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EUROPEAN COMMISSION

Brussels, 10.1.2011  
SEC(2010) 1632 final

Proposal for a

**COUNCIL DECISION**

**of 10.1.2011**

**on the position to be taken by the European Union in the EEA Joint Committee  
concerning an amendment to Annex XX (Environment) and Protocol 37 to the EEA  
Agreement**

## EXPLANATORY MEMORANDUM

### **Incorporation of Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading into the EEA Agreement**

#### **Relevant act:**

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<sup>1</sup>.

#### **Relevant provisions:**

Articles 3c(4), 3d(4), 3e(2), 3f(4), 3e(3), 3f(5), 16, 18a(1) and (3)(b) and 18b.

#### **General remarks:**

The draft JCD proposes the incorporation of Directive 2008/101/EC into the EEA Agreement with a view to extending the aviation emission trading scheme to the whole EEA while respecting as far as possible the principles of the two-pillar structure of the Agreement. For the setting of the EEA-wide historical aviation emissions, of the EEA total quantity of allowances as well as of the EEA-wide allowances to be auctioned, to be put into a special reserve and to be allocated for free, the normal procedures under the EEA Agreement should be followed.

With regard to the benchmarks, the Commission decisions should include the EEA-wide benchmarks, which should be established in close cooperation with the EFTA Surveillance Authority. The calculation and publication of allocation of allowances to aircraft operators administered by the EFTA States based on those benchmarks will take place subsequent to the incorporation of the Commission decisions into the EEA Agreement.

This solution implies that the following decision process will have to take place in close cooperation between the Commission, the EFTA Surveillance Authority and the EEA EFTA States. This cooperation includes that the Contracting Parties foresee special clauses in their respective decisions in the application of Directive 2008/101/EC, making reference to the corresponding decisions of the other Contracting Parties, in order to provide for a transparent ETS system in the EEA for all aviation operators concerned.

#### *i) Article 3c(4)*

The Commission decides on the historical aviation emissions for the EU-27 (A) as foreseen in the Directive, thus covering flights within the EU, between EU Member States and third countries and between EU Member States and EEA EFTA States.

The EFTA Surveillance Authority provides, according to the input from Eurocontrol, the number of historical aviation emissions based on flights within the EEA EFTA territory and flights between the EEA EFTA States and third countries (B).

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<sup>1</sup> OJ L 8, 13.1.2009, p. 3.

The EEA Joint Committee sets the EEA-wide historical aviation emissions by adopting a decision which foresees the incorporation of the Commission decision with the addition of the historical aviation emissions provided for the EEA EFTA States, thus adding numbers (A) and (B) together.

An adaptation text clarifies that the normal procedures under the EEA Agreement apply and that the additional numbers from the EEA EFTA States will be added by decision of the EEA Joint Committee, based on figures provided by the EFTA Surveillance Authority, which will do so in close cooperation with Eurocontrol.

*ii) Article 3e(3)*

Based on (A), the Commission decides on the number of allowances to be allocated to operators for flights performed within the original EU scope of the scheme:

- the total number of allowances,
- number of allowances to be auctioned,
- number of allowances in the special reserve (this applies for the period beginning on 1 January 2013 and subsequent periods),
- number of free allowances.

Based on (B), the EFTA Surveillance Authority will, in close cooperation with Eurocontrol, establish the increase in allowances related to the flights which are added to the scheme due to the extension of the scheme to the EEA EFTA States in each of the following sets of allowances:

- the total number of allowances,
- number of allowances to be auctioned,
- number of allowances in the special reserve (this applies for the period beginning on 1 January 2013 and subsequent periods),
- number of free allowances.

The EEA Joint Committee decides on the number of allowances to be allocated to operators administered by the EEA-30 by adding the EEA EFTA figures to the EU figures when incorporating the respective Commission decision into the EEA Agreement:

- EEA-wide total number of allowances,
- EEA-wide number of allowances to be auctioned,
- EEA-wide number of allowances in the special reserve (this applies for the period beginning on 1 January 2013 and subsequent periods),
- EEA-wide number of free allowances (C).

