

**EXPLANATORY MEMORANDUM TO
THE GREENHOUSE GAS EMISSIONS TRADING SCHEME (AMENDMENT)
REGULATIONS 2014**

2014 No. 3125

1. This explanatory memorandum has been prepared by the Department of Energy and Climate Change and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1. The Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2014 (“the Regulations”) implement EU Regulation No 421/2014 of the European Parliament and of the Council amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community (“the EU Regulation”).

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1. These Regulations are made in exercise of the powers conferred by both section 2(2) of the European Communities Act 1972 and section 2 of the Pollution Prevention and Control Act 1999. A combination of these powers is needed as section 2 of the 1999 Act is the appropriate domestic power, but does not extend to Northern Ireland. It is therefore necessary to exercise the powers in section 2(2) of the 1972 Act as well as those in section 2 of the 1999 Act.

4. Legislative context

4.1. Directive 2003/87/EC (“the Directive”) is currently implemented in the United Kingdom by the Greenhouse Gas Emissions Trading Scheme Regulations 2012 (S.I. 2012/3038) (the “2012 Regulations”). Table 1 sets out the details of the relevant EU and domestic legislation. For aviation, the Directive and the 2012 Regulations provide that aircraft operators which operate flights departing from or arriving in a European Economic Area (“EEA”) airport are required to monitor and report their emissions each year, and surrender a number of allowances equal to their emissions the following year.

4.2. The EU Regulation provides for a derogation from the requirements of the Directive in respect of flights between an EEA airport and an airport outside the EEA (“extra-EEA flights”), and in respect of flights between an EEA airport and an airport in an outermost region (“outermost region flights”), from 2013 to 2016. It also provides for an exemption from the requirements of the Directive for non-commercial aircraft operators emitting less than 1,000 tonnes of carbon dioxide (CO₂) per year between 2013 and 2020. In addition, it provides for an extra-ordinary compliance cycle for 2013 emissions. Whereas in the ordinary course, emissions would have been required to be reported and allowances surrendered in respect of those emissions by 31st March 2014 and 30th April 2014 respectively, the EU Regulation provides that the report for 2013 emissions must be submitted by 31st March 2015 and allowances surrendered by 30th April 2015 – at the same time as for 2014 emissions. These Regulations implement the EU Regulation by making amendments to the 2012 Regulations.

- 4.3. Given that the derogation in the EU Regulation in respect of extra-EEA flights and outermost region flights covers compliance years which are historical (2013), current (2014) and in the future (2015 and 2016), and to avoid these Regulations purporting to have retrospective effect, that derogation is implemented in the Regulations as follows. Where obligations in respect of the derogated flights have already arisen, the Regulations disapply any liability of the operator to a civil penalty for failing to comply with those obligations. In respect of future periods, these Regulations then amend the substantive requirement in the 2012 Regulations, to exclude any compliance requirements in respect of derogated flights. These amendments together implement the derogation. Similarly, for the exemption for non-commercial operators with annual emissions of less than 1,000 tonnes of CO₂, these Regulations disapply the liability to civil penalties in the 2012 Regulations for obligations which have already arisen, and for future obligations, they amend the definition of “aviation activities” in the 2012 Regulations, to exclude activities of exempt operators.
- 4.4. The 2012 Regulations consolidated (with amendments) two previous sets of implementing regulations, including the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (S.I. 2010/1996) (the “2010 Regulations”). The 2010 Regulations were revoked, with savings and transitional provisions, by Part 11 of the 2012 Regulations. The effect of those savings and transitional provisions, amongst other things, was to preserve the obligations of aircraft operators under regulation 26 of the 2010 Regulations, in respect of flights in the calendar year from 1st January 2012, with their associated civil penalties. Under regulation 26, the aircraft operator must, surrender allowances equal to the operator’s aviation emissions in 2012, by 30th April 2013. If the operator fails to surrender sufficient allowances, the operator must surrender allowances equal to the deficit by 30th April in the year following the year in which notice is given.
- 4.5. The 2012 Regulations have since been amended by three instruments including the Greenhouse Gas Emissions Trading Scheme (Amendment) Regulations 2013 (S.I. 2013/1037) (“the 2013 Amending Regulations”). The 2013 Amending Regulations implemented Decision 377/2013 of the European Parliament and the Council (the “Stop the Clock Decision”), which required Member States not to enforce obligations of aircraft operators in respect of 2012 flights, to the extent that they arise in respect of flights to or from an aerodrome outside the EEA and certain other closely connected areas. The 2013 Amending Regulations thus provided that an aircraft operator is not liable to a civil penalty for failing to surrender allowances in respect of such flights, provided that the operator complied with certain other conditions in the Stop the Clock Decision. The 2013 Amending Regulations did not, however, amend the operation of the provision in the 2010 Regulations which require an operator which failed to surrender sufficient allowances by 30th April 2013, to surrender the deficit by the year after notice is given, to take account of the derogation under the Stop the Clock Decision. These Regulations also remedy that omission, by providing that the duty to surrender the deficit does not arise in so far as the duty to surrender relates to flights to or from an aerodrome outside the EEA and other closely connected areas.
- 4.6. These Regulations also correct an error in Schedule 8 of the 2012 Regulations relating to the year for which operators are required to monitor tonne-kilometre data for the purposes of making an application for an allocation of allowances from the special reserve. The Amending Regulations substitute the reference to the “benchmarking year” (i.e. 2010) with the “second calendar year of the trading phase” (i.e. 2014), as required by the Directive. The consultation asked whether any aircraft operators would be prejudicially affected by this amendment, but no responses were received.

