

Legal Alert

Inclusion of aviation in EU Emissions Trading Scheme

Augustus 2008

On 27 June 2008 the European Parliament and the European Council reached an informal second-reading agreement on the inclusion of aviation in the EU Emissions Trading Scheme (“**EU ETS**”). This Legal Alert highlights the main elements of the draft “**Aviation Directive**”, amending Directive 2003/87/EC on the EU ETS (the “**EU ETS Directive**”). Pursuant to the Aviation Directive, greenhouse gas emissions from flights to, from and within the EU will be included in the EU ETS as from 1 January 2012. Similar to industrial companies already covered by the EU ETS, aircraft operators will be allocated an emissions cap. If their emissions increase, they will be obliged to buy additional emission allowances. And if they reduce their emissions, they may sell their surplus allowances.

The European Parliament voted in favour of the Aviation Directive during a plenary session on 8 July 2008. The European Council is expected to give its formal approval within the foreseeable future. All EU Member States will then have 12 months to implement the Aviation Directive into national legislation.

Background

The EU ETS came into existence in 2005 and became the cornerstone of the EU for combating climate change by reducing greenhouse gas emissions in a cost-effective way. From the very beginning, the European Commission intended to include aviation within the scope of the EU ETS. Despite strong opposition from several airline groups and foreign governments, the European Commission adopted a proposal for inclusion of aviation in the EU ETS on 20 December 2006. The rationale lies in the fact that greenhouse gas emissions from aviation account for approximately 3% of the EU’s total emissions and are increasing rapidly (by 87% since 1990). Both the European Parliament and the European Council acknowledged the importance of calling a halt hereto and, after two years of discussions, reached a compromise on the main provisions of the Aviation Directive.

The Aviation Directive

The objective of the amendments to the Emissions Trading Directive included in the Aviation Directive is to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the EU ETS.

The main elements of the Aviation Directive are:

- All (EU and non-EU) aircraft operators flying within the EU and into or out of the EU are required to participate in the EU ETS as of 1 January 2012.
- The total quantity of allowances to be allocated to the aviation industry will be based on average annual emissions between 2004 and 2006. The resulting quantity of average emissions will be capped at 97% in 2012 and at 95% in 2013 (this cap may change as of 2013, as part of the general review of the EU ETS).
- Aircraft operators will receive 85% of their emission allowances free of charge in 2012. The remaining 15% will be auctioned (this percentage may change as of 2013, as part of the general review of the EU ETS).
- A special reserve of allowances (3% of the total quantity of allowances) will be set aside for new entrants or fast-growing airlines. The latter will not receive more than 1,000,000 allowances.
- EU Member States will determine the use of the auctioning revenues. They will have to report how the proceeds are spent and are strongly advised to use the revenues to tackle global climate change (this advice may be converted to a legal obligation, as part of the general review of the EU ETS).
- Aircraft operators may use carbon credits generated through the CDM and JI flexible mechanisms of the Kyoto Protocol (CERs and ERUs) for EU ETS compliance purposes up to 15% of their allocated emissions cap.
- Aircraft operators will be subject to the existing penalties under the EU ETS. Non-compliant operators will be fined and their names will be published. If these penalties fail to ensure compliance, EU Member States may request that an operating ban be imposed on non-compliant aircraft operators.
- An exemption has been introduced for all public aircraft operators (except flights carrying government officials and royalty) and commercial aircraft operators with very low flight frequency or with low annual emissions.

Issues to be solved for a clear take-off

Although the Aviation Directive sets out the basic rules, some important aspects remain uncertain and have been heavily criticised by external parties.

General review of the EU ETS

The Aviation Directive has been developed as part of the EU Climate Action package, which has been presented by the European Commission on 23 January 2008. The aim is to generally review the EU ETS Directive in order to enhance the opportunity to meet the EU's commitment to reduce its emissions by at least 20% below 1990 levels by 2020.

One of the main elements of the package is the inclusion of aviation in the EU ETS. Whereas some elements of the Aviation Directive are irrespective of the overarching package, some elements are dependent on the further outcome of the general review of the EU ETS. The general review is still in progress and it is expected that a final revised EU ETS Directive will not be adopted before the summer of 2009.

Regarding the Aviation Directive, discussions are still underway concerning the exact cap on the emissions to be allocated, the level of emissions to be auctioned and the manner in which the auctioning revenues will be spent.

Unclear issues

At present, little is known about the envisaged auctioning process. The intention is to adopt a supplementing regulation, which contains detailed provisions for the auctioning by EU Member States.

Currently, no guidelines are being developed to regulate the carbon accounting and administration of aircraft operators. In order to ensure equal treatment of aircraft operators in all EU Member States, the Commission will develop harmonised rules within the near future.

External opposition

The inclusion of non-EU air operators into the EU ETS has been strongly opposed by international airline groups and foreign governments, especially the US government.

International airline groups such as the International Air Carrier Association (“**IACA**”) and the International Civil Aviation Organisation (“**ICAO**”) base their objections on the present global energy crisis. It is argued that the Aviation Directive will lead to more airline company bankruptcies and bring the aviation industry into even rougher weather than it already is. Also, the efficiency of the EU ETS is being questioned, since soaring oil prices are already forcing airline operators to adopt fuel efficiency measures.

Both the ICAO and the US government claim that the inclusion of non-EU airline operators into the EU ETS is prohibited under international law. It is argued that the inclusion of aviation breaches the Chicago Convention, the main international aviation regulation. This conflict already existed during the 36th Assembly of the ICAO in Montreal on 28 September 2007, where the ambitious EU proposal on cutting greenhouse gas emissions from international aviation was rejected. Although the Kyoto Protocol provides that the responsibility to reduce greenhouse gas emissions from international aviation rests with the ICAO, the delegates also refused to agree to meaningful international targets to reduce aviation emissions. The EU made a clear reservation on this decision. As unilateral EU action forced the ICAO to implement new measures in the past (e.g. regarding aircraft noise restrictions), it is conceivable that it could happen again in the context of emissions reduction.

To satisfy the US, the EU proposed to sign a bilateral agreement on emissions trade and aviation. To underline its intention to seek a global agreement on reducing emissions from aviation, the Aviation Directive includes the intention to continue to cooperate with the ICAO in developing a global approach.

The way forward

After formal approval by the European Council, which could be given shortly, the EU Member States will be obliged to implement the Aviation Directive within a year.

However, as many crucial aspects were left open for review or consideration in greater detail and several legal objections have been expressed, the future of the Aviation Directive is uncertain. Nevertheless, it is the first step in tackling global warming caused by greenhouse gas emissions from international aviation.

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