The Commission decides on the benchmarks for EEA-30 (also in the case of Article 3f(5)), thereby cooperating closely with the EFTA Surveillance Authority during the process leading

up to the decision. The calculation and publication of allocation of allowances to aircraft operators administered by the EFTA States based on those benchmarks will take place subsequent to the incorporation of the Commission decisions into the EEA Agreement.

A joint declaration reiterating the Contracting Parties' commitment to ensure speedy adoption and entry into force of the EEA Joint Committee decision incorporating benchmark decisions of the Commission is foreseen in the draft JCD.

### *iii) Article 3d(3)*

The number of allowances to be auctioned by each of the EEA-30 is proportionate to its share of the total attributed aviation emissions for all EEA-30 in 2010.

### **Justification and proposed solution for adaptations:**

#### No relevant aviation activities in Liechtenstein

There are currently no aviation activities in Liechtenstein as defined in the Directive. An adaptation text clarifying this as well as stating that Liechtenstein will comply with the Directive when relevant aviation activities will take place on its territory is therefore suggested.

#### Article 3d(4) – Earmarking of revenues:

Budget issues fall outside the scope of the EEA Agreement. Earmarking of revenues is therefore outside the scope of the Agreement. The EEA EFTA States are however, limited to the application of Directive 2008/101/EC, ready to submit to Article 3d(4), in order to guarantee a homogeneous application of the ETS scheme in the field of aviation, which concerns operators from third countries as well. In accordance with the Article it shall be for States to determine the use of revenues generated from auctioning of allowances. Revenues should be used to tackle climate change as specified in the Article, and are deemed to be fulfilled if budget allocation to these purposes exceeds the relevant revenues generated. An adaptation text clarifying that this will not include any reporting obligations and a joint declaration reiterating that the incorporation of this provision into the EEA Agreement shall be without prejudice to the scope of the Agreement are foreseen in the draft JCD.

#### Articles 3e(2) and 3f(4)

In order to comply with the two-pillar structure as far as possible, the EEA EFTA States will submit the applications received to the Commission via the EFTA Surveillance Authority. An adaptation text to this end is foreseen.

#### Article 16 – Operating ban:

The EEA EFTA States suggest using the same approach as is foreseen with regard to the “Black list” in the field of civil aviation safety. In that case the Commission adopts a ban for the territory of EU-27, which is extended to the EEA EFTA States by decision of the EEA Joint Committee incorporating the Commission act into the EEA Agreement. This being said, pending such incorporation, and in view of the urgency of bans in the field of civil aviation safety, the EEA EFTA States have committed to apply the ban simultaneously with the EU Member States.

In the case of Article 16, on the other hand, the same urgency is not present, and provisional application is not necessary. Therefore, the normal procedures for incorporation should apply. This implies that the Commission will adopt a ban for the territory of EU-27, which will only become applicable to EEA-30 through decision of the EEA Joint Committee incorporating the Commission decision into the EEA Agreement. There is no need to foresee an adaptation text stating that the Commission decision will not apply to the EEA EFTA States before, as this is a general principle and follows from the 2-pillar structure.

With regard to requests by the EEA EFTA States in accordance with Article 16(5) and (10), an adaptation text is suggested foreseeing that such requests would be sent to the Commission via the EFTA Surveillance Authority.

Article 18a(1):

The adaptation was proposed by the Commission and sets out some rules regarding the reallocation of aircraft operators to the EFTA States.

Article 18a(3)(b):

An adaptation text is foreseen to ensure that the Commission will publish a list concerning all operators falling under the scope of the scheme, thus an EEA-wide list.

Article 18b – Assistance from Eurocontrol or another relevant organisation:

The EEA EFTA States and the EFTA Surveillance Authority should for the purposes of applying Directive 2008/101/EC be able to rely on expertise of an organisation, like the Commission. An adaptation text is therefore foreseen, stating that the EFTA Surveillance Authority may request the assistance of Eurocontrol or another relevant organisation.

