

Overview of the ETS regulations and aligning your organisation to be ready

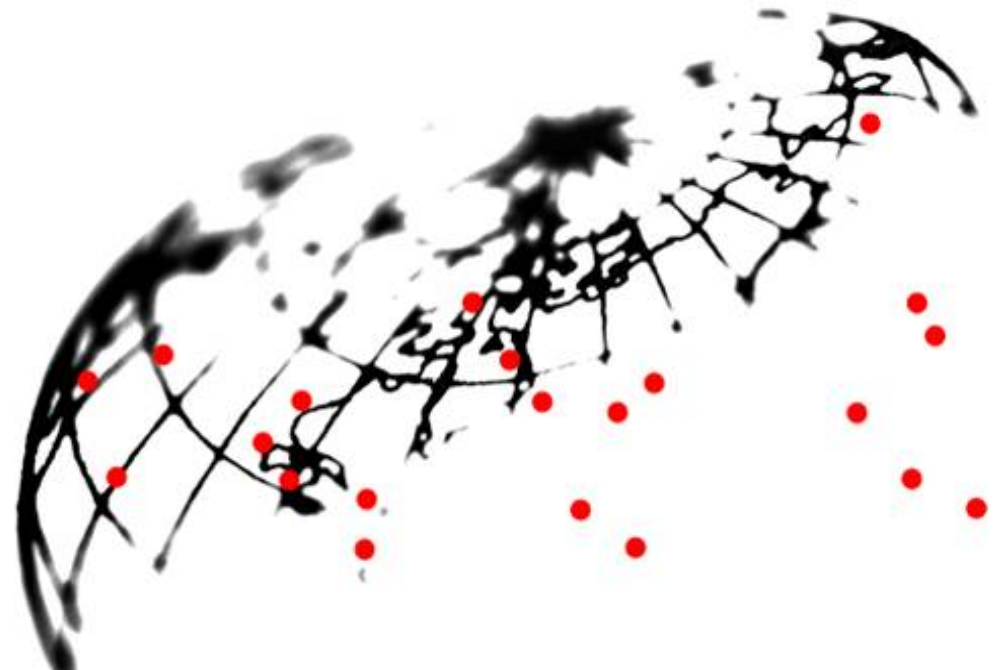
The legal and financial implications of not complying

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Overview

- Why tackle aviation emissions?
- International effort to address aviation emissions
- The EU Aviation Emissions Directive
- The costs of not complying
- Potential challenges to EU unilateral action
- Conclusion



Why tackle aviation emissions?

- Aviation accounts for approximately 3% of global GHG emissions
- However, they are also among the fastest rising
- In Europe, emissions from aviation increased by **97% in the period 1990-2004**
- Scientific uncertainty exists about the climate impact of non-CO₂ emissions (e.g. NO_x), water vapour (condensation trails), sulphates etc
- However, their warming impact is expected to be considerably higher than that of CO₂ emissions

International effort to address aviation emissions (1)

UNFCCC



- **UNFCCC Art.3(3):** Parties required to “take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects”
- **UNFCCC Art.4(1)(b) and (c):** Parties obliged to implement programmes (including regional ones) to mitigate climate change by addressing emissions not controlled by the Montreal Protocol in all relevant sectors “including transport”

International effort to address aviation emissions (2)

Kyoto Protocol

- **Kyoto Art.2(1):** Annex I Parties shall “take measures to limit and/or reduce emissions of greenhouse gases not controlled by the Montreal Protocol in the transport sector”
- **Kyoto Art.2(2):** Annex I Parties “shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organisation [ICAO] and the International Maritime Organisations, respectively”

International effort to address aviation emissions (3)

ICAO discussions

- ICAO is a specialised UN Agency which adopts standards and recommended practices for international civil aviation
- 2004: ICAO accepted the recommendation of the ICAO Committee on Aviation Environmental Protection (**res. 35-5**) to:
 - endorse an emissions trading system for international aviation
 - establish an open voluntary aviation ETS; and
 - provide guidance to contracting states on the incorporation of international aviation emissions into domestic schemes
- 2007: ICAO's 36th Assembly fails to achieve any further progress, but condemns planned EU unilateral action

International effort to address aviation emissions (4)

