

## AVIATION WORKING GROUP – POSITION PAPER

### ***COUNCIL COMMON POSITION 5058/08 – C6-0000/2008 ON THE PROPOSAL TO AMEND DIRECTIVE 2003/87/EC TO INCLUDE AVIATION ACTIVITIES IN THE EU EMISSIONS TRADING SCHEME***

#### **Introduction**

The Aviation Working Group (*AWG*) wishes to submit its comments on the Council of the European Union's Common Position on the Proposal to amend Directive 2003/87/EC to include aviation activities within the European Emissions Trading Scheme (the *EU ETS*), as adopted on 18 April 2008 (the *Common Position*).

The AWG asks that these comments be taken into consideration as part of the current legislative deliberations on the Common Position.

#### **Aviation Working Group**

The AWG is a non-profit entity comprised of the world's major aviation manufacturers and financial institutions. Its purpose is to contribute to the development and acceptance of policies, laws, regulations and rules that facilitate international aviation financing and leasing and which minimise regulatory inefficiencies in the aviation sector. One of the AWG's principal statutory objects is to interact with States, intergovernmental organisations and other public and private national or international bodies, to voice the consensus opinions of its membership.

The AWG's membership is comprised of the leading manufacturers and financiers from Asia, the European Union, Latin America and North America. Accordingly, it is well-placed to provide a unique perspective on the Common Position in terms of its likely impact upon the aviation financing and leasing industry.

For further detail on the activities of the AWG, please see [www.awg.aero](http://www.awg.aero).

#### **Specific Comments on the Common Position**

Taking into consideration the current stage of the legislative process regarding the proposal to include aviation in the EU ETS, the AWG's comments on the Common Position are restricted to the issues that are of primary concern to its members and which, in the AWG's opinion, merit further regulatory consideration.

These issues are:

- Definition of ‘aircraft operator’;
- Proceeds of auctioning;
- Special reserve;
- NOx multiplier; and
- Annex I exclusions.

### **Definition of ‘aircraft operator’**

As a fundamental principle, the AWG considers that the non-operating owners of an aircraft should not incur liability under Directive 2003/87/EC. If any such liability is imposed, it should only occur as a last resort after all possible means of identifying the operator of the aircraft have been exhausted. Financial institutions which own and lease commercial aviation aircraft have no operational role as regards the aircraft. Any responsibilities and obligations created by the proposed amendments to Directive 2003/87/EC ought properly to reside with the operator. There is emerging precedent in other fields of aviation law and regulation for these propositions. Provided that the operator is suitably identified to the relevant regulatory body, there should be no formal recourse to the owner of the aircraft.

This position is recognised in Recital 13 of the Common Position which states that:

*“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....”*

The Common Position proposes the inclusion of the following definition of “aircraft operator” at Article 3(o) of Directive 2003/87/EC:

*“aircraft operator” means the person who operates an aircraft at the time it performs an aviation activity listed in Annex I or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft;*

At present, this definition meets the AWG’s concerns regarding potential owner liability, as it is broad enough to permit all possible means of operator identification by the owner. However, the AWG notes, with concern, Amendment 15 of the European Parliament’s Draft Recommendation for Second Reading on the Common Position dated 14 April 2008 (the **EP Draft Recommendation**) which proposes the following amendments to the definition:

*“aircraft operator” means the person **or body identified by its ICAO code which** operates an aircraft at the time it performs an aviation activity listed in Annex I or, where **the ICAO code** is not known, **the holder of the Air Operator’s Certificate (AOC) or the owner of the aircraft...**”*

The AWG is not supportive of these amendments. They represent a prescriptive list of the circumstances in which default liability will not pass to the owner; yet, these circumstances are not the only means by which an operator may be identified. This is recognised in Recital 13 referred to above which states that:

*“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 operator should be regarded as the aircraft operator unless it proves which other person was the aircraft operator.”*

The AWG notes that a compromise text could retain the EP Draft Recommendation amendments and allow owners to “*prove which other person was the aircraft operator*” in order to avoid any inequitable allocation of liability. A suggested text is set out below:

*“aircraft operator” means the person or body identified by its ICAO code which operates an aircraft at the time it performs an aviation activity listed in Annex I or, where the ICAO code is not known **or that person or body is not identified by the owner of the aircraft**, the holder of the Air Operator’s Certificate (AOC) or the owner of the aircraft. This will require a harmonised provision in Member States’ National Aviation Registries to ensure that the aircraft operator, as well as the owner, is always identified where possible, as per the Cape Town Convention on International Interests in Mobile Equipment;*

## **Proceeds of auctioning**

The AWG considers that a substantial part of the proceeds generated by Member States from the auctioning of emissions allowances should be ring-fenced and used to assist with specific efforts aimed at reducing the aviation sector’s impact on the environment.