Therefore, as far as the UK regulators are aware, operators which intend to apply to the special reserve have been monitoring data for 2014 (as required by the Directive) and will not be prejudiced by this change.

4.7. The definition of “the Directive” in the 2012 Regulations is ambulatory, referring to the Directive “as amended from time to time”. Where definitions in these Regulations refer to the Directive (“aviation activities” and “commercial air transport operators”), these definitions are therefore also ambulatory (which is a continuation of the existing position in the 2012 Regulations in the case of the definition of “aviation activities”). The Regulations also include a new ambulatory reference to Commission Regulation (EU) No 606/2010 of 9 July 2010 on the approval of a simplified tool developed by the European organisation for air safety navigation (Eurocontrol) to estimate the fuel consumption of certain small emitting aircraft operators. That Commission Regulation is purely of a technical nature, specifying the tool that can be used by operators for the verification of aviation emissions.

4.8. A transposition note of the 2012 Regulations is laid alongside these regulations.

A table setting out the European and domestic legislation which is relevant for the purpose of this memorandum is set out below.

EU legislation	Brief description
Directive 2003/87/EU	Established the EU Emissions Trading System
Directive 2008/101/EC	Amended Directive 2003/87/EC to extend the EU ETS to cover aviation activities
Decision 377/2013/EU	Provided for a temporary derogation for flights in 2012 to or from an aerodrome outside of the EEA or certain other closely connected areas
Regulation 421/2014/EU	Provides for a temporary derogation for flights between 2013 and 2016 to or from an aerodrome outside of the EEA or to or from an outermost region and certain other amendments as described in this memorandum
UK legislation	Brief description
S.I. 2009/2301	Transposed part of Directive 2008/101/EC
S.I. 2010/1996	Revoked and replaced S.I. 2009/2301 with certain savings, to complete the transposition of Directive 2008/101/EC
S.I. 2012/2038	Consolidated and replaced previous implementing regulations (in particular S.I. 2010/1996), but with certain savings and transitional provisions
S.I. 2013/755	Amended S.I. 2012/2038 to transfer the functions of the regulator in respect of Wales to the Natural Resources Body for Wales
S.I. 2013/1037	Amended S.I. 2012/2038, to implement Decision 377/2013/EU
S.I. 2013/3135	Made minor amendments to S.I. 2012/2038 for various matters including the harmonisation and improvement of enforcement regimes

5. Territorial extent and application

5.1. These Regulations apply to England, Wales, Scotland and Northern Ireland.

6. European Convention on Human Rights

6.1. As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1. The EU Emissions Trading System (EU ETS) was established under the Directive to promote cost-effective reductions in CO₂ emissions. It supports the EU's commitment to a global carbon market as a key instrument for tackling climate change, and will be central in enabling the EU to achieve its stated goals of reducing emissions by 20% in 2020 and 40% by 2030 compared to 1990 levels. The EU ETS is a cap-and-trade system under which there is a cap (or limit) on total emissions and operators need to surrender carbon allowances in line with their annual emissions. Some allowances are allocated to operators for free, some auctioned, and others available for allocation to new entrants.

