

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 (Text with EEA relevance)

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

Having regard to the opinion of the Committee of the Regions⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾,

Whereas:

- (1) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community⁽⁴⁾ established a scheme for greenhouse gas emission allowance trading within the Community in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.
- (2) The ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC), which was approved on behalf of the European Community by Council Decision 94/69/EC⁽⁵⁾, is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.
- (3) The European Council meeting in Brussels on 8 and 9 March 2007 underlined the vital importance of achieving the strategic objective of limiting the global average temperature increase to not more than 2 °C above pre-industrial levels. The latest scientific findings reported by the Intergovernmental Panel on Climate Change (IPCC) in its Fourth Assessment Report demonstrate even more clearly that the negative impacts of climate change are increasingly posing a serious risk to ecosystems, food production and the attainment of sustainable development and of the Millennium Development Goals, as well as to human health and security. Keeping the 2 °C

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objective within reach requires stabilisation of the concentration of greenhouse gases in the atmosphere in line with about 450 ppmv CO₂ equivalent, which requires global greenhouse gas emissions to peak within the next 10 to 15 years and substantial global emission reductions to at least 50 % below 1990 levels by 2050.

- (4) The European Council emphasised that the European Union is committed to transforming Europe into a highly energy-efficient and low greenhouse gas-emitting economy and, until a global and comprehensive post-2012 agreement is concluded, made a firm independent commitment for the EU to reduce its greenhouse gas emissions to at least 20 % below 1990 levels by 2020. The limitation of greenhouse gas emissions from aviation is an essential contribution in line with this commitment.
- (5) The European Council emphasised that the EU is committed to a global and comprehensive agreement for reductions in greenhouse gas emissions beyond 2012, providing an effective, efficient and equitable response on the scale required to face climate change challenges. It endorsed a 30 % reduction in the EU's greenhouse gas emissions below 1990 levels by 2020 as its contribution to a global and comprehensive agreement for the period beyond 2012, provided that other developed countries commit themselves to comparable emission reductions and economically more advanced developing countries to contributing adequately according to their responsibilities and respective capabilities. The EU is continuing to take the lead in the negotiation of an ambitious international agreement that will achieve the objective of limiting the global temperature increase to 2 °C and is encouraged by the progress made towards this objective at the 13th Conference of the Parties to the UNFCCC in Bali in December 2007. The EU will seek to ensure that such a global agreement includes measures to reduce greenhouse gas emissions from aviation and, in this event, the Commission should consider which amendments to this Directive as it applies to aircraft operators are necessary.
- (6) On 14 February 2007 the European Parliament adopted a resolution on climate change⁽⁶⁾ in which it referred to the objective to limit the average global temperature increase to 2 °C above pre-industrialisation levels, and in which it urged the EU to maintain its leading role in the negotiations with a view to establishing a post-2012 international framework on climate change and to maintain a high level of ambition in future discussions with its international partners, and it emphasised the need to undertake overall emission reductions for all industrialised countries of 30 % compared to 1990 emission levels by 2020 with a view to achieving a reduction in the order of 60 to 80 % by 2050.
- (7) The UNFCCC requires all parties to formulate and implement national and, where appropriate, regional programmes containing measures to mitigate climate change.
- (8) The Kyoto Protocol to the UNFCCC, which was approved on behalf of the European Community by Council Decision 2002/358/EC⁽⁷⁾, requires developed countries to pursue the limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation, working through the International Civil Aviation Organisation (ICAO).

