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Consultation Response Document: Implementing the Aviation EU Emissions Trading System Regulation (421/2014) in UK Regulations

URN: 14D/423

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The consultation and Impact Assessment can be found on DECC's website:

<https://www.gov.uk/government/consultations/aviation-eu-emissions-trading-system-eu-ets>

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Introduction

On 11 August 2014 the Department of Energy & Climate Change, Department for Transport and the Devolved Administrations jointly launched a consultation on the UK implementation of the Aviation Emissions Trading System (EU ETS) Regulation (EU/421/2014). The consultation is available at the following link: <https://www.gov.uk/government/consultations/aviation-eu-emissions-trading-system-eu-ets>

The consultation closed on 22 September and responses were received by the Department of Energy & Climate Change from the following organisations:

1. Aviation Emissions Solutions
2. Avocet
3. European Business Aviation Association

Four other organisations submitted responses and either requested that they remain confidential or did not respond using the consultation response form, and so have not been named in the list above. Their responses are, however, reflected in the summary of responses below.

Government takes note of stakeholders' views, and these have been taken into account in finalising the Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2014. This document sets out the Government's position on the key issues highlighted through the consultation process.

Policy responsibility for UK implementation of the Aviation EU ETS lies jointly with the Department of Energy & Climate Change (DECC) and the Department for Transport (DfT), together with the Scottish Government, Welsh [Assembly] Government and the Northern Irish Executive. Therefore references to Government in this document also cover the Devolved Administrations.

The Department found the responses constructive and helpful, and is very grateful to all the organisations who took the time to respond to this consultation.

Summary of responses

The consultation covered the UK implementation of EU Regulation 421/2014 (“the EU Regulation”), which amended Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the community.

The proposed statutory instrument (“the Amending Regulations”) will amend the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (“the 2012 Regulations”) to reflect the changes implemented by the EU Regulation. The Amending Regulations provide for a derogation of the original geographic scope of Aviation EU Emissions Trading System (“Aviation EU ETS”) by excluding flights between an airport in a country of the European Economic Area (EEA) and an airport in a country outside the EEA, and flights between an airport in the country of the EEA and an airport in an outermost region. They also provide a new exemption threshold for non-commercial aircraft operators emitting less than 1,000 tonnes of carbon dioxide (CO₂) per year. These parts of the Amending Regulations cover different time periods, respectively 2013 until 2016 and 2013 until 2020. In addition, these time periods include compliance years which are historical (2013), current (2014) and future years (2015 onwards). The Amending Regulations also introduce simplified procedures for operators emitting less than 25,000 tonnes of CO₂ per year. Lastly, in order to allow time to implement these new provisions, the Amending Regulations provide for an extraordinary two year compliance cycle for 2013 emissions.

The consultation questions were as follows:

1. Do you have any comments on the proposed amendments to the 2012 Regulations? Are there any parts of the Amending Regulations where further clarity is required?
2. Do you believe there is an enforceable alternative method, other than what is proposed here, of implementing the EU Regulation into UK law? If so, please outline your suggested method.
3. The Amending Regulations have amended Schedule 8 of the 2012 Regulations to substitute the reference to the “benchmarking year” (i.e. 2010) with the “second calendar year of the trading phase” (i.e. 2014), in order to correct for a previous error in the Regulations.

As far as the UK regulators are aware, operators who intend to apply to the special reserve have been monitoring tonne-kilometre data for 2014. The UK regulators also intend to accept data for 2014 when considering applications for the special reserve.

Do you think the proposed change to Schedule 8 will cause any prejudice to operators? If so, could you please provide any evidence of this?

4. There is a provision in the EU Regulation for Member States (including the UK) to “implement simplified procedures for non-commercial aircraft operators [emitting less than 25,000 tonnes of CO₂ per year] as long as such procedures provide no less accuracy than the small emitters tool provides”.

At present, the regulators for UK-administered aircraft operators do not intend to introduce further simplified procedures for non-commercial air transport operators who emit less than 25,000 tonnes of CO₂ per year, but the regulators will keep this under review.

If you wish, please describe what simplified procedures the UK could put in place for non-commercial aircraft operators which would ensure no less accuracy than the small emitter's tool provides.

5. Are you able to provide any additional evidence relating to the impacts which the accompanying UK Impact Assessment has not taken into account? Please state these e.g. impacts on the competitiveness of your business and/or your aircraft operations, in comparison to others.

