Dear Gillian

RE: Fluorinated Greenhouse Gases and Ozone-Depleting Substances (EU Exit) (Miscellaneous Amendments) Regulations 2018

I am writing in response to your letter of 20 November regarding the above EU Exit Regulations which I have recommended for consideration by the Committee in the event of a ‘no deal’ EU Exit. The response to your questions are in the annex.

The Scottish Government believes that the approach set out in the above Regulations is appropriate to ensure continued controls for these potent greenhouse gases in the event of a ‘no deal’ Brexit. The Regulations maintain the current UK wide arrangements, which are long established and will mean that businesses can operate within one UK-wide regulatory regime thus avoiding introducing further burdens. The approach does respect the Scottish Ministers’ devolved competence and provides the flexibility to make alternative arrangements in future if needed.

The Scottish Government is committed to maintaining environmental standards after Brexit, and in particular the Climate Change Bill demonstrates our ongoing ambition to reduce Scotland’s greenhouse gas emissions (which includes potent Fluorinated Greenhouse Gases). The ‘no deal’ approach will ensure that Scotland continues to meet its international obligations to reduce these gases under the UN Montreal Protocol.

Yours,

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ECCLR COMMITTEE SCRUTINY – EU EXIT REGULATIONS – FLUORINATED GREENHOUSE GASES AND OZONE-DEPLETING SUBSTANCES

Reply to Questions from the Scottish Parliament

1. **Under heading 1 (name of the SI) of this notification, precisely which “functions currently exercised by the EU Commission of a legislative character” are to be granted instead to a UK public authority?**

The current EU Regulations (Fluorinated Greenhouse Gases (F-gas) 517/2014/EC and Ozone-Depleting Substances (ODS) 1005/2009/EC) confer various functions on the EU Commission, including legislative powers to adopt implementing acts to specify the detailed requirements for implementing provisions in both regimes. Where these legislative functions relate to devolved areas, the UK SI confers them concurrently on the Scottish Ministers and the Secretary of State (to be exercised only with the consent of Scottish Ministers).

In the EU Regulation for ODS, these functions include powers to, by regulations:
- determine the form and content of labels for exempted ODS that are permitted as feedstocks (for manufacture of other chemicals) and can therefore be placed on the market;
- amend the conditions under which ODS can be placed on the market;
- add to the list of approved technologies for ODS destruction or recovery, based on new technological developments.

In the EU Regulation for F-gas, these functions include powers to, by regulations:
- specify how a leak check of equipment using F-gas is conducted (the existing EU Regulation set out thresholds and frequency);
- specify the format and content of records in relation to leak checks;
- amend the requirements for labelling equipment containing F-gas.

2. **The SI notification highlights, under heading 2 (a brief explanation of law that the proposals amend), that there is a difference between the reach of the Montreal Protocol and that of the EU regime. In policy terms, therefore, there are two different avenues open to the UK and Scottish governments in future. Is it possible/likely they will downgrade the ODS and F-gas protections in future to the level of the UN Montreal Protocol?**

The UN Montreal Protocol seeks to phase out ODS, and since the 2016 Kigali Amendment, to phase down the amount of F-gas sold annually (85% by 2036 on 2011-13 baseline). Both the EU ODS and F-gas regimes implement the EU’s obligations under the UN regime. The EU F-gas regime predates the Kigali Amendment so there are some differences to the UN regime, most importantly an earlier F-gas phase down target (79% by 2030 on 2009-12 baseline). Ultimately both the EU and UN regimes share the objective to reduce the contribution of F-gas to greenhouse gas emissions, providing a double lock.

The UK SI will be made using powers under Article 8 of the EU Withdrawal Act 2018 to fix deficiencies arising from EU Exit. The Act powers cannot be used to make substantial policy changes that deviate from the EU approach (such as downgrading
the approach to the level required by the Montreal Protocol) - to do so would require new primary legislation. Therefore the UK SI maintains the EU approach in the event of a ‘no deal’ EU Exit as far as possible, and where this isn’t possible, it mirrors the EU approach (e.g. maintains the bans on certain gases and mirrors the EU F-gas quota system to deliver the reduction by establishing a UK quota system). The UK SI will ensure that the UK is on track to meet its international obligations to meet the reduction target in the UN regime.

The Scottish Government is firmly committed to maintaining alignment with EU environmental legislation more widely, and specifically to maintaining the EU approach on F-gas. The UK SI will not downgrade the approach to the minimum required by the UN approach, and the Scottish Government would not agree to any attempts to downgrade the approach in future. Given that the existing EU approach is already well-established and UK businesses are responding to it, therefore there is no reason for any administration to downgrade its approach.

3. **Under heading 3 (summary of the proposals and how these correct deficiencies) of the notification, at the top of page 2, does the statement “the UK will mirror these EU arrangements” mean that the UK will mirror EU policy as closely as possible? Will doing this minimise administrative burdens on business?**

The UK SI will maintain and mirror the approach in the EU Regulations as closely as possible. Maintaining the EU regime requirements for F-gas and ODS users means there will be no change in their administrative burdens. Mirroring the EU quota and licensing regime for F-gas and ODS importers and manufacturers seeks to minimise any administrative burdens arising from EU Exit. Given the EU regimes are long established, businesses are familiar with the quota system, and whilst establishing a new quota system will add some administrative burden for companies that operate in both the UK and the EU, introducing a completely new approach not based on the EU regime would introduce significantly more administrative burden.

