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Consultation on the Ordinance on the Acquisition of Data on Tonne-Kilometres performed by Aircraft

Explanatory notes

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1. Background information

CO₂ emissions from international air transport are constantly increasing throughout the world, but to date they have not been the subject of reduction targets within the scope of the Kyoto Protocol, which stipulates that these emissions have to be regulated by the International Civil Aviation Organisation (ICAO). Since no global measures have been introduced as yet on this basis, the European Union (EU) has decided to incorporate all emissions (with a few exceptions) from flights that take off or land at airports in countries of the EU into the European emissions trading scheme (EU ETS) with effect from 2012. The member states of the European Free Trade Association (EFTA) and the European Economic Area (EEA) have adopted these provisions within the framework of the EEA treaty so that with effect from 1 January 2012, all flights that take off or land in the area covered by the treaty are included in the EU emissions trading scheme.

The Federal Council is also endeavouring to find a solution to the problem of CO₂ emissions from aviation. The current CO₂ Act of 8 October 1999 requires the Federal Council to take steps to limit emissions from aviation fuels for international flights and introduce corresponding legislation within the framework of international agreements. The revised CO₂ Act of 23 December 2011, which is scheduled to enter into force on 1 January 2013, gives the Federal Council the power to require aircraft operators to participate in the Swiss emissions trading scheme.

Switzerland and the EU are currently conducting negotiations on linking their emissions trading schemes. These negotiations also cover measures aimed at limiting the level of CO₂ emissions in the civil aviation sector. This development is partly a reflection of Switzerland's integration into the European civil aviation market under the bilateral agreement with the EU in this sector.¹ Since the EU incorporated civil aviation into its emissions trading scheme with effect from 1 January 2012, it will only be possible to link the Swiss and EU emissions trading schemes in a competition-neutral manner if civil aviation emissions are also regulated in Switzerland. The goal is to link the two trading schemes as of 2014. For Swiss industrial companies it is important that this move is made as soon as possible, since they will not be able to buy and sell emission rights on the large and liquid EU market (or have them credited in Switzerland) until the merger has been effected.

¹ Agreement of 21 June 1999 between the Swiss Confederation and the European Community on Civil Aviation, SR 0.748.127.192.68.

2. Purpose and content of the Ordinance

2.1. Purpose of the Ordinance

In order to implement emissions trading in the civil aviation sector it will first be necessary to collect specific data. By collecting tonne-kilometre data in advance, in the event of integration into the emissions trading scheme it will be possible to calculate the quantity of emission rights allocated free of charge. It is also conceivable that the collected tonne-kilometre data could be used as the basis for an alternative measure.

If it proves possible for the EU and Swiss emissions trading schemes to be linked and the regulation of civil aviation emissions to be introduced as of 2014, the tonne-kilometre data would have to be collected in 2013. Aircraft operators would be required to submit the necessary monitoring plans for data acquisition for approval before the end of 2012.

The Data Acquisition Ordinance is based on Article 2 paragraph 3 of the currently applicable CO₂ Act² and on Article 58 paragraph 2 of the Civil Aviation Act³, in conjunction with Article 47 paragraph 4 of the Government and Administration Organisation Act.⁴

Article 2 paragraph 2 of the current version of the CO₂ Act excludes CO₂ emissions from international flights from the reduction target. The reasoning behind this is that unilateral measures on the part of Switzerland based on the special character of international civil aviation would not be expedient. In view of this, Article 2 paragraph 3 of the CO₂ Act mandates the Federal Council to regulate CO₂ emissions from international flights in international agreements. An emissions trading agreement between Switzerland and the EU which also includes the regulation of CO₂ emissions from civil aviation falls under this provision. The prior acquisition of tonne-kilometre data by aircraft operators is a prerequisite for the conclusion of such an ETS agreement. Under Article 16 of the revised CO₂ Act,⁵ which is scheduled to enter into force on 1 January 2013, the Federal Council may require aircraft operators to participate in emissions trading and thus to collect data in advance (cf. section 3).