Proposal for a  
**COUNCIL DECISION**  
**of 10.1.2011**

**on the position to be taken by the European Union in the EEA Joint Committee concerning an amendment to Annex XX (Environment) to the EEA Agreement**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 192 (1) and 218 (9) thereof,

Having regard to Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area<sup>2</sup>, and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

Annex XX to the Agreement on the European Economic Area, (hereinafter referred to as "the EEA Agreement") contains specific provisions and arrangements concerning environment.

- (1) It is appropriate to include 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<sup>3</sup>, in the Agreement.
- (2) Annex XX to the EEA Agreement should therefore be amended accordingly.

HAS ADOPTED THIS DECISION:

*Sole Article*

The position to be taken by the Union in the EEA Joint Committee on an envisaged amendment to Annex XX to the EEA Agreement is laid down in the Annex to this Decision.

Done at Brussels, 10.1.2011

*For the Council*  
*The President*

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<sup>2</sup> OJ L 305, 30.11.1994, p. 6.  
<sup>3</sup> OJ L 8, 13.1.2009, p. 3.

**ANNEX**

**Draft**

**DECISION OF THE EEA JOINT COMMITTEE**

**No**

**of**

**amending Annex XX (Environment) to the EEA Agreement**

THE EEA JOINT COMMITTEE,

Having regard to the Agreement on the European Economic Area, as amended by the Protocol adjusting the Agreement on the European Economic Area, hereinafter referred to as ‘the Agreement’, and in particular Article 98 thereof,

Whereas:

- (1) Annex XX to the Agreement was amended by Decision of the EEA Joint Committee No .../... of ...<sup>4</sup>.
- (2) 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<sup>5</sup> is to be incorporated into the Agreement.
- (3) The decision making process will take place in close cooperation between the European Commission, the EFTA Surveillance Authority and the EFTA States.
- (4) The Contracting Parties have issued a Joint Declaration, emphasizing inter alia that they will make every effort in order to ensure swift adoption and entry into force of an EEA Joint Committee decision incorporating each decision of the European Commission,

HAS DECIDED AS FOLLOWS:

*Article 1*

Point 21a) (Directive 2003/87/EC of the European Parliament and of the Council) of Annex XX to the Agreement shall be amended as follows:

1. The following indent shall be added:
  - ‘- **32008 L 0101**: Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 (OJ L 8, 13.1.2009, p. 3).’
2. The following shall be inserted after adaptation (b):

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<sup>4</sup> OJ L ...

<sup>5</sup> OJ L 8, 13.1.2009, p. 3.



‘(ba) At the time of incorporation of the Directive, Liechtenstein does not have any aviation activities as defined in the Directive operated on its territory. Liechtenstein will comply with the Directive when relevant aviation activities take place on its territory.

(bb) The following subparagraph shall be added in Article 3c(4):

“The EEA Joint Committee shall, in accordance with the procedures laid down in the Agreement and based on figures provided by the EFTA Surveillance Authority in cooperation with Eurocontrol, decide on the EEA-wide historical aviation emissions by adding the relevant numbers concerning flights within and between the territories of the EFTA States and flights between the EFTA States and third countries to the Commission decision when incorporating the latter into the EEA Agreement.”

(bc) In Article 3d(4), the second subparagraph shall be deleted.

(bd) The following subparagraph shall be added in Articles 3e(2) and 3f(4):

“By the same date, the EFTA States shall submit applications received to the EFTA Surveillance Authority, which shall promptly pass them on to the Commission.”

(be) The following subparagraphs shall be added in Article 3e(3):

“The EEA Joint Committee shall, in accordance with the procedures laid down in the Agreement and based on figures provided by the EFTA Surveillance Authority in cooperation with Eurocontrol, decide on the EEA-wide number for the total number of allowances, the number of allowances to be auctioned, the number of allowances in the special reserve and the number of free allowances, by adding the relevant numbers concerning flights within and between the territories of the EFTA States and flights between the EFTA States and third countries to the Commission decision when incorporating the latter into the EEA Agreement.

