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COVER NOTE

From: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of
the European Union

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Subject: COMMISSION DELEGATED REGULATION (EU) .../... of 19.12.2018
amending Commission Regulation No 389/2013 of 2 May 2013
establishing a Union Registry

Delegations will find attached document C(2018) 8871 final.

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Brussels, 19.12.2018
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COMMISSION DELEGATED REGULATION (EU) .../...

of 19.12.2018

**amending Commission Regulation No 389/2013 of 2 May 2013 establishing a Union
Registry**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

As agreed by the co-legislators in the revision in 2017 of Directive 2003/87/EC¹ (the ETS Directive) for the purposes of aviation², the Commission is authorised to implement safeguard measures to protect the integrity of the EU Emissions Trading System (EU ETS) in case of the exit of the United Kingdom from the European Union³.

On 12 February 2018, the Commission adopted an amendment⁴ to the Registry Regulation⁵ to implement safeguard measures to protect the environmental integrity of the EU ETS when Union law ceases to apply in the United Kingdom due to its withdrawal from the European Union. The revised Regulation provides for marking and exclusion from compliance of allowances issued by the United Kingdom as of 1 January 2018, unless Union law would not cease to apply in the United Kingdom by 30 April 2019 or it is sufficiently ensured that the surrender of allowances takes place in a legally enforceable manner by no later than 15 March 2019.

Without this amendment, the United Kingdom operators would not have been bound by the obligation to surrender allowances for the 2018 emissions by 30 April 2019 (i.e. after the United Kingdom's exit of the EU on 29 March 2019) even though the industrial operators would have received free allowances and the United Kingdom authorities would have auctioned allowances in 2018. This would have undermined the environmental integrity of the EU ETS.

For allowances issued in 2018, the marking has finally not been applied because the United Kingdom advanced the compliance date for United Kingdom operators to surrender allowances from 30 April 2019 to 15 March 2019 (i.e. a date before the exit from the EU on 29 March 2019 in case of no agreement) in accordance with Article 41(4) of Regulation (EU) 389/2013⁶.

For allowances to be issued from 1 January 2019, however, the marking and the exclusion from surrender of United Kingdom marked allowances will apply as the legal default on the basis of the abovementioned change in legislation. If a transitional period, ensuring the compliance of UK operators with their obligations pursuant to the ETS Directive (in particular their surrender obligation in accordance with Article 12 of that Directive) with regard to their emissions occurring in 2019 and 2020, would be established in a withdrawal agreement, the marking of allowances issued by the United Kingdom would, however, no longer be necessary because the obligations of operators in the UK would no longer be lapsing (cfr.

¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

² Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021 (OJ L 350, 29.12.2017, p. 7–14).

³ See recital 10 of Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017.

⁴ Commission Regulation (EU) 2018/208 of 12 February 2018 amending Regulation (EU) No 389/2013 establishing a Union Registry (OJ L 39, 13.2.2018, p. 3–4).

⁵ Commission Regulation No 389/2013 of 2 May 2013 establishing a Union Registry (OJ L 122, 3.5.2013, p. 1–59).

⁶ See at http://www.legislation.gov.uk/ukxi/2017/1207/pdfs/ukxi_20171207_en.pdf.

Article 12(3)(a) of Directive 2003/87/EC) during this period. A marking would then make it impossible to properly implement such a transitional period.

Therefore, the Registry Regulation should be amended to allow for an exception from the legal default. As from the day following the one on which the United Kingdom and the EU have both deposited their instruments of ratification of the withdrawal agreement with the Secretary-General of the Council, it will be certain that the withdrawal agreement enters into force and that the operators and aircraft operators administered by the United Kingdom will continue to participate in the EU ETS and comply with their obligations in accordance with the EU ETS Directive during the transitional period as established in a withdrawal agreement. In this scenario, the normal processes of the EU ETS should be resumed as soon as possible to minimise market disruptions.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

Experts from the Member States were consulted on the proposed amendment to the Registry Regulation in the framework of the Commission Expert Group on Climate Change Policy (CCEG), at a meeting held on 7 December 2018. These experts expressed their support for the proposed amendment to the Registry Regulation.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

In paragraph 4 of Article 41 of the Registry Regulation a sentence is added, to provide for no marking of allowances issued by the United Kingdom if the United Kingdom and the EU have both deposited their instruments of ratification of the withdrawal agreement with the Secretary-General of the Council.

COMMISSION DELEGATED REGULATION (EU) .../...

of 19.12.2018

amending Commission Regulation No 389/2013 of 2 May 2013 establishing a Union Registry

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC⁷, and in particular Articles 19(3) thereof,

Whereas:

- (1) The registries system ensures the accurate accounting of transactions under the EU emissions trading system (EU ETS) set up by Directive 2003/87/EC, the Kyoto Protocol and Decision No 406/2009/EC.
- (2) Where necessary and for as long as necessary in order to protect the environmental integrity of the EU ETS, aviation operators and other operators in the EU ETS may not use allowances that are issued by a Member State which has notified the European Council of its intention to withdraw from the Union pursuant to Article 50 of the Treaty on European Union ('TEU'). In the light of the negotiations pursuant to Article 50 TEU, and pursuant to Article 12(3)(a) of Directive 2003/87/EC, the Commission should regularly assess whether the use of allowances by a Member State in respect of which there are obligations lapsing for aircraft operators and other operators is permitted, in particular in situations where Union law does not yet cease to apply in that Member State or where it is sufficiently ensured that the surrender of allowances takes place in a legally enforceable manner before the Treaties cease to apply.
- (3) The draft agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement"), as agreed at negotiators' level on 14 November 2018, establishes a transition period and ensures that UK operators comply with their obligations laid down in the Directive 2003/87/EC as regards their emissions in 2019 and 2020. In case of entry into force of the Withdrawal Agreement, it is no longer necessary to restrict the use of allowances that are issued by such a Member State in those years.

⁷ OJ L 275, 25.10.2003, p. 32.

- (4) No marking of allowances should therefore take place from the day following the one on which the instruments of ratification of both parties to the Withdrawal Agreement are deposited with the Secretary-General of the Council.
- (5) Appropriate technical measures should be put in place to ensure the effectiveness of this Regulation at the time of its application.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation No 389/2013 is amended as follows:

1. In Article 41, paragraph 4 the following is added:
 1. ‘From the day following the one on which both ratification instruments concerning the Withdrawal Agreement have been deposited, allowances created for 2019 and 2020 shall not be identified with a country code if compliance with Directive 2003/87/EC for emissions taking place during these years is required by an agreement setting out arrangements for the withdrawal of such a Member State from the European Union.’

Article 2

2. This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 19.12.2018

For the Commission
The President
Jean-Claude JUNCKER