In this regard, the AWG supports Amendments 3, 5 and 20 of the EP Draft Recommendation. Amendment 3 recognises that “*there is considerable emission lowering potential in technological and operational improvements...*”. Amendment 5 recognises that “*research and technology is the key to innovation and to achieving further cuts in aviation emissions.*” Amendment 20 proposes that “*Revenues generated from the auctioning of allowances shall be used to mitigate greenhouse gas emissions..., and to fund research and development for mitigation, especially in the airline sector...*”.

The AWG agrees with these provisions. Creating a clear linkage between the regulated activity and the proceeds of that regulation will help to garner support from stakeholders to take part in the broader efforts required to address aviation’s environmental impacts.

On this basis, the AWG is opposed to any commingling of the proceeds of allowance auctioning with the national budgets of each Member State.

## Special reserve

To avoid distortions to the market it is essential that the allocation methodology for emissions allowances treats incumbent operators and new entrants/fast-growing airlines in as even-handed manner as possible. Failure to do this will give static operators, or those in decline, a competitive advantage compared to growing rivals. This view is supported by a consideration of recent historical changes in the European aviation market: recent market entrants would have been unable to achieve their respective commercial successes had the aviation sector already been part of the EU ETS. Unequal treatment of new entrants will affect intra-sector competition. Firstly, if incumbent operators receive emissions allowances which are not available to new entrants, incumbents will receive a financial advantage that new entrants will not enjoy. This may act as a barrier to market entry as it will be materially more difficult for new entrants to compete. Secondly, if emissions allowances are not distributed on an equitable basis across the market, incumbent operators may treat the allowances as targeted gain instead of passing on the savings to consumers through lower prices. Thirdly, if a particular airline is growing it is doing so because it is in demand and because it is providing a more compelling service to consumers. If the allocation methodology favours static airlines, it will be favouring operators who are less commercially successful.

It is important to encourage new entrants and fast growing carriers as they tend to acquire the cleanest, most efficient aircraft which produce lower emissions. They also often operate with higher load factors, which means they produce lower carbon emissions per passenger. Discrimination in the allocation between incumbent and new entrant services would effectively discriminate against the services that are the least polluting. While overall growth in aviation may represent a significant environmental concern, if new entrants and fast growing operators replace incumbent airlines with cleaner aircraft, allocation methodology should not discourage them by distorting competition. In light of the above, it is clear that failure to make an appropriate allowance for these entities would be anti-competitive, contrary to consumer interests and potentially prejudicial to the environment. The AWG therefore supports the creation of a special reserve of emissions allowances for new entrants to the market and fast growing airlines, as is currently envisaged by Article 3f of the Common Position.

The AWG does, however, wish to express its concern at the level of the special reserve that is currently proposed by the Common Position.

A 3% reserve on the total quantity of allowances allocated to the market is inconsistent with historical trends and is considered to be too low. It will act as a discriminatory barrier to the normal commercial operations of new entrants/fast growing airlines and will indirectly support and sustain the use of ageing, less efficient aircraft. This would be contrary to the principal aims of the legislation.

This discriminatory effect will be exacerbated if Amendment 16 of the EP Draft Recommendation on allocations, which proposes a cap of 90% of the sum of historical aviation emissions, is adopted instead of the Common Position that envisages a cap of 100% of historical aviation emissions.

The AWG therefore recommends that a higher special reserve be created to avoid the negative consequences outlined above.

## **NOx multiplier**

As indicated in our prior comment letter dated 14 December 2007, the AWG considers that environmental regulation which impacts on the aviation industry should, where possible, be developed by ICAO.

In this regard it is noted that all aircraft are currently required to meet the engine certification standards adopted by the ICAO Council. These are set out in Annex 16, Volume II to the 1944 Chicago Convention on Civil Aviation. These provisions have already established limits for NOx emissions and, whilst they are based on an aircraft's landing and take-off cycle, they also serve to limit NOx emissions from aircraft at altitude.

The AWG notes that the ICAO emission standard for NOx was first adopted in 1981. It was subsequently made more stringent in 1993, when ICAO reduced the permitted emission levels by 20% for newly certificated engines with a production cut-off on 31 December 1999. In 1999, the ICAO Council further tightened the NOx standard by approximately 16% for engines newly-certificated from 31 December 2003.

ICAO has also taken steps to control NOx emissions through non-regulatory measures. The ICAO Council's Committee on Aviation Environmental Protection (*CAEP/7*) met in February 2007. Among the achievements of CAEP/7 was the introduction of medium and long-range goals in the development of technologies to control NOx<sup>1</sup> which gives the industry more clearly defined objectives and a longer planning horizon.