In addition to the CO₂ Act, Article 58 paragraph 2 of the Civil Aviation Act also serves as a legal basis for the Data Acquisition Ordinance. In accordance with paragraph 2 of this Article, the Federal Department of the Environment, Transport, Energy and Communications (DETEC) may issue provisions relating to requirements on airworthiness and on the limitation of noise and pollutant emissions from motorised aircraft. Under Article 47 paragraph 4 of the Government and Administration Organisation Act, the relevant ordinance may be issued by the Federal Council.

The acquisition of tonne-kilometre data will commence on 1 January 2013, provided that the negotiations with the EU on the emissions trading scheme can be concluded in the near future. Should the conclusion of negotiations be delayed, the Federal Council will postpone the collection of tonne-kilometre data.

2.2. Relationship with the EU emissions trading scheme

The EU emissions trading scheme covers all flights that take off from or land at airports within the EU and in Member States of EFTA and the EEA. This includes all flights between EU/EEA countries and Switzerland (in both directions). Switzerland is therefore involved as a third-party state that plays no active role, and has no enforcement duties relating to the EU emissions trading scheme.

The regulation of CO₂ emissions from Swiss aviation to be incorporated into the agreement with the EU is intended to cover not only flights to the EU/EEA, but also those from and to Swiss airports which

² Federal Act of 8 October 1999 on the Reduction of CO₂ Emissions (SR 641.71).

³ Federal Act of 21 December 1948 on Civil Aviation (SR 748.0).

⁴ Federal Act of 21 March 1997 on the Organisation of the Governmental and the Administration, SR 172.010.

⁵ FF 2012 109

to date have not been covered by the EU emissions trading scheme. This includes domestic flights as well as flights between Swiss and international airports outside the EU/EEA (in both directions).

2.3. Content of the Ordinance

The Ordinance regulates the following key points:

- Scope of application: In principle, the Data Acquisition Ordinance applies to all flights that take off from or land at Swiss airports. However, certain categories of flight operations, for example training flights, rescue flights and military flights, are exempted.
- Data acquisition: The number of tonne-kilometres has to be recorded in 2013 for every aerodrome pair. Tonne-kilometres are calculated by multiplying the distance by the payload. The payload corresponds to the total weight of transported freight, mail and passengers.
- Monitoring and reporting: Initially, aircraft operators are required to draw up a monitoring plan and submit it to the Federal Office of Civil Aviation (FOCA) for approval. The monitoring plan must indicate how the tonne-kilometre data are to be recorded. The next step will be to record the tonne-kilometre data in the 2013 calendar year in accordance with the approved monitoring plan. Aircraft operators will then be required to have the data recorded in the monitoring report verified by a verifier. The verified monitoring report then has to be submitted to the FOCA for approval.
- Penalties for non-compliance: The penalty for failure to submit a monitoring plan and/or monitoring report is a fine of up to 20,000 Swiss francs. For serious violations, this fine may be increased to a maximum of 40,000 Swiss francs.

Generally speaking, and unless stipulated elsewhere to the contrary, the provisions of the Ordinance that deal with the acquisition of tonne-kilometre data correspond to the EU provisions (EU Emissions Trading Scheme Directive⁶). Details regarding the individual provisions may be obtained from the explanatory notes on the respective articles (cf. section 4).

3. Relationship with the revised CO₂ Act

The revised CO₂ Act⁷ was adopted by Parliament on 23 December 2011. The public consultation procedure concerning the associated ordinance will be initiated at the same time as the procedure for the Data Acquisition Ordinance

The Data Acquisition Ordinance solely regulates the one-time collection of data in 2013 and the subsequent reporting process in 2014. For the implementation of the tonne-kilometre data acquisition process, progress in the negotiations between Switzerland and the EU on the linking of the two emissions trading schemes is essential. Depending on the status of these negotiations, however, the Federal Council may also consider the option of collecting the data at a later date. If the linking of the Swiss and EU emissions trading schemes including civil aviation is not possible by 1 January 2015 or even later, data acquisition could be postponed until 2014. In this case, the data acquisition process would have to be based on the revised CO₂ Act, which is due to enter into force on 1 January 2013. This would mean that the legal basis for the Data Acquisition Ordinance would be Article 16 of the CO₂ Act of 23 December 2011, which grants the Federal Council the option of requiring certain categories of company to participate in the emissions trading scheme. In order that the Federal Council is in the position to make aircraft operators participate, the data required under the Ordinance should be collected in advance.