Taking each question in turn:

Question 1: Do you have any comments on the proposed amendments to the 2012 Regulations? Are there any parts of the Amending Regulations where further clarity is required?

Consultation response

1. Four respondents commented on the proposed amendments.
2. One respondent commented that they had no concerns regarding the amended definition of "aviation activities" in the Amending Regulations.
3. One respondent requested clarification on the definition of an exempt non-commercial operator, specifically how an operator determines whether it falls under the 1,000 tonnes of CO₂ per year threshold. The respondent also queried whether operators are required to subscribe to Eurocontrol's ETS Facility or whether operators can calculate their own emissions and use this calculation to determine whether they are under the emissions threshold and therefore covered by the exemption.
4. One respondent commented that the derogated scope from 2013 to 2016 should be used for calculating exemption thresholds, rather than the full scope set out in Annex 1 of Directive 2003/87/EC.
5. One respondent requested clarity on whether operators who have submitted a monitoring plan and whose activities are now excluded under the derogation in scope need to revise their monitoring plan for the years 2013-2016. They also asked when any such revised plans would need to be submitted by.

Government response

1. The exemption thresholds for 2013-2016 are calculated on the full scope set out in Annex 1 of Directive 2003/87/EC, i.e. based on all flights to or from airports in the EEA. The new exemptions for non-commercial operators emitting less than 1,000 tonnes of CO₂ per year, the new simplified procedures for operators emitting less than 25,000

tonnes of CO₂ per year, and the existing exemptions for commercial operators emitting less than 10,000 tonnes of CO₂ per year are all calculated on this basis. As such, an operator needs to be aware of what their 'full scope' emissions are, as it is their responsibility to comply with the requirements of the ETS should they exceed the relevant non-commercial or commercial thresholds (respectively, 1,000 and 10,000 tonnes of CO₂ per year). There is no legal requirement to subscribe to the Eurocontrol support facility and operators can determine their emissions in whatever manner they want, provided that the method is sufficiently accurate. Use of the Eurocontrol small emitters tool would be one option that operators could consider.

2. The EU Regulation amends Directive 2003/87/EC to limit the scope of Aviation EU ETS to intra-EEA flights between 2013 and 2016 (inclusive). This is a temporary derogation of the scope of Aviation EU ETS. The Directive defines the full-scope as all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies. Without further amendments to the Directive, the Aviation EU ETS will revert to the full-scope in 2017. The proposed amendments to UK regulations reflect this temporary derogation and, as such, a redefinition of the 'full-scope' of Aviation EU ETS, including for the purposes of calculating exemption thresholds under Annex 1, is outside the scope of the proposed amendments to the 2012 Regulations.
3. Where necessary, following the amendments to the scope of the Aviation EU ETS, the UK Regulators for Aviation EU ETS will amend monitoring plans where an operator remains inside the Aviation EU ETS and has monitoring, reporting and surrender requirements. These operators will therefore not be required to apply to amend their monitoring plans. There are no Aviation EU ETS monitoring, reporting and surrender requirements where an operator only carries out excluded flights. However, it remains the responsibility of the aircraft operator to ensure that they monitor their flights and meet Aviation EU ETS requirements for any flights which are not excluded (i.e. intra-EEA flights, including activities such as re-positioning flights as a result of poor weather).

Question 2: Do you believe there is an enforceable alternative method, other than what is proposed here, of implementing the EU Regulation into UK law? If so, please outline your suggested method.

Consultation response

1. Two respondents commented on Government's proposed method of implementing the EU regulation into UK law.
2. One respondent commented that they did not believe there was an enforceable alternative method to the one Government is adopting.
3. One respondent requested clarification of data on enforcement for the 2012 scheme year of Aviation EU ETS, referencing the number of UK administered operators mentioned in the Impact Assessment.

Government response

1. The enforcement for the 2012 scheme year is outside the scope of the proposed amendments to UK Regulations, and also of the EU Regulation. The Environment Agency will publish a list of non-compliant operators for the 2012 scheme year by 30 June 2015, in line with the requirements of the existing UK regulations, once any civil penalties have been issued and the appeal period has expired without an appeal being made, or an appeal has been determined against the appellant or withdrawn. As explained in the Impact Assessment (Annex A to the consultation document), the number of expected UK operators for 2013 was estimated on the basis of the available 2012 Eurocontrol data.

Question 3: The Amending Regulations have amended Schedule 8 of the 2012 Regulations to substitute the reference to the “benchmarking year” (i.e. 2010) with the “second calendar year of the trading phase” (i.e. 2014), in order to correct for a previous error in the Regulations.

