

Clarifying legal powers to regulate international aviation under the EU Emissions Trading Scheme

Legal briefing | December 2025

Executive summary

- The EU Emissions Trading System (ETS) was expanded by Directive 2008/101/EC (the **Aviation ETS Directive**) to include all flights arriving at or departing from an EU airport (with limited exceptions). Since 2012, a ‘stop the clock’ mechanism which delayed the inclusion of such flights in the ETS has been repeatedly extended.
- It is estimated that, had all flights departing European Economic Area (EEA) countries been included in the ETS between 2012 and 2023, an additional 1.1bn tCO₂ would have been incorporated into the ETS and an additional €26 bn in revenue generated.
- By 1 July 2026, the European Commission is to publish a report assessing the environmental integrity of the Carbon Offsetting and Reduction Scheme for International Aviation (**CORSIA**) and, where appropriate, a legislative proposal to amend the ETS consistent with the EU’s climate and environmental objectives and laws. The legislative proposal will bring all departing international flights into scope of the ETS if CORSIA is not sufficiently strengthened in line with the Paris Agreement by the end of 2025 or if less than 70% of international aviation emissions are covered by CORSIA.

- Under such a legislative proposal, it is possible that both CORSIA and the EU ETS could apply to the same flight route. This is expressly contemplated in Directive 2023/958 which provides that the proposal will ‘allow the possibility for aircraft operators to deduct any costs incurred from CORSIA offsetting on those routes, to avoid double charging’. As such those flight routes may be regulated twice, but will likely only be effectively liable under one regime.
- This briefing finds that:
 - **Including international aviation in the ETS does not contravene international law.** This has been confirmed by the European Court of Justice (ECJ) which found that aircraft physically in the territory of an EU Member State are subject to the ‘unlimited jurisdiction’ of the relevant Member State and the European Union. As such, there is already legal certainty about the competence of the EU to regulate international flights and to apply the ETS to such flights.
 - **‘Double regulation’ is not prohibited under international customary law or EU law,** meaning both CORSIA and the EU ETS can apply to the same flight route. Indeed, this is expressly contemplated in the ETS Directive (as amended), with the European Commission signalling its intention to allow aircraft operators to deduct CORSIA offsetting costs in such circumstances to avoid double charging.

Background

The Aviation ETS Directive amended Directive 2003/87/EC (the **ETS Directive**) to bring aviation into the scope of the EU ETS. The Directive provided that, from 1 January 2012, all flights arriving at or departing from an EU airport (with some exceptions, for example military aircraft) would be within the ETS scope.¹

In 2012, the EU Commission delayed the inclusion of international aviation in the ETS with Decision 377/2013/EU until after the International Civil Aviation Organization (ICAO) Assembly in October 2013, in order to facilitate ICAO's work towards adopting a global market-based mechanism for reducing emissions (CORSIA). This is known as the 'stop the clock' mechanism and the temporary derogation has since been extended several times, most recently until 31 December 2026,² when CORSIA will enter its mandatory phase.

It is estimated that, had all flights departing EEA countries been included in the ETS between 2012 and 2023, an additional 1.1bn tCO₂ would have been incorporated into the ETS, equivalent to the total greenhouse gas emissions from Greece over the same period. This could have generated an additional €26 bn in revenue. Had the ETS also included arriving flights as intended in the original legislation those figures would be even higher.

Directive 2023/958 provides that the European Commission will publish a report by 1 July 2026 assessing the environmental integrity of CORSIA.³ At the same time, the European Commission is to produce a legislative proposal, where appropriate, 'to amend the ETS Directive in a way consistent with the Paris Agreement temperature goal, the EU's 2030 GHG emission reduction commitment, and the objective of climate neutrality by 2050 at the latest, and with the aim of preserving the environmental integrity and effectiveness of the Union's climate action'.⁴ Such proposal shall include as appropriate the application of the ETS to departing flights from EEA aerodromes to aerodromes outside of the EEA from January 2027 (and exclude arriving flights) if the report finds that:

- (i) 'ICAO has not strengthened CORSIA by 31 December 2025 in line with its long-term aspirational goal of meeting the Paris Agreement targets', or
- (ii) 'States [participating in CORSIA] represent less than 70% of international aviation emissions'.

