

Airlines / EU-ETS

The procedure for monitoring and sanctioning CO2 emissions declarations has been discreetly modified:

The opinion of the CAAC¹ will no longer be sought by the Minister!

By ministerial decree no. 2024-546 of 14 June 2024, a number of changes have been made to the regulatory provisions of the Environment Code relating to the system for reporting emissions and surrendering CO2 allowances.

These changes include, in particular, the abolition of the opinion of the CAAC, a body bringing together professionals and representatives of the aviation sector authorities.

Decree n° 2024-546 of 14 June 2024 relating to the CO2 emission trading scheme within the European Union

Reminder of the regulatory framework of the CO2 emission trading scheme:

With effect from 1 January 2012, and in order to reduce CO2 emissions, the European Union (EU) decided to subject the aviation sector to the Emission Trading Scheme (EU-ETS), which had been in place for industrial installations since 2005.

Aviation activities were included in the EU-ETS via European Directive 2008/101/EC, which came into force on 2 February 2009 and was transposed into the French Environment Code by articles L.229-5 to L.229-24-2 and articles R.229-5 to R.229-37-11. This integration has been incorporated by European Directive 2003/87/EC, which defines the procedures for implementing this system.

¹ Commission Administrative de l'Aviation Civile (CAAC) of the Direction Générale de l'Aviation Civile (DGAC)

Ministerial decree no. 2024-775 of 8 July 2024 amends the list of flights included in the 'total scope' and the list defining the 'reduced scope' for calculating CO2 quotas. It also replaces the limit of 30,000 seats per year by 50,000 seats per year for flights linked to a public service obligation.

This directive concerns all IFR flights made with an aircraft of a maximum take-off weight greater than 5.7 tonnes, to or from the European Economic Area (EEA). However, certain flights are excluded from the scope of the directive, such as humanitarian or emergency medical flights, circular flights, training flights and flights linked to a public service obligation if, for example, the capacity offered does not exceed 50,000 seats per year.²

The Commission has published a decision (Decision 2009/450/EC) providing an interpretation of the activities and exclusions referred to in Annex I of Directive 2003/87/EC as amended.

Beyond the above-mentioned flights, commercial operators holding an Air Operator Certificate (AOC) and operating less than 243 flights per four-month period during the three consecutive four-month periods of the year or emitting fewer than 10,000 tonnes of CO2 per year are exempt from the system.

The existing system requires aircraft operators to submit an annual emissions monitoring plan by 31 August of year N-1, which must be approved by the DGAC (**obligation to submit a monitoring plan**). The emissions monitoring plan must be updated before each new period.

Article 25 of Ministerial Decree no. 2024-546 of 14 June 2024 postpones from the obligation to surrender CO2 quotas from 30 April to 30 September.

Before 31st March of the following year (N+1), operators must send the competent authority (i.e. the DGCA's ETS unit) a declaration of annual emissions (**obligation to declare emissions**). After submitting their declaration, each aircraft operator must transfer a number of quotas corresponding to their declared emissions, before 30 September of year N+1 (**obligation to surrender quotas**).

Operators who fail to comply with their obligations to submit a monitoring plan, with their obligations to report emissions or with their obligations to surrender quotas may be penalised.

² Article D.229-37-2 of the Environment Code

Reminder of the control and penalty procedure for failure to report CO2 emissions:

Article R.229-37-7 paragraph 4 of the Environment Code - in the version in force before 17 June 2024 - stipulated that in the absence of a declaration of CO2 emissions for a given year "the competent authority **shall implement the procedure provided for in Article R. 229-37-9 and, where appropriate,** shall automatically calculate the CO2 emissions" emitted using Eurocontrol software tools.

Article 24 of ministerial decree no. 2024-546 of 14 June 2024 stipulates that any airline may ask the European Commission not to publish the flight data contained in its declaration, explaining why such publication could be prejudicial to its commercial interests.

The said article R.229-37-9 paragraphs 1 and 2 of the Environment Code stipulated, in this case, that "the competent authority shall give the operator formal notice to comply within one month and shall inform the national administrator of the European registry mentioned in article L. 229-12. The formal notice shall state the fine incurred and invite the operator to submit its observations. If the operator has not complied with the formal notice within one month, the competent authority will impose an administrative fine on the operator under the following conditions:

1° In the event that this operator is a commercial air carrier within the meaning of the provisions of article R. 229-37-1, the administrative fine is imposed under the conditions set out in articles R. 330-20 et seq. of the French Civil Aviation Code; [...]"

Lastly, the said article R.330-20 of the Civil Aviation Code states: "The Minister responsible for civil aviation may, **after consulting the Civil Aviation Administrative Commission** provided for in article R. 160-3, impose an administrative fine on any natural or legal person who [...]"

In other words, in the absence of a declaration of CO2 emissions by an airline, the Minister for Ecological Transition could clearly only proceed with an ex officio calculation of emissions from last year's activities after obtaining the opinion of the CAAC.

This is no longer the case.

Despite this amendment to the Environment Code, which now excludes the opinion of the CAAC, the provisions of article R.6231-7 of the Transport Code maintain this opinion... an obvious risk of confusion!

The change resulting from Decree 2024-546 of 14 June 2024:

Articles 24 and 26 of Ministerial Decree no. 2024-546 of 14 June 2024 delete :

- Firstly, in the aforementioned article R. 229-37-7, the words "**shall implement the procedure provided for in article R. 229-37-9 and, where appropriate**".
- Secondly, all the provisions of article R. 229-37-9 of the Environment Code.

As a result, in the absence of a declaration of CO2 emissions for a given year, "**the competent authority shall automatically calculate the CO2 emissions**" emitted, without first having to consult the CAAC.

Analysis:

The deletion of the CAAC's opinion is regrettable. The obligation to declare CO2 emissions, and subsequently the obligation to surrender CO2 quotas, depend directly on the count of flights eligible for quotas and flights exempt from them, with regard to the list of exceptions referred to in Annex I of Directive 2003/87/EC as amended and in European Commission Decision 2009/450/EC.

However, several exceptions are open to interpretation and require operational knowledge. The presence of CAAC professionals therefore made sense in a penalty procedure for failure to comply with CO2 declaration obligations, just as it continues to make sense when it comes to airlines' failure to meet their obligations to provide take-off or landing slots or their obligations under Regulation 261-2004 on passenger rights. In seeking to simplify the procedure, the Minister will find himself deprived of an important technical insight and the airlines of an opportunity to be heard by their peers.



Amaël CHESNEAU

Avocat au barreau de Paris
achesneau@chesneau-fischel.com
www.chesneau-fischel.com

<https://www.chesneau-fischel.com/en/our-releases/>