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- (9) While the Community is not a Contracting Party to the 1944 Chicago Convention on International Civil Aviation (the Chicago Convention), all Member States are Contracting Parties to that Convention and members of the ICAO. Member States continue to support work with other States in the ICAO on the development of measures, including market-based instruments, to address the climate change impacts of aviation. At the sixth meeting of the ICAO Committee on Aviation Environmental Protection in 2004, it was agreed that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices seemed sufficiently unattractive that it should not then be pursued further. Consequently, Resolution A35-5 of the ICAO's 35th Assembly held in September 2004 did not propose a new legal instrument but instead endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. Appendix L to Resolution A36-22 of the ICAO's 36th Assembly held in September 2007 urges Contracting States not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States. Recalling that the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States, the Member States of the European Community and fifteen other European States placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory.
- (10) The Sixth Community Environment Action Programme established by Decision No 1600/2002/EC of the European Parliament and of the Council⁽⁸⁾ provided for the Community to identify and undertake specific actions to reduce greenhouse gas emissions from aviation if no such action were agreed within the ICAO by 2002. In its conclusions of October 2002, December 2003 and October 2004, the Council has repeatedly called on the Commission to propose action to reduce the climate change impact of international air transport.
- (11) Policies and measures should be implemented at Member State and Community level across all sectors of the Community economy in order to generate the substantial reductions needed. If the climate change impact of the aviation sector continues to grow at the current rate, it would significantly undermine reductions made by other sectors to combat climate change.
- (12) In its Communication of 27 September 2005 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions entitled 'Reducing the Climate Change Impact of Aviation', the Commission outlined a strategy for reducing the climate impact of aviation. As part of a comprehensive package of measures, the strategy proposed the inclusion of aviation in the Community scheme for greenhouse gas emission allowance trading and provided for the creation of a multi-stakeholder working group on aviation as part of the second phase of the European Climate Change Programme to consider ways of including aviation in the Community scheme. In its Conclusions of 2 December 2005, the Council recognised that, from an economic and environmental point of view, the inclusion of the aviation

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sector in the Community scheme seemed to be the best way forward and called on the Commission to bring forward a legislative proposal by the end of 2006. In its resolution of 4 July 2006 on reducing the climate change impact of aviation⁽⁹⁾, the European Parliament recognised that emissions trading has the potential to play a role as part of a comprehensive package of measures to address the climate impact of aviation, provided that it is appropriately designed.

- (13) A comprehensive package of measures should also include operational and technological measures. Improvements in air traffic management under the Single European Sky and SESAR programmes could help increase overall fuel efficiency by up to 12 %. Research into new technologies, including into methods for improving the fuel efficiency of aircraft, can further cut emissions from aviation.
- (14) The objective of the amendments made to Directive 2003/87/EC by this Directive is to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the Community scheme.
- (15) Aircraft operators have the most direct control over the type of aircraft in operation and the way in which they are flown and should therefore be responsible for complying with the obligations imposed by this Directive, including the obligation to prepare a monitoring plan and to monitor and report emissions in accordance with that plan. An aircraft operator may be identified by the use of an ICAO designator or any other recognised designator used in the identification of the flight. If the identity of the aircraft operator is not known, the owner of the aircraft should be regarded as the aircraft operator unless it proves which other person was the aircraft operator.
- (16) In order to avoid distortions of competition and improve environmental effectiveness, emissions from all flights arriving at and departing from Community aerodromes should be included from 2012.
- (17) The Community and its Member States should continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. The Community scheme may serve as a model for the use of emissions trading worldwide. The Community and its Member States should continue to be in contact with third parties during the implementation of this Directive and to encourage third countries to take equivalent measures. If a third country adopts measures, which have an environmental effect at least equivalent to that of this Directive, to reduce the climate impact of flights to the Community, the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country's measures, after consulting with that country. Emissions trading schemes being developed in third countries are beginning to provide for optimal interaction with the Community scheme in relation to their coverage of aviation. Bilateral arrangements on linking the Community scheme with other trading schemes to form a common scheme or taking account of equivalent measures to avoid double regulation could constitute a step towards global agreement. Where such bilateral arrangements are made, the Commission may amend the types of aviation activities included in the Community scheme, including consequential adjustments to the total quantity of allowances to be issued to aircraft operators.