Summary Chronology

- 1997:** Article 2(2) Kyoto Protocol - pursue reductions through ICAO
- 1999:** ICAO ask IPCC to report on aviation and climate change
- 2004:** ICAO 35th Session endorses open emissions trading for aviation in national or regional schemes based on mutual consent
- 2005:** European Commission recommends inclusion of aviation in the EU ETS
- 2006:** European Commission proposes directive on aviation
- 2007:** ICAO condemns EU plans for unilateral action
- 2008:** Aviation Directive adopted

The EU Aviation Emissions Directive (1)



General overview

- Proposal published in 2006, negotiated via the co-decision procedure
- Official title: Directive **2008/101/EC** of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community
- Amends the original EU ETS Directive
- The forthcoming revised EU ETS Directive (COD/2008/0013) also contains some minor amendments to the aviation text introduced into the original EU ETS Directive by the Aviation Emissions Directive

The EU Aviation Emissions Directive (2)

Who is affected?

- Will apply to **all flights** departing from or arriving in a European airport, therefore both EU and non-EU airlines
 - **Note:** on 11 February 2009, the European Commission published a draft 60 page long list of aircraft operators to which the directive applies
- **De minimis** provisions for private jets, state aircraft, flights with total annual emissions of 10,000 tonnes per annum etc
- “**Operator**” defined as the person who operated the aircraft at the time of the “aviation activity”; where that person cannot be found, the operator will be the owner of aircraft
- **Interpretation Issues:** Wet-leasing - who is the aircraft “Operator”?

The EU Aviation Emissions Directive (3)

What is the emissions cap and when will it begin?

- A separate aviation emissions cap will be set for the aviation industry (1 Jan 2012 - 31 Dec 2013 = **97%** of “*average historical emissions*”; subsequently = **95%** of the same)
- *Average historical emissions* = the average of emissions in the period 2004-2006
- Note art 3, c(4) of the Aviation Directive requires the European Commission to report on average historical emissions by 2 August 2009
- The scheme will start operating on **1 January 2012**

The EU Aviation Emissions Directive (4)

Allowances

- Special **aviation allowances** will be allocated to the aviation sector
- Stationary installations will not be able to use aviation emission allowances for compliance (although the aviation sector will have access to EUAs)
- This one-way gateway mechanism is to ensure accounting issues (arising from the fact that aviation allowances cannot be backed by AAUs) are avoided

The EU Aviation Emissions Directive (5)

Monitoring and reporting guidelines

- On 16 April 2009, the European Commission adopted Decision 2009/339/EC to establish guidelines for the monitoring and reporting of greenhouse gas emissions from aviation activities pursuant to the EU-ETS Directive
- This was done by way of an amendment to the existing monitoring and reporting guidelines established by Decision 2007/589/EC (18 July 2007)
- It provides detailed activity-specific guidelines for the determination of emissions and tonne-kilometre data from aviation activities

The EU Aviation Emissions Directive (6)

Allocation of allowances

- Limited auctioning: **15%** of the allocation – although this may change following future reviews of the EU ETS Directive
- Although auctioning will be carried out by Member States, harmonised rules will apply
- Allocation carried out on the basis of **benchmarks**
- Operators will have access to **Kyoto credits**, but only up to **15%** of their compliance effort (again, subject to review)
- **3%** of allowances set aside for a special reserve for new entrants and airlines whose emissions have increased substantially since start of monitoring; allocation of free allowances from the reserve cannot exceed **1m** per operator

The EU Aviation Emissions Directive (7)

Adaptation to third country schemes

- EU ETS aviation scheme could be easily adapted if third countries adopt measures to limit or reduce emissions from aviation
- Art 25a of the EU-ETS Directive enables the European Commission “where necessary” to adopt amendments to provide for flights arriving from a third country with an equivalent scheme to be excluded from the list of aviation activities.

The costs of not complying (1)

Aviation Directive requirement

- **Obligation** - By 30 April each year, each Aircraft Operator needs to surrender allowances equal to total emissions during preceding calendar year
- **Penalties** - **€100** per tonne of CO₂ emitted, plus obligation to cover the shortfall imposed by **Administering Member State**
- **Note:** *Administering Member State will be the state that issued the operating licence; in the case of overseas operators, the Administering Member State will be the Member State to which the operator flies the most (overwhelmingly the UK)*

The costs of not complying (2)

- In addition, **art 16(1)** of the EU-ETS Directive requires Member States to implement “**effective, proportionate, and dissuasive**” national penalty provisions for non-compliance
- DECC issued a **consultation** on the transposition of the Aviation Directive into UK law which ran from 4 March 2009 to 14 May 2009; a subsequent consultation will be issued later this year to provide more detail on the proposals
- The proposed penalties are all **civil** in nature due to the difficulties associated with enforcing criminal penalties on international operators (c.f. certain criminal penalties for non-compliance with the EU-ETS)

