

 **Client Alert****Consultations on the Aviation Directive Touch Down**

On 14 May 2009, the first consultation period for the UK Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 (“GHG Regulations”) will come to an end. The GHG Regulations are the first draft of the UK proposal to incorporate into national legislation the European Union (“EU”) amending directive to include aviation into its emissions trading scheme (“Aviation Directive”).

In anticipation of transposing the Aviation Directive into national law by February 2010, the UK government (England and Wales, Northern Ireland and Scotland) is engaging in a two-stage consultation. The first consultation document was issued on 4 March 2009 primarily addressing the reporting requirements for aircraft operators and proposing sanctions for non-compliance that include the imposition of civil penalties and detention and sale rights for the regulator. The proposed powers of the regulator to detain and sell aircraft operated by non-compliant aircraft operators will be of concern to owners and mortgagees of aircraft.

A second consultation document will be released closer to the end of the year, alongside a set of new UK regulations to address, amongst other things, the meatier issues of how aircraft operators will surrender allowances and the proposed EU-wide operating ban on non-compliant operators.

The Aviation Directive

The Aviation Directive entered into force on 2 February 2009. Effective 1 January 2012, it includes the aviation sector on the list of heavy emitters covered by the EU Emissions Trading Scheme (“EU ETS”), covering all aircraft flying to and from aerodromes in Europe. It establishes a cap for aviation sector emissions of 97 percent of the average of 2004 – 2006 levels. The cap will be reduced to 95 percent for 2013 – 2020. Like emitters in the electricity generation, iron, steel and cement manufacturing and pulp and paper industries already subject to the cap-and-trade programme, allowances are allocated to listed aircraft operators (i.e., passenger, freight and postal, unless they fall within the exception list in Annex 1 of the Aviation Directive) based on their actual greenhouse gas (“GHG”) emissions, and must be surrendered at the end of the compliance period. In the event of a shortfall, aircraft operators may purchase allowances in the market to cover the outstanding balance (e.g., at auction or from other EU ETS allowance holders). Credits obtained using the current [Kyoto Protocol](#) mechanisms (e.g., Clean Development Mechanism and Joint Implementation) can be used to achieve a portion of this compliance. A fine of 100 euro per tonne will be applied to emissions not curtailed to meet the cap.

UK Consultations

The GHG Regulations are designed to meet the 2010 requirements of the European Union’s [Monitoring and Reporting Decision](#). As proposed, the GHG Regulations submit aircraft operators licensed in the UK (and those designated in the [preliminary list](#) issued by the European Commission under Article 18a of the Aviation Directive, including large airlines such as Cathay Pacific and Continental, as well as lessors such as CIT Leasing) to reporting requirements that must be fulfilled by the end of August 2009, when the GHG Regulations are proposed to come into force.

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The reporting requirements are set out in two parts (1) benchmarking (voluntary) and (2) CO₂ emissions monitoring (mandatory).

Benchmarking

The requirement to submit a benchmarking scheme entails setting out how data will be collected in order to determine the “total tonne-kilometres” of freight and passengers flown to and from EU destinations in 2010 (calculated as the weight of passengers or cargo multiplied by the distance carried). The appropriate regulator in the UK (i.e., the Environment Agency for England and Wales, the Scottish Environmental Protection Agency and Chief Inspector of the Department of the Environment for Northern Ireland) must approve the plan by the end of 2009. The benchmarking data that has been obtained must then be verified by a third party verifier and submitted to the UK regulator by April 2011. The data will be used to determine the allocation by the European Commission of the cap applicable to the aircraft operator. Submitting a benchmarking plan, and collecting data under it, is voluntary and, although there is no penalty for not doing it, aircraft operators that do not engage in this first stage will not be entitled to any free allocation of allowances before 2020. What will be the cost of obtaining the allocations (e.g., at auction) remains to be determined.

CO₂ Emissions Monitoring

UK aircraft operators must submit to the regulator, by the end of August 2009, a plan detailing how CO₂ emissions will be monitored annually from 2010. This is mandatory for all UK aircraft operators. If the regulator does not approve the initial submission, the submission must be revised within four months to reflect the regulator’s requirements. The emissions data (for 2010) must then be collected, verified by an approved verifier and reported to the regulator by 31 March 2011 (using a formula based on fuel consumption multiplied by an emission factor for each flight and fuel).

Taking into consideration the large number of non-EU operators in the UK, the GHG Regulations propose civil penalties for this monitoring and reporting requirement (instead of harder to enforce criminal sanctions). The penalty for missing the deadline for reporting (or failing to re-submit a rejected plan within 15 days) is £5,000 on the first day, increasing by £500 every day thereafter, to a maximum after 90 days of £50,000. The same penalty applies for not monitoring in accordance with the emissions plan approved by the regulator. Slightly lower penalties apply for failure to submit a verified emissions report by 31 March 2011, and for failure to comply with obligations arising under the Monitoring and Reporting Decision.