7.2. The Directive to include aviation in the EU ETS (2008/101/EC)¹ entered into force on 2 February 2009, and aviation was fully included in the EU ETS from 1 January 2012. Aviation EU ETS requires all aircraft operators that operate flights into or out of aerodromes situated in the EEA (e.g. a flight between New York and London) to monitor their CO₂ emissions for those flights each calendar year from 1 January 2010. Aircraft operators are required to then submit an independently verified report of their CO₂ emissions for those flights to their regulator by 31 March of the following year. Subsequently, from 30 April 2013 aircraft operators must surrender the corresponding number of EU emissions allowances to their designated regulating body each year to account for their annual verified emissions in the previous year.

7.3. Shortly after coming into force, the Aviation EU ETS was met with international opposition due to perceived infringements on sovereignty. In parallel, progress in negotiations at the International Civil Aviation Organisation (ICAO)² towards a global measure to address aviation emissions encouraged the European Commission to propose to temporarily suspend, or 'stop the clock' ("the Decision"), on enforcement of the intercontinental elements of Aviation EU ETS for one year, pending "sufficient progress" at the ICAO General Assembly in autumn 2013.

7.4. The 2013 ICAO Assembly adopted a non-binding Resolution agreeing to make a decision at the next Assembly in 2016 on a global market-based measure to address aviation emissions from 2020. The EU welcomed this progress towards the global measure to tackle aviation emissions. In addition, the Resolution sought to limit the application of national and regional market based measures where "mutual consent" had not been obtained. Forty two European states³ placed a reservation on this part of the Resolution to signal their disagreement with this text.

¹ Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0101:EN:NOT>.

² ICAO, an agency of the United Nations, was created in 1944 to promote the safe and orderly development of international civil aviation throughout the world. It sets standards and regulations necessary for aviation safety, security, efficiency and regularity, as well as for aviation environmental protection.

³ This included all the Member States of the EU and 14 other Member States of the European Civil Aviation Conference (ECAC) including Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, the Republic of Moldova, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland, and the Former Yugoslav Republic of Macedonia.

- 7.5. Following the Assembly, the Commission proposed to amend Aviation EU ETS for the period from 2014 to 2020 based on a ‘European Regional Airspace’ scope⁴. The majority of EU Member States, however, favoured an intra-EEA scope (e.g. a flight between London and Madrid)⁵ and after six months of negotiations, the European Parliament and Council approved the compromise agreement on this basis from 2013 until 2016 (with automatic resumption of the full scheme in 2017 subject to a European Commission lead review in 2016 to take account of the ICAO Assembly in 2016).
- 7.6. These Regulations implement the EU Regulation which came into force on 30 April 2014. The EU Regulation reduces the scope of the Aviation EU ETS to an intra-EEA scope from 1 January 2013 until 31 December 2016, meaning that it will only cover emissions from flights between two EEA airports. In order to allow time to implement these new provisions, there is an extraordinary two-year compliance cycle for 2013 aviation emissions, which means that data for both 2013 and 2014 is to be reported and allowances are to be surrendered by 31 March 2015 and 30 April 2015 respectively. The EU Regulation also introduces a new exemption for non-commercial operators emitting less than 1,000 tonnes CO₂ per year until 2020, as well as simplified procedures for operators emitting less than 25,000 tonnes CO₂ per year. The number of free allowances issued and allowances auctioned are reduced in proportion to the reduction in scope of Aviation ETS.
- 7.7. Globally, the aviation sector is responsible for about one to two per cent of emissions of greenhouse emissions (GHGs), the gases responsible for climate change⁶. In the UK, domestic and international aviation⁷ emissions account for about six per cent of total GHG emissions or about 21 per cent of the transport sector’s GHG emissions.⁸ Aviation is, however, likely to make up an increasing proportion of the both UK and global total GHG emissions as other sectors decarbonise more quickly over time.
- 7.8. The Government’s objective is to ensure that the aviation sector continues to make a significant and cost effective contribution towards reducing global emissions. The emphasis is on action at a global level as the best means of securing UK objectives.
- 7.9. As noted above, the inclusion of aviation in the EU ETS attracted international opposition. The EU Regulation ensures that Aviation EU ETS continues to operate in an effective manner whilst ensuring broad acceptability with non-EU countries, thus creating the conditions to facilitate an agreement on a global measure for aviation emissions at ICAO in 2016. The emissions coverage, and likely emissions reductions, of any global measure would far outweigh that of the Aviation EU ETS.
- 7.10. The amendments to the 2010 and 2012 Regulations are necessary to reflect the change in scope of the Aviation ETS, to ensure that the domestic law is consistent with EU law, to give certainty to UK operators, verifiers and other stakeholders, and to ensure UK regulators have the appropriate powers to implement the provisions of the

⁴ This would have required airlines to surrender allowances for emissions incurred by any flights within European airspace, i.e. anywhere within the space extending to 12 nautical miles from the EU’s coast.