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- (18) In line with the principle of better regulation, certain flights should be exempt from the Community scheme. To further avoid disproportionate administrative burdens, commercial air transport operators operating, for three consecutive four-month periods, fewer than 243 flights per period should be exempt from the Community scheme. This would benefit airlines operating limited services within the scope of the Community scheme, including airlines from developing countries.
- (19) Aviation has an impact on the global climate through releases of carbon dioxide, nitrogen oxides, water vapour and sulphate and soot particles. The IPCC has estimated that the total climate impact of aviation is currently two to four times higher than the effect of its past carbon dioxide emissions alone. Recent Community research indicates that the total climate impact of aviation could be around two times higher than the impact of carbon dioxide alone. However, none of these estimates takes into account the highly uncertain cirrus cloud effects. In accordance with Article 174(2) of the Treaty, Community environment policy is to be based on the precautionary principle. Pending scientific progress, all impacts of aviation should be addressed to the extent possible. Emissions of nitrogen oxides will be addressed in other legislation to be proposed by the Commission in 2008. Research on the formation of contrails and cirrus clouds and effective mitigation measures, including operational and technical measures, should be promoted.
- (20) In order to avoid distortions of competition, a harmonised allocation methodology should be specified for determining the total quantity of allowances to be issued and for distributing allowances to aircraft operators. A proportion of allowances will be allocated by auction in accordance with rules to be developed by the Commission. A special reserve of allowances should be set aside to ensure access to the market for new aircraft operators and to assist aircraft operators which increase sharply the number of tonne-kilometres that they perform. Aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated.
- (21) Full harmonisation of the proportion of allowances issued free of charge to all aircraft operators participating in the Community scheme is appropriate in order to ensure a level playing field for aircraft operators, given that each aircraft operator will be regulated by a single Member State in respect of all their operations to, from and within the EU and by the non-discrimination provisions of bilateral air service agreements with third countries.
- (22) Aviation contributes to the overall climate change impact of human activities and the environmental impact of greenhouse gas emissions from aircraft can be mitigated through measures to tackle climate change in the EU and third countries, especially in developing countries, and to fund research and development for mitigation and adaptation including in particular in the fields of aeronautics and air transport. Decisions on national public expenditure are a matter for Member States, in line with the principle of subsidiarity. Without prejudice to that position, revenues generated from the auctioning of allowances, or an equivalent amount where required by overriding budgetary principles of the Member States, such as unity and universality, should be

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used to reduce greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, to fund research and development for mitigation and adaptation and to cover the cost of administering the Community scheme. Revenues generated from auctioning should also be used on low-emission transport. The proceeds of auctioning should in particular be used to fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and measures to avoid deforestation and facilitate adaptation in developing countries. The provisions of this Directive relating to the use of revenues should not prejudice any decision on the use to be made of revenues generated from the auctioning of allowances in the broader context of the general review of Directive 2003/87/EC.

- (23) Provisions for the use of funds from the auctioning should be notified to the Commission. Such notification does not release Member States from the obligation laid down in Article 88(3) of the Treaty to notify certain national measures. This Directive should be without prejudice to the outcome of any future State aid procedures that may be undertaken in accordance with Articles 87 and 88 of the Treaty.
- (24) To increase the cost-effectiveness of the Community scheme, aircraft operators should be able to use certified emission reductions (CERs) and emission reduction units (ERUs) from project activities to meet obligations to surrender allowances up to a harmonised limit. The use of CERs and ERUs should be consistent with the criteria for acceptance for use in the trading scheme set out in this Directive. The average of the percentages specified by Member States for the use of CERs and ERUs during the Kyoto Protocol's first commitment period is approximately 15 %.
- (25) In its Conclusions, the European Council meeting in Brussels on 13 and 14 March 2008 recognised that in a global context of competitive markets the risk of carbon leakage is a concern that needs to be analysed and addressed urgently in the new Emissions Trading System Directive, so that if international negotiations fail appropriate measures can be taken. An international agreement remains the best way of addressing this issue.
- (26) In order to reduce the administrative burden on aircraft operators, one Member State should be responsible for each aircraft operator. Member States should be required to ensure that aircraft operators which were issued with an operating licence in that Member State, or aircraft operators without an operating licence or from third countries whose emissions in a base year are mostly attributable to that Member State, comply with the requirements of this Directive. In the event that an aircraft operator fails to comply with the requirements of this Directive and other enforcement measures by the administering Member State have failed to ensure compliance, Member States should act in solidarity. The administering Member State should therefore be able to request the Commission to decide on the imposition of an operating ban at Community level on the aircraft operator concerned, as a last resort.
- (27) To maintain the integrity of the accounting system for the Community scheme in view of the fact that emissions from international aviation are not integrated into Member States' commitments under the Kyoto Protocol, allowances allocated to the aviation sector should only be used to meet the obligations placed on aircraft operators to surrender allowances under this Directive.

