

Giulia Mauri, Partner, Aviation & Transport,
Verhaegen Wairavens and
Guy Viselé, EBAA and IBAC expert
on environmental matters

HAS THE CLOCK REALLY BEEN STOPPED ?



Stop The Clock

When European Climate Change Commissioner Connie Hedegaard announced on 12 November 2012 the decision to “Stop the Clock” on EU Emission Trading Scheme, this was considered as an important political signal to try and avoid a potential trade war between the European Union and the rest of the world. This does not however mean the end of the EU Aviation Emission Trading Scheme Directive.

Indeed, the “Stop the Clock” decision simply proposes to suspend the application of the EU ETS (aviation) Directive to flights taking off from, or landing in, any European Member State. This suspension will apply for a period of one year in order to give time to the ICAO Assembly of October-November 2013 to come up with a global market-based alternative to the EU ETS.

URGENT

The clock being now stopped on EU-ETS, ICAO has little time to find a viable alternative.



Indeed, the announcement to (partially) stop the clock on the EU ETS came immediately after the ICAO Council decision of 9 November 2012 to create a High level Group on Climate Change (HGCC) with the mission to develop policy recommendations including *inter alia*, the development of a framework for market-based measures (MBMs) and the feasibility of a global MBM scheme.

The partial suspension of the EU ETS should give precious time to the ICAO’s General Assembly of October 2013 for discussing and hopefully agreeing on a viable alternative. If ICAO should not succeed in finding a global alternative to the EU ETS, then the EU will revert, in November 2013, to the original version of the EU ETS Directive, applicable to all flights within and in and out of the EU.

Legal Issues

The proposed suspension raises several questions for operators, both within the European Union and in other countries.

From a legal standpoint, this suspension (the idea being that Directive 2003/87/EC will remain in force, but will have a derogation that covers extra-European flights) needs to be established through the EU “co-decision” procedure, which means that it needs consultation and agreement of the three EU institutional bodies: the Commission, the Council and the Parliament. The legislative proposal was published on 20 November 2012 and DG Climate Change is confident that the derogation will be approved by April 2013.

This estimate only concerns the approval of an amendment to the existing Directive, however, as indeed the EU ETS regulation is a “Directive”, once the changes will be formally published, they will still need to be implemented into national law in 27 different Member States, each of which will have its own legal requirements and timing. This entails that there could be a lack of uniformity not only on the types of implementing measures and their contents, but also on the timing of their coming into effect.

As a consequence, the Competent Authorities (CAs) of the EU Member States find themselves in a difficult position. They will have to continue applying the EU ETS Directive until this has been amended and the amendments implemented in national law, even though they are aware of the will of the Commission to stop the clock on extra-European flights.

Practical Questions for Operators

Unfortunately, the EU Commission’s political sign to avoid a trade war has been taken without considering all the players.

It particularly, this affects business aircraft operators as it represents an additional administrative workload. Operators face issues linked to the separation of data relating to intra-EU and extra-EU flights if they operate both and even if they are included in the “*de minimis*” rule, they will still have the burden to comply with Monitoring, Reporting and Verification (MRV).

We would advise operators to contact their CAs for clarification.

However, until the new rules come into force, the old rules will continue to apply. We therefore consider that it is safer, as things stand at this moment, to keep monitoring 2012 emissions data. Moreover, operators need to be aware that if no satisfactory agreement is found at the ICAO Assembly in October 2013, they will certainly have forced to comply with the ETS in 2013. It is therefore advisable to keep track of their emissions throughout the next year, should an agreement within ICAO prove impossible.

Several practical questions are being raised by operators, such as the definition of “international” flight, and what is or not covered by the “derogation”, the impact of the suspension on the “*de minimis*”, MRVs and free allowances, etc. The Commission has answered some of the more recurrent questions by issuing two FAQs documents, which can be consulted on their web-site (EU ETS: http://ec.europa.eu/clima/policies/ets/index_en.htm).

In this article, we will try and cover the most important questions.

The definition of « international flights » (temporarily exempted from the EU ETS Directive) has now been clarified. It covers all flights to and from the European Union (27 States), but also from EEA (27 EU + Iceland, Liechtenstein and Norway), EFTA (same + Switzerland), and Croatia. Therefore, a flight operated from, let



us say, the USA to one of those countries does not need to report and it is not subject to the EU ETS. However, if that same aircraft (whether EU or non-EU registered) operates an intra-European flight (as defined here-above), then such flight will be covered by the EU ETS.

