us all being closely aligned in our thinking and unlikely to resort to dispute resolution, but those are the levels that we have available.”²⁵

31. She added that good progress was being made through various iterations of the Framework Outline Agreement.²⁶

32. The Minister noted that the draft Order could not be amended at this stage but indicated that she was confident that it:

“establishes in law a robust scheme for emissions reduction, and, together with the proposed review points ... it does provide a

²² LJC Committee, RoP [107], 14 September 2020

²³ LJC Committee, RoP [110], 14 September 2020

²⁴ LJC Committee, RoP [109], 14 September 2020

²⁵ LJC Committee, RoP [114], 14 September 2020

²⁶ LJC Committee, RoP [116], 14 September 2020

mechanism to help us achieve our climate targets and our ambitions, so that's why I'm asking you to support it on that basis."²⁷

33. She acknowledged that she would be keen to consider recommendations from the Committee about how the Order could be strengthened by future amendment.²⁸ The Minister also said that she would “take any suggestions that [the Committee has] into any discussions I have with the UK Government”, noting that “all four nations would have to agree to any changes to the legislation.”²⁹ She indicated that revisions “would be managed under a sort of rolling issues log and prioritised.”³⁰

3. Our view

34. As indicated earlier, we have already reported on the draft Order as a statutory instrument that is subject to the requirements of the Senedd’s Standing Orders.

35. Our focus in this report is to consider the draft Order from a constitutional perspective, as part of a common framework necessary to deliver an effective emissions trading scheme covering Welsh policy interests as a result of the UK’s exit from the EU.

36. We note the Minister’s observations for adopting a four nation approach and agree that a UK emissions trading scheme offers a sensible and effective solution.

37. We note the Minister’s confirmation that the draft Order does not change the legislative competence of the Senedd. However, we are clear that the common framework will restrict the Senedd and Welsh Government from acting in a way that is incompatible with the framework. In that sense, we note that the framework will act as a practical constraint on devolved competence.

38. We also welcome the Minister’s comments alluding to collaborative working to deliver a scheme that works for the needs of all four nations. We hope that the

²⁷ LJC Committee, RoP [91], 14 September 2020

²⁸ LJC Committee, RoP [92], 14 September 2020

²⁹ LJC Committee, RoP [92], 14 September 2020

³⁰ LJC Committee, RoP [125], 14 September 2020

benefits of such a co-operative approach will act as a benchmark for the development of future common frameworks.

39. We note that the four governments have agreed a model for the scrutiny of common frameworks. Under this model, each of the governments will lay the provisional Framework Outline Agreement in its respective parliament. Parliamentary committees will then be able to set out their views on the provisional framework and submit them to Ministers from the four governments. However, the Senedd and its Committees are having to scrutinise the draft Order before the provisional Framework Outline Agreement is laid and enters the formal scrutiny process. Furthermore, it is unclear how scrutiny of the draft Order and other legislation required for the common framework will tie in to the formal scrutiny of the framework.

40. While we accept the principle of a UK emissions trading scheme, we are therefore disappointed that we have had to scrutinise the draft Order without the full accompanying documentation (including the provisional Framework Outline Agreement and governance concordant) being made available in a timely manner.

41. We were in a position to consider the summary framework document in our evidence session with the Minister. However, was only made available just prior to the session. This is not satisfactory. We welcome the Minister's expectation that the provisional Framework Outline Agreement and governance concordat will be made available for scrutiny ahead of the Plenary debate on the draft Order and we consider this to be important.

42. We wish to highlight our specific concerns about the lack of full documentation being made available to accompany scrutiny of the draft Order.

43. First, the draft Order is a long-term solution insofar as it establishes the scheme, with no future Welsh scheme viable for the reasons outlined by the Minister, and so all necessary documentation should have been available to enable Senedd Committees to undertake scrutiny and the Senedd to make a fully informed decision.