The Commission shall decide on the EEA-wide benchmark. During the decision-making process the Commission shall cooperate closely with the EFTA Surveillance Authority. The calculation and publication by the EFTA States under Article 3e(4) shall take place subsequent to the decision of the EEA Joint Committee incorporating the decision adopted by the Commission into the EEA Agreement.”

(bf) The following subparagraph shall be added in Article 3f(5):

“The Commission shall decide on the EEA-wide benchmark. During the decision-making process the Commission shall cooperate closely with the EFTA Surveillance Authority. The calculation and publication by the EFTA States under Article 3f(7) shall take place subsequent to the decision of the EEA Joint Committee incorporating the decision adopted by the Commission into the EEA Agreement.”

3. The following shall be inserted after adaptation (i):

‘(ia) The following paragraph shall be inserted after Article 16(12):

“(13) The EFTA States shall submit any requests pursuant to Article 16(5) and (10) to the EFTA Surveillance Authority, which shall promptly pass them on to the Commission.”

(ib) The following subparagraph shall be added in Article 18a(1):

“Reallocation of aircraft operators to the EFTA States, should take place during year 2011, after fulfilment by the operator of its 2010 obligations. A different timeline for reallocation of aircraft operators initially assigned to a Member State on the basis of the criteria mentioned under (b), can be agreed by the initial administering Member State, further to an explicit request introduced by the operator within 6 months from the adoption by the Commission of the EEA-wide list of operators foreseen under Article 18a(3)(b). In this case, reallocation shall take place no later than year 2020 with regard to the trading period beginning in 2021.”

(ic) In Article 18a(3)(b), the words “for the whole EEA” shall be inserted after the words “aircraft operators”.

(id) The following subparagraph shall be added in Article 18b:

“For the purposes of carrying out their tasks under the Directive, the EFTA States and the EFTA Surveillance Authority may request the assistance of Eurocontrol or another relevant organisation and may conclude to that effect any appropriate agreements with those organisations.”

#### *Article 2*

The texts of Directive 2008/101/EC in the Icelandic and Norwegian languages, to be published in the EEA Supplement to the *Official Journal of the European Union*, shall be authentic.

#### *Article 3*

This Decision shall enter into force on the day following the last notification to the EEA Joint Committee under Article 103(1) of the Agreement \*.

#### *Article 4*

This Decision shall be published in the EEA Section of, and in the EEA Supplement to, the *Official Journal of the European Union*.

Done at Brussels, .

*For the EEA Joint Committee  
The President*

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\* [No constitutional requirements indicated.] [Constitutional requirements indicated.]

*The Secretaries  
to the EEA Joint Committee*

**Joint Declaration by the Contracting Parties**  
**to Decision No [...] incorporating Directive 2008/101/EC into the Agreement**  
**[for adoption with the Decision and for publication in the OJ]**

‘Directive 2008/101/EC introduces the earmarking of revenues generated from the auctioning of allowances for aviation. The application of this provision by the EFTA States is without prejudice to the scope of the EEA Agreement.

As regards the decisions on benchmarks pursuant to Articles 3e(3) and 3f(5) of Directive 2003/87/EC as amended by Directive 2008/101/EC, the Contracting Parties will make every effort in order to ensure swift adoption and entry into force of an EEA Joint Committee decision incorporating each decision of the European Commission. In order to guarantee the homogeneity of the EEA and of its common ETS, a joint and parallel process of the Contracting Parties shall lead up to the decisions of the European Commission, which shall be incorporated into the EEA Agreement, if necessary by use of written procedure.

With the aim to provide for a transparent ETS in the EEA for all aviation operators concerned, the Commission will foresee special clauses in its decisions implementing Directive 2008/101/EC, which will make reference to the extension of the decisions to the EEA EFTA States by decisions of the EEA Joint Committee.’