

This note considers the scope of reporting required in respect of the Non-CO₂ MRV under the ETS Directive and the extent to which this is reflected in the Draft Implementing Act.

In this note, all references to “Articles” are to Articles of the ETS Directive unless otherwise stated.

The requirement for a Non-CO₂ MRV in the ETS Directive

Article 14(5) of the ETS Directive provides that:

- (i) aircraft operators shall report once a year on the non-CO₂ aviation effects occurring from 1 January 2025;
- (ii) the European Commission (the **Commission**) shall adopt an implementing act by 31 August 2024 in respect of the Non-CO₂ MRV. The Non-CO₂ MRV shall contain, at a minimum, the three-dimensional aircraft trajectory data available, and ambient humidity and temperature to enable a CO₂ equivalent per flight to be produced;
- (iii) from 1 January 2025, Member States shall ensure that each aircraft operator monitors and reports the non-CO₂ effects from each aircraft it operates during each calendar year to the competent authority after the end of each year in accordance with the implementing acts;
- (iv) from 2026, the Commission shall submit an annual report on the results of the Non-CO₂ MRV; and
- (v) by 31 December 2027, based on the results of the Non-CO₂ MRV, the Commission shall submit a report and, where appropriate and having first carried out an impact assessment, a legislative proposal to mitigate non-CO₂ aviation effects by expanding the scope of the EU Emissions Trading System (**ETS**) to include non-CO₂ aviation effects.

The “aircraft operator” is the person who operates an aircraft at the time in performs and aviation activity listed in Annex 1 to the ETS Directive (Article 3(o)) and the ETS Directive applies to all those activities (Article 2). The aviation activities listed in Annex 1 include flights which depart from or arrive in an aerodrome situated in the territory of a Member State (subject to certain exemptions (e.g. military flights and humanitarian flights)).

Accordingly, under the ETS Directive, all aircraft operators operating flights departing from or arriving from an aerodrome situated in the EU should report non-CO₂ aviation effects from 1 January 2025 and Member States should be ensuring this happens.

The position under the Draft Implementing Act

Article 1(1) of the Draft Implementing Act amends the 2018 Implementing Regulation such that the 2018 Implementing Regulation applies, from 1 January 2025, to non-CO₂ aviation effects. It provides that:

[The 2018 Implementing Regulation] shall apply to [...] (ii) from 1 January 2025, non-CO₂ aviation effects.

The monitoring and reporting of non-CO₂ aviation effects from 2025 shall cover all non-CO₂ effects from aviation activities listed in Annex I to the Directive involving an aerodrome located in the EEA. However, in respect of the monitoring and reporting of non-CO₂ aviation effects taking place in 2025 and 2026, such reporting shall only be required in respect of routes involving two aerodromes located in the EEA, and routes from an aerodrome located in the EEA departing to Switzerland or to the United Kingdom. In respect of 2025 and 2026, the non-CO₂ aviation effects taking place from other flights may be reported on a voluntary basis.

As such, the Draft Implementing Act establishes a two-year period during which the monitoring and reporting of non-CO₂ effects from aviation only applies on a mandatory basis to a reduced scope of flights, i.e., intra-EEA flights and flights from an EEA aerodrome to Switzerland or to the United Kingdom. Recital 26 to the Draft Implementing Act suggests this is to “facilitate the start of the MRV for non-CO₂ effects”.

From 1 January 2027, the monitoring and reporting of non-CO₂ effects from aviation shall cover all flights which involve an aerodrome located in the European Economic Area (EEA).

Legal analysis

Unlike delegated acts, which have a quasi-legislative nature, implementing acts are intended to merely implement the provisions of the “parent act” (in this case, the ETS Directive).⁵ The European Court of Justice has held that (*Parliament v Commission (Case C-65/13)*):

- (a) it is settled case law that within the limits of the framework of the Commission’s implementing power (which must be determined by reference to the essential general aims of the legislative act), the Commission is authorised to adopt all the measures necessary or appropriate for implementation, provided they are not contrary to the legislative act (paragraph 44); and
- (b) in exercising an implementing power the Commission “may neither amend nor supplement the legislative act, even as to its non-essential elements” (paragraph 45).

On its face, the delayed introduction of full scope non-CO₂ reporting runs contrary to the ETS Directive, which does not provide for a two-year period of reduced scope reporting of non-CO₂ effects. Whilst the Draft Implementing Act does provide for the reporting of non-CO₂ effects from all flights involving an EEA aerodrome, the effective date of that obligation (1 January 2027) is different to that which is provided for in the ETS Directive (1 January 2025). This change of date and scope therefore amends the terms of the ETS Directive in a way that does not appear permitted or envisaged under the ETS Directive.

We consider that this risks exceeding the Commission’s implementing powers under the ETS Directive. Whilst the Commission may adopt all the measures necessary or appropriate for implementation, the effective date and scope of the obligation were already established in the ETS Directive. Article 14(5) envisages the implementing act setting out the technical requirements of the Non-CO₂ MRV (for example, the minimum technical requirements of the Non-CO₂ MRV including three-dimensional aircraft trajectory data available, and ambient humidity and temperature to enable a CO₂ equivalent per flight to be produced) but the Draft Implementing Act goes beyond implementing measures that merely set out the format and technical means of the data provision.

We do not consider that such a temporary scope reduction was the legislative intention. Had it been so, the ETS Directive could have provided a temporary derogation from the reporting requirement (for example, under the Article 28a derogations). Given Article 28a was also replaced by the 2023 Directive that introduced the Non-CO₂ MRV requirements, we do not consider that the legislative intention was to provide a temporary scope derogation for the Non-CO₂ MRV.

Finally, we note that the proposed changes under the Draft Implementing Act will have the effect that certain obligations under the ETS Directive cannot strictly be met. These include the requirement for all aircraft operators to report non-CO₂ effects from 1 January 2025 and the associated obligation on Member States to ensure compliance by aircraft operators. Further, it will be more difficult for the Commission to meet its requirement to report, by 31 December 2027, on the Non-CO₂ MRV and submit where appropriate a legislative proposal to expand the ETS to include non-CO₂ effects if it does not have the full data set envisaged by the ETS Directive.

⁵ European Commission, “Delegated Acts – Guidelines for the services of the Commission” (2011), Available at: [https://ec.europa.eu/transparency/documents-register/detail?ref=SEC\(2011\)855&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SEC(2011)855&lang=en), paragraph 1.

For the reasons set out above, it is our view that the Draft Implementing Act risks exceeding the Commission's implementing powers under the ETS Directive if it is adopted as currently drafted.

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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