44. Secondly, because the draft Order as a statutory instrument is subject to a yes or no vote, with no amendments possible. It also requires the approval of all four parliaments. Furthermore, as the Minister indicated, any future changes suggested by Senedd Members and Welsh stakeholders would require the agreement of all

four governments and parliaments. We recognise that the draft Order makes provision for review. However, there is little information available about how the mechanisms for future changes will operate, and as part of that, how Senedd Committees and Welsh stakeholders can play a constructive and proactive role.

Recommendation 1. The Minister should explain how the mechanisms for future changes to the common framework (including the Order) will operate in a way that will allow Senedd Committees and stakeholders to play a constructive role in its review and any subsequent revisions.

45. Thirdly, we are unable to assess how the governments will work together in their joint capacity as the UK ETS Authority. The summary framework document provides little information on the proposed mechanism for the resolution of disputes between the governments, which are to be contained in the governance concordat. The summary framework document states that disputes in areas of reserved competence will be escalated to the Joint Ministerial Committee. We note the view of the Welsh Government that the dispute resolution mechanism at the Joint Ministerial Committee is not fit for purpose,³¹ a view we share and that a review of intergovernmental relations by the UK Government is ongoing.³²

Recommendation 2. The Minister should provide further information on the proposed dispute resolution mechanism either before or during the debate on the draft Order.

Recommendation 3. The Minister should explain how dispute resolution in the common framework will link to the ongoing Intergovernmental Relations Review being undertaken by the UK Government.

Recommendation 4. In the event that there is any escalation of a dispute on the framework to the Joint Ministerial Committee secretariat, the Minister should notify the Senedd of this outcome.

46. Fourthly, and linked to our third reason, is the use of a governance concordat, which impacts on the delivery of policy, has yet to be finalised and will not be legally binding. Our reports on legislative consent memoranda make it clear that

³¹ See for example, Welsh Government, [Reforming our Union Shared Governance in the UK](#), 2019, page 12

³² [Joint Ministerial Committee communiqué](#), 14 March 2018

we have reservations about the extent to which agreements (of various kinds) between governments are being used to deliver policy that affects people and business in Wales. This is because it marginalises the role of the Senedd, not only in holding the Welsh Government to account, but also in terms of the ability of Senedd committees and Members of the Senedd to influence based on their engagement with Welsh stakeholders. This engagement, as a result of devolution, has offered Welsh stakeholders the ability to contribute their expertise to policy development and to have their voices heard, and so it would be a retrograde step to limit that role.

47. On a point related to the complexity of the framework, we believe that greater clarity could have been provided about the extent to which clause 93 of the Finance Bill formed part of the ETS common framework, before the Senedd granted its consent.

48. We have set out our concerns about the implications of this Committee being asked to consider the UK ETS Order without having been given full sight of framework documents associated with it. As indicated above, we consider that these documents should be published before the Senedd is asked to vote on the draft Order.

Recommendation 5. The Welsh Government should ensure that in future the Senedd is not asked to consider subordinate legislation related to a common framework before the provisional framework document is made available to the Senedd for scrutiny.

49. We note the wider uncertainty about how the draft Order will operate in practice. It is unclear whether the UK ETS common framework will be linked to the EU ETS (given that it is connected to wider negotiations about the UK's future relationship with the EU) and whether it will be superseded by a carbon tax, which is a matter reserved to the UK Government. We note the Minister's comments on this point and share her concerns. Pursuing such a tax after positive co-operation between the four governments to develop the common framework would be unwelcome and represent a considerable undermining of goodwill and trust.

Recommendation 6. The Minister must keep the Committee and the Senedd regularly informed of any developments relating to the adoption of a carbon tax by the UK Government.

50. The position is further complicated by the impact of the UK Internal Market Bill and it remains unclear to us whether or not the Bill will have an impact on the UK ETS common framework.

Recommendation 7. The Minister should provide the Committee with an assessment of the impact of the UK Internal Market Bill on the UK ETS common framework.

51. We may issue a further report on the ETS common framework following receipt of the provisional framework and governance concordat.