4. **Further on in this same paragraph is the statement that “the UK SI reassigns EU Commission legislative functions to the appropriate authority, which is the Scottish Ministers within devolved areas, but exercisable by the Secretary of State with the consent of Scottish Ministers…” What does this mean? Will Scottish Ministers be the “appropriate authority”, but without the functions of an “appropriate authority”? Can the Scottish Government specifically identify these “legislative functions”?**

The UK SI transfers legislative functions that currently exist within the EU Regulations for the EU Commission to make implementing acts that specify requirements to implement provisions in the EU Regulations. Examples of these legislative functions are given in answer to question one.

There is no transfer of legislative functions to either the Secretary of State or the Scottish Ministers to amend the UK SI itself (nor does the EU Commission have powers to change the EU Regulations without the European Parliament and Council approval). Any substantive policy change that deviates from the EU regimes (e.g.
changing the phase down rate) could would require primary legislation to provide powers to make separate provision.

The UK SI confers the transferred legislative functions on the ‘appropriate authority’. Where these legislative functions are capable of being exercised within devolved competence, the appropriate authority is the Scottish Ministers and the Secretary of State with the consent of Scottish Ministers. The Scottish Ministers would only agree to the Secretary of State exercising such a power where it made sense to do so, to ensure consistent operation of the regime across the UK.

- **Are there policy (or other) reasons for why, “within devolved areas”, the function is still to be exercisable by the Secretary of State? Does this contradict what is said further on, under heading 5 (Scottish Government categorisation of significance of proposals): “it involves the transfer of both legislative and non-legislative functions….Most of these fall within…devolved competence, and therefore…[will be] exercised by the Scottish Ministers and Scottish regulatory agencies.”?**

Legislative functions in devolved areas are conferred concurrently on Scottish Ministers and the Secretary of State. In practise Scottish Ministers want to maintain the current UK wide approach established by the EU Regulations, and therefore may wish to consent to the Secretary of State exercising these legislative functions for devolved matters. For example if further regulations were needed to specify the format of labels for products containing F-gases, a single approach across the UK would avoid adding further barriers for businesses operating across the UK. However in order to respect the Scottish Ministers’ devolved competence the UK SI confers the powers concurrently on the Scottish Ministers so they have the option to make alternative arrangements in future if needed.

Similarly the UK SI establishes the Environment Agency as the default ‘appropriate regulator’ in relation to Scotland, to maintain its current UK wide coordination role. But the SI ensures that the Scottish Ministers may direct another body to as appropriate regulator in Scotland, and direct any appropriate regulator in the exercise of its functions for devolved purposes in Scotland.

**5. Are there likely to be any practical difficulties in decoupling UK environmental regimes from EU regimes e.g. relating to access to records/information or monitoring/reporting?**

The main practical difficulty in establishing a separate UK F-gas quota regime, is determining the proportion of the current EU wide quota (established in the EU Regulation) that is currently held by UK companies to place F-gas on the UK market vs the EU 27 markets. This data is needed to establish what the UK F-gas phase out trajectory and annual quota available to businesses to place F-gas on the UK market needs be in order to reach the same target as the EU regime in 2030. The Environment Agency wrote to all UK companies with F-gas quota in January 2018 to collect this data. In parallel the EU Commission wrote to all EU 27 companies to ask for the same information.
In the ‘no deal’ scenario the UK would no longer have automatic access to the EU IT systems that hold historic records and reporting from UK companies. The aggregated UK data would continue to be available in the report made under the UN regime, however the UK would have to rely on the EU Commission providing us with data disaggregated to individual companies. The UK Government has raised the issue with the EU Commission.

6. **In the paragraph at the top of page 2, there is an indication that the Environment Agency is “the default appropriate regulator for the UK quota system…but with the flexibility to allow the Scottish Ministers to designate [SEPA] to act in Scotland instead under any future Scottish arrangement”. Is it likely that SEPA will be designated as the “appropriate regulator” in the future; under what scenarios might this happen?**

The Scottish Ministers wish to maintain the current UK-wide approach for enforcement of the directly applicable EU F-gas and ODS regimes, as this is preferable for businesses that operate across the UK. Establishing a UK-wide approach ensures that SEPA’s resources are allocated efficiently and proportionately to the scale of the issue in Scotland. However the UK SI ensures that the Scottish Ministers have the flexibility to make alternative arrangements in future if desired – given that the SI ensures continuity of the quota-based system in the UK, mirroring as closely as possible the EU system, to ensure phase-down by 2030, we do not currently anticipate any situation in which there would be any change to the Environment Agency’s role in regulating the UK quota system.

7. **Under heading 7 (summary of stakeholder engagement/consultation) there is no mention of consultation with SEPA; is this the case? Has the Scottish Government only consulted with the one Scottish manufacturer; if so, who was this, and what are its views?**

The Scottish Government has discussed the ‘no deal’ approach with SEPA, which will continue with its current role under the EU regimes (enforcement of requirements on F-gas and ODS users, and coordination with the Environment Agency for the requirements on importers and exporters).

Given that the UK SI seeks to maintain a UK wide approach, any specific stakeholder engagement has been undertaken by the UK Government rather than the Scottish Government. The UK Government has informally engaged with a number of UK stakeholders but given commercial confidentiality, it does not record the views of individual organisations. The Scottish Government has been involved alongside the UK Government, in supporting Mitsubishi Electric Air Conditioning System Europe Ltd to understand their position in a ‘no deal’ Brexit including in relation of F-gas Regulations.