

# **EU ETS AVIATION**

## **Guidance on Civil Penalties**

## EU ETS AVIATION – Guidance on civil penalties

This document contains guidance on civil penalties for EU ETS Aviation.

Where a person is liable to a civil penalty under the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 (2009 Regulations) or the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2010 (2010 Regulations), we must impose that penalty, subject to limited discretion to waive or modify the penalty (see section D below).

### A : Establishing liability

1. We will investigate breaches of the Regulations to establish whether or not a person is liable to a civil penalty.

#### Standard of proof

2. The penalties under the 2009 Regulations and 2010 Regulations are civil penalties.
3. We will apply the civil standard of proof to the penalties, meaning that we must be satisfied on the balance of probabilities that a breach has occurred.

#### Procedures for establishing liability

4. In gathering evidence to prove that a person is liable to a civil penalty, we will use evidence reasonably available to us. This includes use of the Eurocontrol tool and information from third parties, such as the Civil Aviation Authority and aerodromes.
5. We may use our powers to serve notices requiring information under the 2010 Regulations to ascertain or confirm certain facts.
6. When assessing the evidence to establish whether or not a breach has occurred, we will carefully assess the weight and cogency of the evidence to satisfy ourselves according to the civil standard of proof.
7. If we issue a civil penalty, we will set out a statement of the facts behind the penalty or a summary of the evidence upon which we rely.

#### Power to withdraw civil penalty notice after issue

8. If, following the issue of a civil penalty, we cease to be satisfied that a person is liable to the penalty specified in the notice, we may withdraw the notice or modify it to reflect the correct penalty due. We may only exercise these powers up until the point at which the penalty is due (see section C below).

### B : Assessing amount of penalty due

1. The level of penalty for each offence is set out in the 2009 Regulations and 2010 Regulations. However, some penalties consist of a fixed sum only and others include both a fixed sum and an “additional daily penalty”.

### **Additional daily penalty**

2. An additional daily penalty may only be due for the offences of:
  - Failure to submit or resubmit an application for an emissions plan
  - Failure to monitor emissions
  - Failure to report aviation emissions
  - Failure to comply with emissions plan conditions
  - Failure to comply with an information notice
3. A person is liable to an additional daily penalty if there is a continuing breach which the person could take action to remedy. If the breach cannot be remedied or if it has already been remedied by the time the initial civil penalty notice is served, the person is not liable to an additional daily penalty.
4. An additional daily penalty starts to accumulate from the date that the initial civil penalty notice is served (see section C below) and stops accumulating on the date that the person either remedies the breach or the maximum amount payable has been reached.

### **Variable penalty**

5. The level of penalty for each offence is set out in the 2009 Regulations and 2010 Regulations. However, the regulator may substitute a lower amount than specified in the Regulations in relation to the following offences:
  - Failure of an aircraft operator to monitor aviation emissions
  - Failure of an aircraft operator to comply with emissions plan conditions
  - Failure of an aircraft operator to comply with an information notice
  - Failure of an aerodrome operator to provide reasonable advice and assistance
  - Failure to a person comply with a direction to enforce an operating ban
6. Before substituting a lower amount, we will:
  - (a) take into account the seriousness of the failure to comply; and
  - (b) ensure that the new amount provides for an effective and dissuasive penalty.
7. In assessing the seriousness of the failures listed in point 4 above, our primary consideration will be the impact of a particular failure on the effective operation of EU ETS Aviation. The system will only work effectively if it can be carried out within a transparent, honest and trustworthy framework and where the data on which decisions are made is reliable and timely. These requirements can be summed up in the word “probity”. Maintaining “probity” is crucial for EU ETS Aviation and the severity of the impact on “probity” is therefore an important consideration in assessing the seriousness of a failure.
8. In addition to the consideration of the impact of the failure on “probity”, we will also consider factors such as:
  - the scale of the failure, in terms of the duration of the non-compliance.
  - the financial benefit to the person of the failure.
  - the existence of any intentional, reckless or negligent behaviour relating to the failure.

- the ability or willingness of the person to remedy the failure.
9. When determining whether a lower penalty would be effective and dissuasive, we will consider factors such as:
- the likely deterrent effect on the person by reference to its financial situation and attitude to compliance.
  - the likely deterrent effect on other persons.
  - the effectiveness of similar penalties on that person or other persons in the past.

### **C: Procedure for imposing penalties**

1. A civil penalty notice must state the amount of the penalty due and whether or not a person is liable to an additional daily penalty (“the initial notice”).
2. When the level of additional daily penalty can be determined, a further civil penalty notice will be served, confirming the total amount due (“the further notice”).
3. Where a civil penalty does not include an additional daily penalty, the initial notice will specify the total penalty due. The penalty is due one month after the initial notice is served.
4. Where a civil penalty includes an additional daily penalty, that penalty is due one month after service of the further notice.
5. A civil penalty must be paid to us. Any unpaid penalties are recoverable as a civil debt and, in relation to a penalty imposed for failure to comply with the 2010 Regulations from 1<sup>st</sup> January 2012 and where appropriate, by detention of aircraft.
6. We do not expect to commence debt recovery proceedings in relation to an unpaid civil penalty until after the 8 week time period for submission of representations in relation to our limited discretion to waive or modify the penalty has expired (see section D below).
7. If, during the period between service of a civil penalty notice and the due date of the penalty, we cease to be satisfied that the person is liable to the penalty, we may withdraw or modify the notice.
8. By 30<sup>th</sup> June in each year, we will publish a list of aircraft operators that were liable to a civil penalty in the preceding year for failure to surrender sufficient allowances or project credits.