If the acquisition of data is postponed, the provisions of the Data Acquisition Ordinance could be amended in line with the postponement or incorporated into the future ordinance on the revised CO₂ Act.

⁶ 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 trading within the Community.

⁷ FF 2012 109

4. Explanations of the individual Articles of the Ordinance

Article 1:

As noted in 2.1, the Ordinance calls for aircraft operators to record tonne-kilometre data so that the necessary data can be obtained for specifying CO₂ limitation targets for aircraft operators. The purpose of the acquisition of data in 2013 is to prepare for the implementation of a future bilateral agreement with the EU concerning the linking of the two emissions trading schemes and for the regulation of civil aviation emissions with effect from 2014.

Article 2:

Tonne-kilometre data have to be recorded for all flights that take off from or land at Swiss airports.

The Ordinance also applies to flights that take off from or land at Basel-Mulhouse Airport if they are classified as Swiss flights in accordance with the treaty between Switzerland and France dated 4 July 1949⁸ on the construction and operation of Basel-Mulhouse Airport in Blotzheim.

For administrative reasons, and in view of their low share of CO₂ emissions from civil aviation operations, certain categories of flights are exempted from the data acquisition requirement. These exceptions correspond to those specified in the EU emissions trading scheme.⁹ A *de minimis* threshold for commercial aircraft operators as provided in the EU emissions trading scheme cannot be applied to the acquisition of tonne-kilometre data. In view of the planned linking of emissions trading schemes, the threshold would have to apply to all flights to and from the EU/EEA and Switzerland, and thus could not be independently monitored by the Swiss authorities before the entry into force of a bilateral agreement, since this would require cooperation with the European authorities. The intended waiver of a *de minimis* data acquisition threshold on practical grounds does not have a prejudicial effect on the later introduction of this threshold in the event of the integration of civil aviation into emissions trading.

Article 3:

In order to ensure the greatest possible degree of coherence between the two schemes in the event that the Swiss and EU emissions trading schemes should be linked, the definition of aircraft operator in the Ordinance is identical to that contained in the relevant EU Directive.¹⁰ The term aircraft is defined in greater detail in the Annex to the Civil Aviation Ordinance.¹¹ This definition also specifically includes helicopters.

Articles 4 and 5:

In accordance with the procedure specified in the EU emissions trading scheme, before data acquisition is initiated all aircraft operators are required to draw up a monitoring plan which describes how the data are to be collected and which method is to be used for calculating tonne-kilometres. For this purpose the model monitoring plan (Excel template) provided by the EU Commission can be used as the basis. Monitoring plans have to be submitted to the FOCA for approval. Aircraft operators who already possess an approved monitoring plan within the scope of the EU emissions trading scheme may use this as the basis. In this case, both the monitoring plan and the corresponding approval granted for the EU emissions trading scheme have to be submitted to the FOCA. In addition, the

⁸ SR 0.748.131.934.92

⁹ Annex I to 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 trading within the Community, OJ L 8 of 13.1.2009, p. 3.

¹⁰ 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 trading within the Community. OJ L 8 of 13.1. 2009, p. 3.

¹¹ Civil Aviation Ordinance of 14 November 1973 (SR 748.01).

aircraft operator is required to explain how the monitoring plan will be applied to the additional Swiss flight operations.

The short period between the entry into force of the Ordinance and the cut-off date for submitting monitoring plans is considered to be sufficient, since aircraft operators will be informed accordingly before the Ordinance enters into force. In addition, many aircraft operators can make use of monitoring plans already prepared within the scope of the EU emissions trading scheme.

The FOCA is responsible for examining and approving monitoring plans. If a monitoring plan cannot be approved, the aircraft operator concerned is required to submit a modified version within a deadline specified by the FOCA.