The AWG is of the view that NOx emissions are already appropriately regulated by ICAO. The AWG is therefore opposed to Amendment 25 of the EP Draft Recommendation which proposes the inclusion of a NOx multiplier in the absence of specific Community measures on NOx emissions. Such a provision would constitute unnecessary regulatory action and would fail to afford due recognition to the efforts that have already been made by aircraft operators and manufacturers to improve NOx emission standards.

The need to proceed with due consideration (and avoid wasted legislative time) is underscored by the scientific uncertainty which exists regarding the actual contribution of NOx to global warming. The 35<sup>th</sup> ICAO Assembly sought to ensure that future climate change assessments undertaken by the UN Inter-governmental Panel on Climate Change (*IPCC*) included updated information on aircraft-induced effects on the atmosphere. The workshop drew the following conclusions regarding NOx emissions and climate change:

*"Climate impacts are highly uncertain. There remain significant uncertainties on almost all aspects of aircraft environmental effects on climate, with the exception of the radiative forcing from the CO2 emissions. The ozone and methane RFs from NOx emissions are opposite in sign, so the extent to which they offset each other is an important uncertainty. Estimates for contrails and cirrus are particularly highly uncertain."*

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<sup>1</sup> Report of the Independent Experts to the Long Term Technology Task Group on the 2006 LTTG NOx Review and the Establishment of Medium and Long Term Technology Goals for NOx (CAEP/7 -WP/11 11/10/06)

The AWG is aware that the European Commission is considering the introduction of separate NO<sub>x</sub>-specific legislation in the European Union. For the reasons set out above, the AWG is opposed such regulatory action believing it to be duplicative of current ICAO efforts in this area.

### **Annex I exclusions: Test flights**

Point (g) of the table contained at Annex I, paragraph 2 of the Common Position contains an exclusion for “*flights performed exclusively for the purpose of checking, testing or certifying aircraft or equipment whether airborne or ground-based.*”

The AWG is supportive of Amendment 42 of the EP Draft Recommendation which proposes the extension of the exclusion to “*ferrying new aircraft as well as ferry flights performed by or on behalf of an aircraft owner as consequence of the occurrence of a sudden early termination event, event of default, repossession, or similar occurrence in respect of a leasing, charter or similar arrangement*”. Flights of this nature are normally unremunerated, of a one-off nature and occur with relative infrequency. It is therefore wholly appropriate that they be excluded from the scope of the legislation given the cost/benefit analysis in terms of administrative burden and actual reductions in carbon emissions.

### **Annex I exclusions: ‘de minimis’ levels of activity**

Point (j) of the table contained at Annex I, paragraph 2 of the Common Position contains an exclusion in respect of ‘de minimis’ levels of aviation activity which is defined as those flights “*performed by a commercial air transport operator operating, for three consecutive four month periods, fewer than 243 flights per period, which, but for this point, would fall within this activity*”.

This exclusion is a recognition that a threshold of aviation activity should exist, under which the requirements of the legislation should not apply. This regulatory approach is underpinned by the principle that administrative efficiency should take priority over the achievement of negligible carbon emission reductions. This is reflected in the wording of Recital 15 of the Common Position:

*“In line with the principle of better regulation, certain flights should be exempt from the scheme. To avoid further disproportionate administrative burdens, commercial air transport operators operating, for three consecutive four-month periods, fewer than 243 flights per period should be exempted from the scheme. This would benefit airlines operating limited services within the scope of the Community scheme, including airlines from developing countries.”*

Given the nature of Amendment 42, it can be seen that a possible alternative to the amendment of the test flights exclusion at point (g) would be to amend point (j) to cover “ferry-flights” and aviation activities of a similar nature. A suggested amendment and justification is enclosed in Appendix 1 to this paper.

The AWG also comments on Amendment 45 of the EP Draft Recommendation, which proposes that the ‘de minimis’ exclusion operate on the basis of carbon dioxide emissions instead of the number of flights. Given that the underlying rationale for exclusion is to reduce the administrative burden where the benefits in terms of carbon emissions reduction would be disproportionately low, it seems illogical to shift the basis of the exclusion to carbon emissions. Administratively, it would be simpler to monitor the number of flights.

For these reasons the AWG is supportive of Common Position approach to the ‘de minimis’ exclusion.

The AWG would welcome the opportunity to discuss its comments in further detail.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "J. Wool".

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Jeffrey Wool  
Secretary, AWG

CC: Claude Brandes (Airbus Industrie), Co-Chairman, AWG  
Scott Scherer (The Boeing Company), Co-Chairman, AWG