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- (28) In order to ensure equal treatment of aircraft operators, Member States should follow harmonised rules for the administration of aircraft operators for which they have responsibility, in accordance with specific guidelines to be developed by the Commission.
- (29) To safeguard the environmental integrity of the Community scheme, units surrendered by aircraft operators should only count towards greenhouse gas reduction targets that take these emissions into account.
- (30) The European Organisation for the Safety of Air Navigation (Eurocontrol) may possess information which could assist Member States or the Commission in discharging their obligations imposed by this Directive.
- (31) The provisions of the Community scheme relating to monitoring, reporting and verifying emissions and to penalties applicable to operators should also apply to aircraft operators.
- (32) The Commission should review the functioning of Directive 2003/87/EC in relation to aviation activities in the light of experience of its application and should then report to the European Parliament and the Council.
- (33) The review of the functioning of Directive 2003/87/EC in relation to aviation activities should consider the structural dependence on aviation of countries which do not have adequate and comparable alternative modes of transport and which are therefore highly dependent on air transport and in which the tourism sector provides a high contribution to those countries' gross domestic product. Special consideration should be given to mitigating or even eliminating any accessibility and competitiveness problems arising for the outermost regions of the Community, as specified in Article 299(2) of the Treaty, and problems for public service obligations in connection with the implementation of this Directive.
- (34) The Ministerial Statement on Gibraltar Airport, agreed in Córdoba on 18 September 2006, during the first Ministerial meeting of the Forum of Dialogue on Gibraltar, will replace the Joint Declaration on the Airport made in London on 2 December 1987, and full compliance with it will be deemed to constitute compliance with the 1987 Declaration.
- (35) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission⁽¹⁰⁾.
- (36) In particular, the Commission should be empowered to adopt measures for the auctioning of allowances not required to be issued for free; to adopt detailed rules on the operation of the special reserve for certain aircraft operators and on the procedures relating to requests for the Commission to decide on the imposition of an operating ban on an aircraft operator; and to amend the aviation activities listed in Annex I where a third country introduces measures to reduce the climate change impact of aviation. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, *inter alia*, by supplementing this Directive with new non-

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essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

- (37) Since the objective of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (38) In accordance with point 34 of the Interinstitutional Agreement on better law-making⁽¹¹⁾, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables illustrating, as far as possible, the correlation between the Directive and the transposition measures, and to make them public.
- (39) Directive 2003/87/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) [OJ C 175, 27.7.2007, p. 47.](#)
- (2) [OJ C 305, 15.12.2007, p. 15.](#)
- (3) Opinion of the European Parliament of 13 November 2007 (not yet published in the Official Journal), Council Common Position of 18 April 2008 ([OJ C 122 E, 20.5.2008, p. 19](#)) and Position of the European Parliament of 8 July 2008 (not yet published in the Official Journal). Council Decision of 24 October 2008.
- (4) [OJ L 275, 25.10.2003, p. 32.](#)
- (5) [OJ L 33, 7.2.1994, p. 11.](#)
- (6) [OJ C 287 E, 29.11.2007, p. 344.](#)
- (7) [OJ L 130, 15.5.2002, p. 1.](#)
- (8) [OJ L 242, 10.9.2002, p. 1.](#)
- (9) [OJ C 303 E, 13.12.2006, p. 119.](#)
- (10) [OJ L 184, 17.7.1999, p. 23.](#)
- (11) [OJ C 321, 31.12.2003, p. 1.](#)