

Julie James AS/MS  
Y Gweinidog Newid Hinsawdd  
Minister for Climate Change



Llywodraeth Cymru  
Welsh Government

Ein cyf/Our ref: MA/JJ/1687/23

Huw Irranca-Davies MS  
Chair  
Legislation, Justice and Constitution Committee  
Welsh Parliament  
Cardiff Bay  
Cardiff  
CF99 1SN

21 July 2023

Dear Huw,

I am writing to update you on the UK Emissions Trading Scheme (UK ETS) Authority Government Response to the “Developing the UK Emissions Scheme” consultation, which was published on 3 July. This update follows my oral statement, delivered on 4 July 2023. As I set out, the key change within the Government Response is the reduction of the UK ETS cap to bring it in line with net zero targets. Within the Response, the UK ETS Authority (formed of Welsh Government, UK Government, Scottish Government, and Northern Ireland Executive) committed to implementing a new cap by January 2024. It is the Authority’s aim to pursue a legislative programme in line with the decisions and intentions made in the Government Response, including for the cap.

Changes to the cap, (maximum amounts of reportable emissions available under the Greenhouse Gas Emissions Trading Scheme Order 2020 (“the 2020 Order”)) would ordinarily have been made through regulations under an enabling power within the Climate Change Act 2008 (“the 2008 Act”). Such regulations would be in the form of a statutory instrument (“SI”) laid within each of the four legislatures of the United Kingdom as an Order in Council. The SIs would be subject to the affirmative procedure, as they would contain provision, making the overall requirements of a trading scheme “significantly more onerous”. However, due to the absence of a Northern Ireland Executive and sitting Assembly, it is not possible to make affirmative procedure legislation, in all legislatures in parallel.

With no clear date on when a Northern Ireland Executive will be formed and with time criticality on the changes required, the UK ETS Authority have been assessing alternative options.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

The agreed alternative is for the UK Government to amend the Greenhouse Gas Emissions Trading Scheme Auctioning Regulations 2021 (“the Auctioning Regulations”) by way of an enabling power within the Finance Act 2020 (“the 2020 Act”), until the changes can be made under the 2008 Act.

The enabling power under section 96(3) of the 2020 Act provides that:

*The Treasury may make schemes about the conduct and terms of allocations of emissions allowances in return for payment (the schemes having effect subject to any regulations under this section).*

The Auctioning Regulations are part of the UK ETS framework and are used to determine the share of allowances which can be brought to auction each year. This amendment will set the auction share and therefore the number of allowances that enter circulation in line with the proposed net zero cap. This will mean that the number of allowances available to the market is in line with a lower cap consistent with net zero. The amendments to the Auctioning Regulations do not change the cap as set out in the 2020 Order, and legislation amendments made through an enabling power under the 2008 Act will be needed to deliver policy in the long term. However, reducing the share of allowances available to auction, will have the desired effect, until the legislation amendments made through the 2008 Act enabling power, can be made. Namely, limiting the emissions of participants by reducing the number of allowances available.

In accordance with the UK ETS Common Framework, the Welsh Government's stance on the UK ETS is that the financial elements are simply the mechanism by which the ultimate goal of the system – environmental protection via incentivising decarbonisation – is achieved. As the amendment to lower the auctioning allowances is being made to the Auctioning Regulations, and not primary legislation, a Legislative Consent Motion is not relevant. The amendment is being made by an SI to subordinate legislation. As the subordinate legislation being amended is not retained direct principal EU legislation under paragraph 4 of part 1 under schedule 8 of the European Union (Withdrawal) Act 2018, the procedure to be applied before the Senedd is not what would apply to that legislation as if it were amending an enactment contained in primary legislation. An SI Consent Memorandum is therefore unnecessary, as per the Standing Orders of the Welsh Parliament<sup>1</sup>. However, proceeding with the proposal to modify the Auctioning Regulations potentially eliminates the opportunity for the Senedd (and other Parliaments) to assess the proposed changes. Consequently, I am cautious about using this approach.

Nevertheless, reducing the UK ETS cap is time critical. Without an agreed legislative route, the Government Response with the commitment to implement the cap by 2024 could not have been published. Failing to do this would have delayed the implementation of the cap and therefore posed significant risks to both our climate targets and the participants of the UK ETS. Delaying implementation of the cap will only result in a steeper cap (and decarbonisation) trajectory later in this decade, placing greater pressure on our industries. In recognition of the urgency and importance of this proposal and the need to respect the political and legislative process in Northern Ireland, I have agreed with the other Portfolio Ministers across the Authority for the amendments to be made in this way. We have also committed via an exchange of letters to legislate under the 2008 Act to lower the UK ETS cap as soon as practicably possible. To avoid delaying the publication of the Government Response and therefore the implementation of the new cap, the scrutiny process will be carried out as normal across the four legislatures when the cap is legislated for, through the enabling power under the 2008 Act. Moving forward, I will continue to seek the Senedd's approval where relevant.

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<sup>1</sup> [Standing Orders of the Welsh Parliament \(senedd.wales\)](https://www.senedd.wales)

Of the other proposals within the Government Response, some will be made through an SI, subject to the negative procedure, pursuant to the 2008 Act, amending the 2020 Order. This will make a number of operational changes to the scheme which will be applied UK-wide, such as the inclusion of benchmarks into UK law. It is still possible to lay legislation under negative resolution procedure in Northern Ireland. Once laid, the SI will come into force on the specified commencement date. However, on their return, if the NI Assembly passes a resolution of annulment within the statutory period (being a period comprising at least 10 days on which the Assembly has been sitting, but not in any event less than 30 calendar days during one or more than one session of the Assembly) then that rule will be void from the date of that resolution.

Other changes will be made through an SI, subject to the affirmative procedure, which will apply only to Great Britain, for example, capping aviation free allocation at 100% of an operator's emissions. As there are currently no operators in Northern Ireland who would be affected by the provisions in this SI, the Authority have agreed that a GB-only SI would be acceptable in the short term.

I am copying this letter to Llyr Gruffydd, Chair of the Climate Change, Environment and Infrastructure Committee.

Yours sincerely,



**Julie James AS/MS**  
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Minister for Climate Change