The costs of not complying (3)

Table 1. National enforcement powers proposed by DECC

Contravention	Proposed Penalty
Failure to submit a benchmarking plan	No financial penalty, but operator at risk of receiving no free allowances up to 2020
Failure to submit an emissions plan, or where emissions plan is rejected, failure to re-submit within 15 days	£5,000 , then following receipt of notice of the penalty and until an emissions plan has been received, £500/day up to 90 day max (max total £50,000)
Failure to monitor in accordance with emissions plan	Same as above
Failure to submit a verified emissions report	Same as above AND a determination fee to pay for appropriate regulator's determination of emissions

The costs of not complying (4)

Table 1. National enforcement powers proposed by DECC (continued)

Contravention	Proposed Penalty
Failure to comply with the European Commission's Monitoring and Reporting Decision OR with a request for information from the appropriate national regulator	£3,000 , then following receipt of notice of the penalty and until an emissions plan has been received, £500/day up to 90 days (max total £48,000)
Misreporting of activity and emissions data	£1,000 , plus where a false or misleading statement has led to over-allocation of allowances, those allowances; furthermore, where fraud is suspected, the police would have other powers
Unpaid civil penalty for failure to report emissions data	The appropriate regulator may detain and with leave of the court, sell an aircraft belonging to an aircraft operator

The costs of not complying (5)

Further costs of non-compliance include:

- **Community level operating ban:** Once the Administering Member State has exhausted “other enforcement measures” to ensure compliance, that Member State can also request the European Commission to impose an **operating ban** on the operator
- **Reputation risk** to the operator for non-compliance
 - Article 16(2) of the EU-ETS Directive requires Member States to publish the names of operators who fail to surrender sufficient allowances

The costs of not complying (6)

Summary of key dates for compliance with the scheme

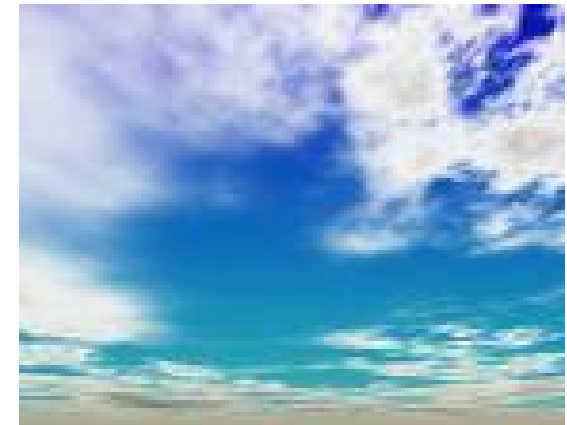
- **31 August 2009** - Submission of monitoring plans (and benchmarking plan for operators who wish to apply for a free allocation)
- **1 January 2010** - Start of the emissions monitoring year (start of the benchmarking year)
- **31 March 2011** – deadline for submission of verified emissions data (and, if applicable, benchmarking data)
- **30 June 2011** - Administering Member State submits application for free allowances to European Commission
- **30 September 2011** - Commission determines benchmark number of allowances and free allocation
- **31 December 2011** - Regulator publishes final allocations to each operator
- **28 February 2012** - Regulator issues allowances to each operator
- **31 December 2012** - **Operators submit** emissions report (independently verified)
- **30 April 2013** - Operators must surrender correct number of allowances 20

Potential challenges to EU unilateral action

- **Chicago Convention**
 - Article 11, 15, and 24; Annex 16
- **Bilateral agreements**
 - E.g. Open Skies agreement between the EU and the US
- **UNFCCC/Kyoto**
 - Article 2(2) of Kyoto asks Parties to “work through” the International Civil Aviation Organisation
 - Negotiating text published 19 May 2009 for UN Climate Change Talks in Bonn (1-12 June) includes two options for cooperative sectoral approaches to reducing aviation emissions, both of which include “working through the ICAO”

Conclusions

- EU unilateral action on aviation has been triggered by failure to achieve progress at the international negotiations
- Aviation Emissions Directive builds on the existing framework of the EU ETS but adapts it to suit the specifics of aviation as an industry sector
- Enforcement powers include fines and operator bans
- Potential challenges may be launched under the Chicago Convention, bilateral aviation agreements, the UNFCCC and Kyoto Protocol



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