⁵ This requires only those flights that both depart and arrive in the EU to surrender allowances.

⁶ *Reducing Transport Greenhouse Gas Emissions: Trends & Data* (International Transport Forum, 2010), available at: <http://www.internationaltransportforum.org/Pub/pdf/10GHGTrends.pdf> and David McCollum, Gregory Gould and David Greene, *Greenhouse Gas Emissions from Aviation and Marine Transportation: Mitigation Potential and Policies* (Prepared for the Pew Center on Global Climate Change, 2009), available at: <http://www.c2es.org/docUploads/aviation-and-marine-report-2009.pdf>.

⁷ There is currently no internationally agreed way of allocating international emissions to individual countries. The percentage shares are based on the percentage of bunker fuel sales to the aviation sector from the UK.

⁸ *2012 inventory data tables* (DECC, 2014), available at:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277022/20140204_2012_UK_Greenhouse_Gas_Emissions_Final_Figures_data_tables.xls.

EU Regulation. Whilst there were only seven responses to the consultation, Aviation EU ETS more widely continues to attract substantial interest from non-EU states and other stakeholders.

8. Consultation outcome

8.1. The public consultation commenced on Monday 11 August 2014 for a six week period concluding on Monday 22 September 2014. An invitation to respond was issued to aircraft operators; non-governmental organisations; wider EU ETS participants and verifiers. There were seven responses which broadly sought clarity on how the proposed amendments would impact on their operations. The Government also held four stakeholder workshops in November and December 2013 and February and June 2014 to update stakeholders on the negotiations taking place and the likely legislative outcome. A full consultation response will be published on gov.uk before the new legislation is laid before Parliament.

9. Guidance

9.1. The Environment Agency, the English regulator for EU ETS has developed guidance for aircraft operators which explains their obligations under the new legislation. This will be available by the end of December 2014 on gov.uk.

10. Impact

10.1. The final impact assessment will be published alongside these regulations. The consultation responses were reviewed when finalising this impact assessment. However, significant amendments to the consultation stage impact assessment were not required as the consultation responses did not provide any substantial new evidence.

11. Regulating small business

11.1. The legislation does apply to small business. There is an exemption threshold in the Regulations which excludes non-commercial aircraft operators which emit less than 1,000 tonnes of CO₂ per annum from 2013 until 2020 (small emitters) alongside the existing commercial threshold of 10,000 tonnes of CO₂ per annum. Furthermore, there are simplified procedures for aircraft operators emitting less than 25,000 tonnes of CO₂ per annum which allows operators to use Eurocontrol's small emitters tool. All UK regulated operators were consulted on the amended regulations and had the opportunity to attend the stakeholder workshops. Whilst it has not been possible to attribute how many of these small emitters are small businesses, we can estimate that there were 65 small businesses (10-49 employees) in the passenger air transport sector in the UK; and 25 small businesses in the freight air transport and space transport sector in the UK at the start of 2013⁹.

⁹ *Business population estimates 2013* (BIS, 2013), available at: <https://www.gov.uk/government/publications/business-population-estimates-2013>.

12. Monitoring and review

- 12.1. Article 1(8) of the EU Regulation provides that the European Commission shall report to the European Parliament and the Council following the 2016 ICAO assembly, and in that report, shall consider and, if appropriate, include proposals on the appropriate scope for the coverage of emissions from activity to and from airports in countries outside the EEA from 1 January 2017. If any further EU legislation is adopted following this review, the 2012 Regulations (including the changes made by these regulations) will need to be reviewed.
- 12.2. In addition, following agreement on the 2030 Climate and Energy Framework at the October European Council, the European Commission is expected to announce legislation to implement the 40% greenhouse gas reduction target by 2030 (on 1990 levels) which will involve a review of the ETS directive. Although there is no indication by the Commission of the timing or extent of this review yet, this is likely to take place in 2015 and would provide a further opportunity for review and consolidation of the 2012 Regulations.
- 12.3. The review clause in the 2012 Regulations is also still applicable to these amendments. This requires that the Secretary of State reviews the operation and the effect of the 2012 Regulations and sets out the conclusions of the review in a published report within 5 years of them coming into force, and within every 5 years after that.

13. Contact

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