

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

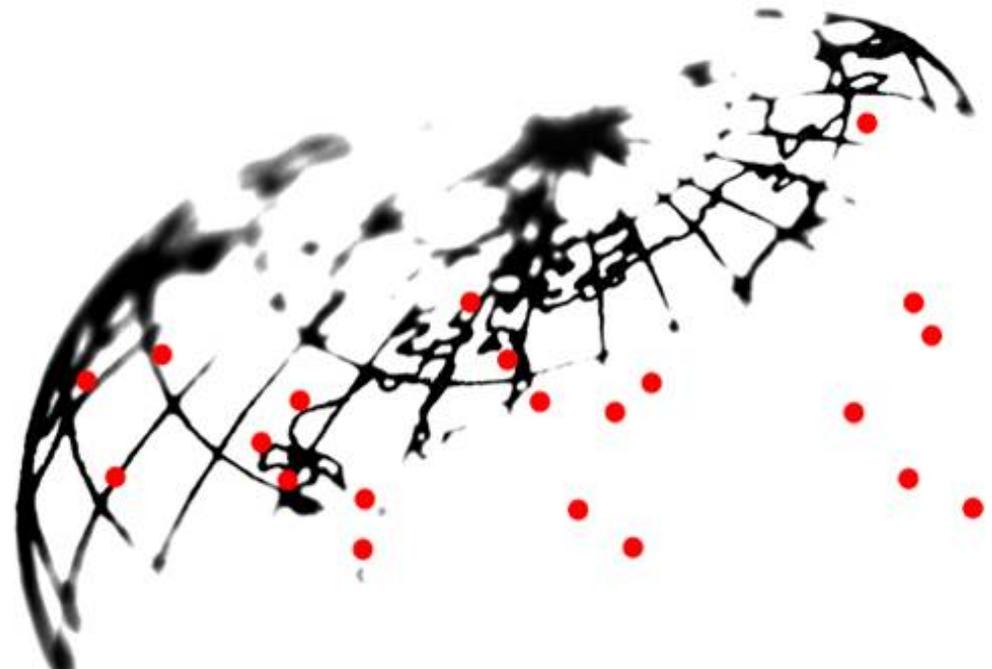
The legal and financial implications of not complying

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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-CO<sub>2</sub> emissions (e.g. NO<sub>x</sub>), water vapour (condensation trails), sulphates etc
- However, their warming impact is expected to be considerably higher than that of CO<sub>2</sub> 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”

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## 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 36<sup>th</sup> 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 35<sup>th</sup> 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

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# 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

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## 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**

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## 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

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## 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

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## 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 CO<sub>2</sub> 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)*

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## 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 <b>no free allowances up to 2020</b>
Failure to submit an emissions plan, or where emissions plan is rejected, failure to re-submit within 15 days	<b>£5,000</b> , then following receipt of notice of the penalty and until an emissions plan has been received, <b>£500/day</b> 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 <b>AND</b> 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)

<b>Contravention</b>	<b>Proposed Penalty</b>
Failure to comply with the European Commission's Monitoring and Reporting Decision <b>OR</b> with a request for information from the appropriate national regulator	<b>£3,000</b> , then following receipt of notice of the penalty and until an emissions plan has been received, <b>£500/day</b> up to 90 days (max total £48,000)
Misreporting of activity and emissions data	<b>£1,000</b> , 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	<b>The appropriate regulator may detain and with leave of the court, sell an aircraft belonging to an aircraft operator</b>

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## 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

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## 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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