Articles 6 to 8:

The tonne-kilometre data have to be collected in the 2013 calendar year on the basis of the approved monitoring plan, and included in a monitoring report.

The monitoring report then has to be verified by a specialised bureau that is able to demonstrate that it has the required competence to verify tonne-kilometre data in the civil aviation sector. The task will be performed by verifiers that have been accredited within the framework of the EU emissions trading scheme.¹² Accreditation is also possible for Swiss entities.

Verified monitoring reports have to be approved by the FOCA.

Article 9:

Monitoring reports and the data contained therein will be archived by the FOCA until they are required for use in connection with a measure aimed at limiting CO₂ emissions from civil aviation. The FOCA will treat the data as confidential and guarantee their safekeeping. If they are required to implement measures to limit greenhouse gas emissions from the civil aviation sector, the FOCA may pass the data on to the Federal Office for the Environment at its specific request. For the further processing of the data, the required legal provisions will be issued at the same time as the ratification of a future emissions trading scheme agreement.

Article 10:

If an aircraft operator fails to submit a monitoring plan and/or monitoring report, or fails to collect the required data or wilfully collects the data incorrectly, a fine of up to 20,000 Swiss francs may be imposed. For serious violations, this fine may be increased to a maximum of 40,000 Swiss francs.¹³ In such cases, it will not be possible to calculate an individual limitation target within the scope of a future measure, or in the case of inclusion in the emissions trading scheme, an allocation free of charge based on the tonne-kilometre data submitted by the company. This means that a limitation target would have to be specified or the allocation would have to be made on the basis of a conservative estimate by the FOCA.

¹² Legal bases for accreditation:

Ordinance of 17 June 1996 on the Swiss Accreditation System and the Designation of Testing, Conformity Certification, Registration and Approval Bodies (Accreditation and Designation Ordinance, SR 946.512);

Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93. OJ L 218 of 13.08.2008, p. 30.

¹³ Article 91, paragraph 1 i in conjunction with paragraph 3, Civil Aviation Act, SR 748.0.

5. Impacts

5.1 Impacts at federal level

The implementation of the Data Acquisition Ordinance will mean additional duties for the FOCA. Initially these encompass the examination and approval of monitoring plans at the end of 2012 and the beginning of 2013. This step will be followed by the verification of monitoring reports in the second quarter of 2014. It is anticipated that around 350 monitoring plans and reports will be submitted. In addition, it will be necessary to ensure that the above activities can be carried out in a manner that is compatible with implementation in the EU.

5.2 Impacts on the cantons

Data acquisition will not have any impacts on the cantons.

5.3 Impacts on the economy

As far as the national economy is concerned, the Data Acquisition Ordinance will only give rise to minor administrative costs. For those aircraft operators who have not collected tonne-kilometre data within the scope of the EU emissions trading scheme, however, the administrative costs may be considerable.

5.4 Impacts on the environment

The Data Acquisition Ordinance itself cannot result in any direct reductions in emissions, but it represents a major preparatory step towards the implementation in Switzerland of measures based on the "polluter pays" principle aimed at reducing CO₂ emissions from civil aviation operations.

6. Relationship to international legislation

The Data Acquisition Ordinance applies to an equal extent to domestic and foreign aircraft operators. It relates only to data acquisition and does not anticipate any definitive decision by the Federal Council concerning the incorporation of civil aviation into the Swiss emissions trading scheme or the introduction of any other measure.

The provisions of the Ordinance have been harmonised with those of the EU emissions trading scheme. At an international level, however, there are differences of opinion regarding the legality of the integration of flights and aircraft operators from third-party states into the EU emissions trading scheme. In the view of a large number of third-party states, including major civil aviation nations such as the USA, Russia and China, the integration is contrary to the provisions of the Chicago Convention, which regulates international civil aviation. By contrast, a ruling by the EU Court of Justice dated 21 December 2011 confirmed the legality of the steps taken by the EU.¹⁴ At present it is not possible to predict how and when these international differences will be resolved.

¹⁴ European Court of Justice, ruling of 21.12.2011, Rs. C-366/10, Air Transport Association of America et al versus Secretary of State for Energy and Climate Change, not yet published.