The proposal shall, as appropriate, 'allow the possibility for aircraft operators to deduct any costs incurred from CORSIA offsetting on those routes, to avoid double charging'.⁵ The legislation therefore anticipates that the ETS and CORSIA may apply simultaneously to the same flight route, and in such circumstances, as appropriate, it may be possible for aircraft operators to deduct any costs incurred from CORSIA offsetting.

Including international aviation in the ETS does not contravene international law

The ECJ has considered the validity of the Aviation ETS Directive⁶ (as originally enacted, including its application to international flights) and held that the Directive is valid and does not contravene various instruments of international law, including:

- the EU/US Open Skies Agreement;
- the Convention on International Civil Aviation signed on 7 December 1944 (commonly known as The Chicago Convention); and
- customary international law.

The ECJ was responding to a referral from the English High Court in *Air Transport Association of America and others v Secretary of State for Energy and Climate Change*, a case brought by the Air Transport Association of America and certain American airlines against the UK's implementation of the Aviation ETS Directive, which claimed that the inclusion of international flights breached international law.

The ECJ found that the EU has competence to regulate aircraft emissions for flights arriving at or departing from EU airports, as those aircraft are physically in the territory of an EU Member State and so are subject to the 'unlimited jurisdiction' of the relevant Member State and the European Union.⁷ As such, there is already legal certainty about the competence of the EU to regulate international flights and to apply the ETS to such flights.

'Double regulation' is not prohibited under international customary law or EU law

There is no general principle of law preventing a single event, fact or greenhouse gas emission to be regulated by several legal regimes. While the EU has expressed its willingness to consider adopting measures to facilitate interactions between the EU ETS

¹ Directive 2008/101/EC amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (Aviation ETS Directive) [2008] OJ L8/3

² Directive (EU) 2023/958 amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and the appropriate implementation of a global market-based measure [2023] OJ L 130/115

³ *ibid*, Article 28b(2)

⁴ *Ibid*, Article 28b(3)

⁵ *ibid*

⁶ Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011]

⁷ *ibid*, para 125

and other countries' schemes,⁸ there is no legal principle imposing an obligation on the EU to adopt unilateral measures or agreements with states and international organisations to avoid the adoption of parallel emissions trading schemes or carbon markets for similar emissions.⁹

The ECJ Advocate General Juliane Kokott confirmed this analysis in the context of the EU ETS in her opinion for the ATAA case.¹⁰ She stated that, although *"there is a risk of 'double regulation', that is to say, a risk of one and the same route being taken into account twice under the emissions trading schemes of two States (...) in particular, if an emissions trading scheme applicable at the place of departure of an international flight and the scheme applicable at its place of destination were both – like Directive 2008/101 – to take account of the whole flight"*, she confirmed that **"however onerous it might be for the airlines concerned, such double regulation is not prohibited under the principles of customary international law at issue here. It is indeed accepted under customary international law, just as the widespread phenomenon of double taxation is accepted in the field of direct taxation"**.¹¹

As a consequence, there is no legal principle preventing international flights departing from or arriving to the EU from being subject both to CORSIA and an extended EU ETS. As noted above, Directive 2023/958 explicitly contemplates the situation where both the EU ETS and CORSIA apply to the same flight route, and provides that in any legislative proposal to extend the ETS to international flights, such proposal shall, as appropriate, 'allow the possibility for aircraft operators to deduct any costs incurred from CORSIA offsetting on those routes, to avoid double charging'. As such, it is clear that the EU anticipates being able to apply the ETS to flights which are subject to CORSIA (which it can legally do) and potentially allowing aircraft operators to deduct any costs incurred from CORSIA offsetting on routes which are covered by the ETS (to avoid any resultant double counting).

⁸ See e.g., Recital 17 of the Aviation ETS Directive and Article 25a of the ETS Directive (as amended by the Aviation ETS Directive)

⁹ See Opinion of Advocate General Kokott delivered on 6 October 2011 in Case C-366/10 (6) para. 159.

¹⁰ *ibid*, para 157-158.

¹¹ In the ATAA case, the EU judge accepted to review the legality of the EU ETS in light of several key principles of internal law: the principle that each State has complete and exclusive sovereignty over its airspace, the principle that no State may validly purport to subject any part of the high seas to its sovereignty, and the principle which guarantees freedom to fly over the high seas, as well as the Air Transport Agreement concluded between the United States of America.

About

Opportunity Green is an NGO working to unlock the opportunities from tackling climate change using law, economics, and policy. We do this by amplifying diverse voices, forging ambitious collaborations and using legal innovation to motivate decision makers and achieve climate justice.

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