As far as the UK regulators are aware, operators who intend to apply to the special reserve have been monitoring tonne-kilometre data for 2014. The UK regulators also intend to accept data for 2014 when considering applications for the special reserve.

Do you think the proposed change to Schedule 8 will cause any prejudice to operators? If so, could you please provide any evidence of this?

Consultation response

1. No respondents submitted any concerns over any potential prejudice caused by the change to Schedule 8 and no evidence was received.

Question 4: There is a provision in the EU Regulation for Member States (including the UK) to “implement simplified procedures for non-commercial aircraft operators [emitting less than 25,000 tonnes of CO₂ per year] as long as such procedures provide no less accuracy than the small emitters tool provides”.

At present, the regulators for UK-administered aircraft operators do not intend to introduce further simplified procedures for non-commercial air transport operators who emit less than 25,000 tonnes of CO₂ per year, but the regulators will keep this under review.

If you wish, please describe what simplified procedures the UK could put in place for non-commercial aircraft operators which would ensure no less accuracy than the small emitter’s tool provides.

Consultation response

1. Two respondents commented on the issue of simplified procedures for non-commercial operators who emit less than 25,000 tonnes of CO₂ per year.
2. One respondent commented that the current procedures for small emitters delivered the necessary accuracy to establish their CO₂ figures.

3. One respondent welcomed the simplified procedures in the EU Regulation for operators emitting less than 25,000 tonnes of CO₂ per year and suggested that the procedures could be further simplified. More specifically, they suggested that a group of operators could open a single registry account through a 3rd party and that the Monitoring Plan template for operators who emit less than 25,000 tonnes of CO₂ per year could be further simplified. They referred to a Price Waterhouse Coopers (PWC) and European Commission produced study of the application of Aviation EU ETS to small emitters as a useful guide for simplifications¹.

Government response

1. The Government referred to the PWC/Commission report on small emitters when drafting the Impact Assessment (Annex A to the consultation document). With regard to the suggestion made by the respondent on simplified procedures for small emitters, the Government does not consider it possible to allow a group of operators to use a single registry account under Directive 2003/87/EC, as it would not allow for sufficiently accurate accounting of transactions and compliance. The ETS Registry Regulation (389/2013) does, however, allow for 3rd parties to open registry accounts for small emitters, potentially reducing the administrative and cost burdens for these operators. The data requirements for the Monitoring Plan template are set out by Directive 2003/87/EC and Commission Regulation 601/2012 (the Monitoring and Reporting Regulation) and are therefore beyond the scope of the proposed amendments to the UK regulations.
2. The Government received no further specific suggestions that would not require legislative changes to the Directive 2003/87/EC on how the procedures for small emitters could be simplified and, as such, does not intend to take action at this time. However, the Government remains open to future suggestions on simplified procedures for small emitters.

Question 5: Are you able to provide any additional evidence relating to the impacts which the accompanying UK Impact Assessment has not taken into account? Please state these e.g. impacts on the competitiveness of your business and/or your aircraft operations, in comparison to others.

Consultation response

1. One respondent commented that it had incurred time and cost burdens as a result of the changes in scope to Aviation EU ETS. They also requested clarification on whether an operator's full scope emissions needed to be accounted for when complying with the revised intra-EEA scope between 2013 and 2016 under the EU Regulation and the amended UK Regulations.

¹ *ETS Aviation small emitters* (prepared by PWC for the European Commission, 2014), available at: http://ec.europa.eu/clima/policies/transport/aviation/docs/report_ets_aviation_small_en.pdf.

Government response

1. The Government is aware that the recent amendments to Aviation EU ETS have placed additional burdens on aircraft operators. However, it also notes, and welcomes the fact that the EU Regulation introduces new exemptions and simplified procedures that are likely to reduce administrative costs for aircraft operators in complying with Aviation EU ETS. On the scope of the scheme, the EU Regulation amends Directive 2003/87/EC, introducing a temporary derogation of the scope of Aviation EU ETS to intra-EEA flights between 2013 and 2016. However, emissions under the full-scope of Aviation EU ETS (i.e. any flights which arrive at or depart from an EEA aerodrome) are still used for determining the exemption thresholds for commercial operators (10,000 tonnes of CO₂ per year) and non-commercial operators (1,000 tonnes CO₂ per year), as well as the threshold under which operators can benefit from simplified procedures for small emitters (25,000 tonnes of CO₂ per year). Operators should therefore continue to monitor all of their emissions for flights to or from EEA aerodromes.