### **D: Discretion**

1. Where a person is liable to a civil penalty, we must impose that penalty, subject to limited discretion to waive or modify the penalty.
2. Except where an aircraft operator is liable to a penalty for failure to surrender sufficient allowances, we may waive or modify a civil penalty where:

- (a) the person liable to a civil penalty or upon whom a civil penalty has been imposed demonstrates to our satisfaction, within 8 weeks of service of the initial notice imposing the penalty (or we otherwise become satisfied at any time), that the person exercised all due diligence and took all steps possible—
- (i) to comply with the provision of the Regulations giving rise to the penalty; or
  - (ii) to rectify any failure in compliance as soon as it came to that person's notice, provided that the person was acting reasonably in being unaware of the failure in compliance; and
- (b) in all the circumstances it is reasonable to exercise our discretion.
3. We will consider each matter on a case by case basis, according to the facts of each case.
  4. In relation to 2(a) above, it is the responsibility of the person liable to the penalty or upon whom the penalty has been imposed to provide us with evidence of the behaviour which they consider brings them within the scope of our discretion to waive or modify the penalty. We will carefully consider and weigh any representations we receive from that person up until the 8 week deadline.
  5. The test is “all due diligence” and “all steps possible”. It is therefore a high standard and certainly higher than “reasonableness”.
  6. In relation to the exercise of all due diligence and all steps possible to comply with a provision, circumstances which are relevant to our determination of whether or not this test is satisfied may include the following features:
    - The person did everything possible to comply but has been overcome by exceptional events or circumstances beyond their control.
    - The person has made all efforts to engage with a third party necessary to fulfil its obligations but that third party has not delivered and the circumstances are beyond the person's control.
    - The person was only prevented in complying with its obligations due to a fault with our systems.
    - The person has shown engagement and cooperation with us in understanding its responsibilities under the Regulations and remedying any failures.
  7. In relation to the exercise of all due diligence and all steps possible to rectify a failure in compliance as soon as it came to that person's notice (provided that the person was acting reasonably in being unaware of the failure), circumstances which are relevant to our determination of whether or not this test is satisfied may include the following features:
    - The person was not previously aware of the failure in compliance and can show (or we are satisfied) that it is not unreasonable that they were not previously aware.
    - The person did everything possible to rectify the failure in compliance as soon as it came to their notice and has actually rectified the failure.
    - The person did everything possible to rectify the failure in compliance as soon as it came to their notice but has been overcome by exceptional circumstances beyond their control.

- The person has been proactive in rectifying the failure as soon as it came to their notice and has ensured future compliance.
  - The person has notified us quickly on becoming aware of a failure.
8. Whilst the test of “all due diligence” is a high standard, the action necessary to establish this due diligence will generally increase as EU ETS Aviation progresses. This is to take account of the fact that, in early years of the scheme, a person may not be as familiar with the actions necessary to ensure compliance.
9. In determining 2(b) above, we will take account of certain public interest factors as follows:
- **Intent** - Intention could include deliberate actions as well as reckless or negligent actions or inactions.
  - **Forseeability** - Whether or not the non-compliance could have reasonably been foreseen and whether any avoiding and / or preventative measures were taken.
  - **Deterrent effect** - The deterrent effect of the penalty to the person in breach or to other persons.
  - **Previous History** - The number and severity of previous breaches.
  - **Attitude of the person in breach** - Whether or not the non-compliance is self-reported, the attitude of the person to rectifying the breach or to avoiding future breaches.
  - **Personal circumstances** – The extent to which the personal circumstances of the operator have contributed to the non-compliance.
  - **Financial implications** - The extent to which a person benefits financially from not having complied with the regulations.
  - **Nature of offence** - The impact of the non-compliance on the “probity” of EU ETS Aviation.
10. We may only waive or modify a penalty where we are satisfied that a person exercised all due diligence and took all steps possible in accordance with 2(a) above **and** where we determine it to be reasonable to exercise our powers in accordance with 2(b) above.
11. Our powers of discretion are as follows. We may:
- (a) waive a civil penalty;
  - (b) impose or substitute a lower civil penalty;
  - (c) allow the person a period of no more than 31 days to rectify any failure in compliance before it imposes a civil penalty, subject to such conditions (if any) as we consider appropriate;
  - (d) extend the time for payment.
12. In determining which of the above powers to exercise in relation to each breach, we will again consider the public interest factors listed above.

## E: Appeals

1. There is a right of appeal against the imposition of a civil penalty to either:
  - a) the Welsh Ministers, where the person appealing is a UK operator and where that UK operator has its registered office in Wales; or
  - b) otherwise, the Secretary of State
2. The relevant addresses of the appeal bodies are:

England:

Secretary of State for Energy and Climate Change  
Department of Energy and Climate Change  
3 Whitehall Place  
London  
SW1A 2AW

Wales:

Claire Bennett  
Head of Climate Change Unit  
Environment Protection and Quality  
Welsh Assembly Government  
1st Floor- CP2  
Cathays Park  
Cardiff  
CF10 3NQ
3. An appeal must be made within 24 days of the date of the civil penalty notice.
4. The appeals procedure is contained in Schedule 2 to the 2009 Regulations (in relation to penalties issued under the 2009 Regulations) and in Schedule 3 to the 2010 Regulations (in relation to penalties issued under the 2010 Regulations).