The EU ETS Directive had established a « *de minimis* » rule, exempting from its application commercial aircraft emitting globally less than 10,000 tons of CO₂ per year. The proposed suspension does not vary the rule which remains fixed at 10,000 tons of global emissions. This means that an operator emitting less than 10,000 tons of CO₂ in Europe, but more than 10,000 tons globally, it is still bound by the EU ETS despite the “Stop The Clock” exemption of international flights. However, rather than paying for the global amount of emissions, for example 14,000 tons of CO₂, once the suspension approved, the operator will pay only for the portion of CO₂ emitted in Europe (for example 9,000 tons).

The exemption of international flights also impacts on the number of allowances which will be calculated in April 2013. The percentage of auctioning remains unchanged at 15% as laid down in the Directive. This means that a lower quantity of aviation allowances will be auctioned for 2012, proportionately reflecting the lower number of total allowances in circulation. Consequently, the Commission will withdraw a proportion of the allowances they had initially allocated for that period. The details thereof will be provided by the CAs of the relevant Member States and should be communicated to their assigned operators in the coming weeks.

The geographical scope of the exemption may be clarified as such. The “stop the clock” will have no impact on operators flying exclusively intra-EU: they need to continue to conform to all obligations of the EU ETS Directive, including the monitoring, reporting and verification mechanisms. Operators flying exclusively international flights (as defined here-above) would be excluded from the EU ETS for one year, and would also be exempt from surrendering EU ETS allowances corresponding to their 2012 emissions by the end of April 2013. However, even-though non-compliance penalties would not be

SQUARE ONE

Without an alternative, the EU will revert to the original version of EU-ETS.



enforced (conditional upon the return of their international flights-related allowances), they might still be requested to submit a verified 2012 annual emission report by end of March 2013. Moreover, they would still need to keep monitoring flights and emissions in 2013, so as to be ready should the ICAO MBM fails and should the EU Commission decide to apply again the full EU ETS.

As for operators flying both international and intra-EU, the situation is even more complicated: they will have to keep separate data for intra-EU flights and for international flights. In theory, they would have to report only their intra-EU flights and no penalties should be enforced for not reporting international flights. The worst case scenario would be that of a non-commercial operator flying just one intra-EU flight during the 2012 monitoring period: the operator will then have to submit a verified 2012 annual emission report by end of March 2013.

Monitoring, Reporting and Verification (MRV) would still be required for international flights but the non-compliance penalties should not be enforced on condition that the operator returns the allowances allo-

cated to him for his international flights. However, some Competent Authorities (CAs) might decide to keep requiring MRV for international flights, although the surrendering of allowances could be waived.

MRV remains mandatory for intra-EU flights, except for commercial operators below the “*de minimis*” threshold, which could require a verification to confirm the “*de minimis*” status (see above).

What will happen at the end of this year ?

Depending on the outcome of the ICAO Assembly of October 2013, several scenarios are possible.

Either the EU Member States considers the ICAO results positive enough to lengthen the international flights exemption for an indefinite period of time, or if they feel that there is not sufficient progress on the market-based mechanism, they will revert to the original EU ETS Directive, in which case international flights will automatically be again covered by the EU ETS for the entire 2013 period. This means that operators would then be required to submit a 2013 annual emissions report for both intra-EU and

international flights, and surrender allowances by end of April 2014.

Business aircraft operators are one of the collateral victims of the political move of the Commission. The already unrealistic administrative burden compared to the small size of their operations and their low level of emissions is now even worse, with no stability in the process which is time-limited and conditional on an ICAO positive result.

This creates distortion of competition between operators flying only intra-EU and having to comply at a high cost to them to the full EU ETS regulations, and operators flying only “internationally”. Moreover, it imposes a dual recording of data for operators flying both within the EU and international.

For non-EU business aircraft operators flying only very limited operations intra-EU, this will still generate heavy MRVs obligations, even if they fly only one intra-EU flight.

For US operators, the recently signed U.S. ETS Prohibition Bill (27th November 2012) doesn’t change much the situation as the Bill doesn’t preclude U.S. carriers to respect their ETS obligations for their intra-European flights. The U.S. law cannot have an extraterritorial effect. Just like any other non-EU carriers, U.S. carriers are bound by EU legislation when flying within the Union.

The “stop-the-clock” was announced by a press-conference, but no formal aviation stakeholders consultation meeting has been organized by DG Climate Change since then. The European Business Aviation Association has been very active on the issue, and had a first bilateral meeting with the Commission at the end of November 2012 and organized an EBAA Environmental Group meeting with operators early December 2012. EBAA is promoting a common global Business Aviation environmental strategy through IBAC at ICAO level. IBAC is now moving toward adoption of a position that any MBM framework approved by ICAO be “simple, predictable and manageable, taking into account the different scale of activity undertaken by business operators compared to that of commercial air transport.”



PRESSURE

All eyes will be on the ICAO general assembly in October 2013 to see if a solution can be found.