Interestingly, if any penalty goes unpaid for six months after notice of penalty has been given, the regulator has the power to “detain and sell” any aircraft of which the aircraft operator is the operator at the time when the detention begins (with prior court approval and in accordance with the guidelines set out in the GHG Regulations for issuing public notice of the application for leave to sell an aircraft (and notifying, amongst others, the owner, operator, charterer and mortgagee of the aircraft)). The power extends to any aircraft documents and any equipment and stores used in connection with the aircraft’s operation, carried within the aircraft.

Where the ability to detain and sell the aircraft is linked in the GHG Regulation to non-payment of the penalty for breaching the reporting obligation, one must question whether this power sends the correct signal to aircraft operators prepared to pay the fine on time (but still not prepared to comply with the reporting obligation). Nevertheless, owners and aircraft financiers will undoubtedly feel that the mere existence of such power is draconian and disproportionate relative to the low amounts involved.

These provisions in the GHG Regulations are similar to the power to detain and sell aircraft which already exists in the UK for nonpayment of charges under [National Air Traffic Services](#) and [Eurocontrol charges](#). Similar to the UK legislation the power to detain and sell aircraft under the GHG Regulations does not distinguish between aircraft within a fleet. In order to exercise its power to detain and sell an aircraft, the regulator must issue a notice to do so, against “any aircraft of which the aircraft operator is the operator at the time when the detention begins.” A complex procedure for detention and sale (including appeals) is proposed.

The GHG Regulations also propose a priority for distribution of the proceeds of the sale: (1) payment of any customs duty on the aircraft (having brought it into the UK); (2) expenses incurred by the regulator for the detention and sale and the attendant proceedings; (3) payment of air services charges under the Transport Act 2000; (4) payment of airport charges owed by the aircraft operator to the owner of the aerodrome at which the aircraft was detained and (5) payment of the penalty under the GHG Regulations for which court approval was sought. Any surplus goes to those whose interests have been divested by the sale.

Owners of aircraft and mortgagees are directed the following questions in the Consultation Document in respect of the detention and sale of aircraft for unpaid civil penalties:

1. Do you consider it appropriate to follow a similar precedent (to NATS and EuroControl) for the aviation emissions trading scheme?
2. Can you suggest effective, dissuasive and proportionate methods of enforcement that do not involve the power to detain aircraft, especially in relation to overseas-based regulatees who may have no significant assets permanently located in the UK?
3. Do you agree that the appropriate regulator should have the power to seek leave of the court to sell any aircraft that has been detained for 40 days in order to recover any fees or penalties that remain outstanding?
4. Do you agree that the circumstances in which an appropriate regulator will not continue to detain an aircraft as outlined in Reg. 17 provide for effective, dissuasive and proportionate sanctions?
5. Do you agree with the extension of powers to sell aircraft to include the equipment of aircraft and any stores used in connection with its operation?
6. Please provide any comments on the proposed use of the proceeds of any sale of a detained aircraft, particularly the order of priorities.

Over the Horizon

Recognising the importance of air transport and the increase in air travel (even under current economic conditions), the UK government has confirmed its commitment to allow “environmentally sustainable” expansion of the aviation industry in the context of its obligations under the [Climate Change Act 2008](#). In addition to domestic measures to reduce aviation emissions, the UK has vehemently supported the inclusion of aviation in the EU ETS and any future international GHG reduction and trading agreement.

Although the Aviation Directive has been criticised as being “soft” on many important issues, it has been embraced by the EU as a much-needed and effective solution to reduce global GHG emissions. According to the influential Stern Review, transport accounts for 14 percent of global GHG emissions, and the majority of these are from road transport (76 percent) and aviation (12 percent). By 2050, direct CO₂ emissions from aviation are expected to account for 2.5 percent of global GHG emissions. If upstream CO₂ and CO₂ equivalent emissions are included, aviation is expected to account for approximately five percent of the total global warming effect in 2050.

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But the Aviation Directive has been pushed through the system at a time when the future of the Kyoto Protocol, or any international emissions reduction and trading system, is questionable. At the same time, the economics of the industry may be doing all of the “heavy lifting” in reducing aircraft emissions, with less air travel than in a more robust economic climate and fuel price volatility that is encouraging efficiency.

The UK has a heavy dependence on the airline industry and the GHG regulations that result from consultations over the next ten months will present a formidable challenge to legislators trying to balance a global climate crisis with a global financial crisis.

Submitting Comments

Comments on the consultation document should be sent by 14 May 2009 to:

EU ETS Aviation Consultation Team
EU Emissions Trading Scheme
Department of Energy and Climate Change (DECC)
4A Ergon House, Horseferry Road
London SW1P 2AL

or by e-mail to aviation.euets@decc.gsi.gov.uk

Responses will be summarised (including a list of names of organisations that responded but not the names of individuals, their addresses or other contact details).

Please feel free to contact the specialists listed below should you have any questions regarding this Alert or should you require assistance with submitting comments to DECC.

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The Firm's Climate Change, Renewable Energy and Clean Technology practice group, as well as the Aviation Practice, is following developments in this area closely. The groups regularly advise on this and other issues relating to climate change developments.

Please contact any of the lawyers listed below for additional information about White & Case's Climate Change, Renewable Energy and Clean Technology Initiative.

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