

## INFORMATION NOTE ON THE LEGAL STATUS OF THE LIST OF AIRCRAFT OPERATORS

Pursuant to Article 18a of Directive 2003/87/EC ("the Directive"), the Commission must publish and update each year **a list of aircraft operators** which performed an aviation activity listed in Annex I ("the list").

This note deals with **the legal status of that list**. This can be broken down into 2 questions:

- (1) Does the list determine the aircraft operators which are included in the EU ETS?
- (2) Does it determine the administering Member State for each aircraft operator?

### 1. LEGAL EFFECT ON THE INCLUSION OF AIRCRAFT OPERATORS INTO THE EU ETS

The requirements of the Directive apply to **aircraft operators**, which are defined in Article 3(o) of the Directive as "the person who operates an aircraft at the time it performs an aviation activity listed in Annex I to the Directive". No express link is made between the obligations under the Directive and the list in Article 18a. The inclusion in the EU ETS is, therefore, linked to the performance of an aviation activity and is not subject to inclusion on the list.

To interpret the Directive as only applying to aircraft operators on the list would **create an additional condition for inclusion in the scheme** which is not provided for in the Directive: not only would a company have to be performing an aviation activity but also it would have to be on the list. This would create a loophole in the Directive as new operators (i.e. those operating within the scope of the scheme for the first time including those that operate above the *de minimis* threshold for the first time) or those which were excluded from the list in error would not be subject to the Directive until such time as the list is amended to include them. This would mean that emissions in the period prior to inclusion on the list would not have to be accounted for under the ETS. This is inconsistent with the Directive and would therefore remove the incentive for such operators to come forward for inclusion in the list as soon as possible.

Likewise there may be some operators included on the list which **cease performing an aviation activity**. Such operators are excluded from the scheme once they cease to perform an aviation activity and not at the point they are removed from the list.

Therefore, it can be concluded that **aircraft operators performing an aviation activity listed in Annex I to the Directive are covered by the EU ETS whether or not they are on the list of operators at the time of the activity**.

### 2. LEGAL EFFECT ON THE DETERMINATION OF THE ADMINISTERING MEMBER STATE

A second question is whether the list determines which administering Member State is responsible for an aircraft operator.

Article 18a(3)(a) requires the Commission, based on best available information, to publish a list of aircraft operators which performed an aviation activity on or after 1 January 2006 **specifying the administering Member State** for each operator in accordance with the objective criteria in Article 18(1).

The list ensures that each operator knows which Member State it will be regulated by and that Member States are clear which operators they need to regulate. If an operator performs an aviation activity in one Member State but is included on the list for another Member State then the first Member State does not need to take any action. The list is intended to avoid double regulation as well as the absence of any regulation. **These aims can only be achieved by the preparation of a single list at Community level.**

Legally the consequence of this is that **Member States and operators can rely on the determination of the administering Member State made in the list.**

### **3. SOME RELATED ISSUES**

#### **3.1. Updating the list to include new entrants**

As concluded above, new operators are included in the scheme as soon as they perform an aviation activity and are therefore subject to the requirements to monitor and report emissions and surrender allowances. For this reason, it is important that their administering Member State is determined as soon as possible. Where a Member State identifies a new operator which is not included in the list, it should notify the Commission.

For new entrants with operating licences granted by a Member State, it will be possible to identify the administering Member State immediately. Member States should be able to recognise at the point of granting an operating licence that they may need to regulate this operator. Of course it is necessary to establish that the aviation activities of the operator are within the scope of the scheme and above the *de minimis* threshold.

For operators from third countries, the administering Member State is defined by the Directive as the Member State with the greatest estimated attributed aviation emissions from flights performed in the base year. The base year for new operators is the first year of operation. Therefore, **the administering Member State for third country operators can only be determined definitively after the end of the first year of operation.** However, it may already be possible for most new entrants to identify their administering Member State on the basis of their anticipated flights and therefore discuss with them the monitoring requirements.

However, it will be necessary to take a pragmatic approach to ensuring that emissions during the first year of operation are accounted for under the scheme. Where an operator has not monitored its emissions in accordance with the Monitoring and Reporting Guidelines for the first year of operation, it will be necessary to make an ex-post estimation of the emissions using the data gap provisions of the monitoring and reporting guidelines (Chapter 5 of Annex XIV to Decision 2007/589/EC).

Where the Commission is notified of a new operator with an operating licence issued by an EU Member State it **may update the list**, assuming that it is clear that the aviation activities of the operator are within the scope of the scheme.. Updates of the list for third country aircraft operators will only be feasible at the end of the calendar year. Under the

Directive, the Commission is required to update the list by 1 February. However, the Commission may update the list more often if necessary.

### **3.2. Removal of operators from the list**

Consistent with the conclusion that the list does not determine the inclusion in the scheme, **it is not necessary to delete aircraft operators** as soon as they cease operations. As the determination of the administering Member State is fixed based on activities in the base year, it can be retained on the list in case the aircraft operator subsequently performs another aviation activity.

### **3.3. Guidelines on the administration of aircraft operators**

The Commission has a power to adopt **guidelines relating to the administration of aircraft operators** pursuant to Article 18a(4). This power may be used in particular to further specify the role of the list and to adopt rules on the administration of new operators.