Wider responses regarding the EU Regulation and the UK Amending Regulations

Consultation response

1. Whilst the scope of the consultation was limited to the proposed amendments to the UK Regulations, three respondents commented more widely on the EU Regulation and the consultation process undertaken by Government.
2. One respondent suggested that operators from developing countries should benefit from the allocation of additional free allowances. They also asked which states and outermost regions were included in the derogated ETS scope between 2013 and 2016 (inclusive).
3. One respondent proposed that the 10,000 tonnes of CO₂ per year exemption threshold for commercial operators should also apply to non-commercial operators.
4. One respondent commented that the consultation should have been conducted before the implementation of the EU Regulation in the UK.

Government response

1. The first two points raised above are outside the scope of the amendments. Specifically, the amendments to Directive 2003/87/EC agreed at European level in the EU Regulation limit the scope of Aviation EU ETS to intra-EEA flights only. With an intra-EEA scope, a *de minimis* exemption or adjustment that would apply to developing states was not considered relevant during the EU negotiations and, ultimately, in the agreed EU Regulation, as an operator's obligations under ETS are calculated on a route-basis, rather than on the basis of their country of origin. This is an important principle as there should be no discrimination between operators on the same routes as this could create competitive distortions. On the states included in the derogated scope of Aviation EU ETS, the Environment Agency published a list in their May 2014 newsletter, which every operator administered by the UK would have received.

2. The exemption threshold for non-commercial operators is similarly outside the scope of the proposed amendments to the UK Regulations. The threshold was considered during the EU negotiations, and it was agreed that 1,000 tonnes of CO₂ per year was the most appropriate. This is therefore the threshold specified for non-commercial operators in the EU Regulation.
3. In response to the final point regarding the adoption of the EU Regulation, the Government and the UK Regulators were required to give effect to the EU Regulation as a matter of EU law. In line with requirements under domestic law, the Government also consulted on the content of the UK regulations which implemented the EU Regulation. . In addition to this consultation on the content of the UK regulations, the Government carried out four stakeholder workshops on the EU Regulation and its implementation, in November and December 2013, and February and June 2014 as well as inviting written comments from stakeholders throughout the process.

Conclusions and next steps

The Government has carefully considered the responses generated by this consultation and has decided that no substantive changes need to be made to the proposed statutory instrument or the impact assessment on the basis of them. However the following drafting changes have been made to the proposed statutory instrument found at Annex C of the consultation, for the sake of clarity.

- a. The definition of “excluded aviation activities” has been slightly amended and a new definition of “outermost region flights” has been inserted, to reflect that Croatia became an EU member state on 1st July 2013.
- b. Regulation 42 of the 2012 Regulations has been expressly revoked, whereas the previous draft provided that it ceases to apply after 31st December 2014.
- c. The drafting of the amendments to regulation 35 of the 2012 Regulations has been amended for clarity.
- d. The consultation draft amended the transitional provisions in the 2012 Regulations, to provide that where an operator failed to surrender sufficient allowances to cover 2012 emissions, and the operator is required to surrender a number of allowances equal to the deficit in the year following the year in which it is given notice, the requirement to surrender the deficit takes account of the revised scope for 2012 flights under the ‘Stop the Clock Decision’ (Decision 377/2013/EU). The drafting of this amendment has been improved in the revised draft, but the effect remains the same.
- e. The revised draft also provides that where an operator is issued with a penalty notice for a failure to surrender sufficient allowances to cover 2012 emissions by 30th April, and they are also issued with a notice requiring them to surrender the deficit the following year, an appeal against the penalty notice is deemed to be an appeal against the deficit notice. The appeal body for this right of appeal is the same appeal body as for the civil penalty notice for failing to cover sufficient allowances to cover 2012 emissions (i.e. Secretary of State in England, Welsh Ministers in Wales, Scottish Ministers in Scotland and the Planning Appeals Commission in Northern Ireland). These are also the appeal bodies for an appeal against a penalty for failing to surrender a deficit of allowances to cover 2012 emissions.

Taking into account the consultation responses, the Government does not intend to introduce further simplified procedures, but it will keep this under review and the Government remains open to suggestions for how procedures for small emitters can be further simplified outside of any legal changes to Directive 2003/87/EC.

It is expected that the proposed amendments to the UK Regulations in the statutory instrument will be laid before Parliament on 26 November. The statutory instrument is expected to come into force before the end of 2014.

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