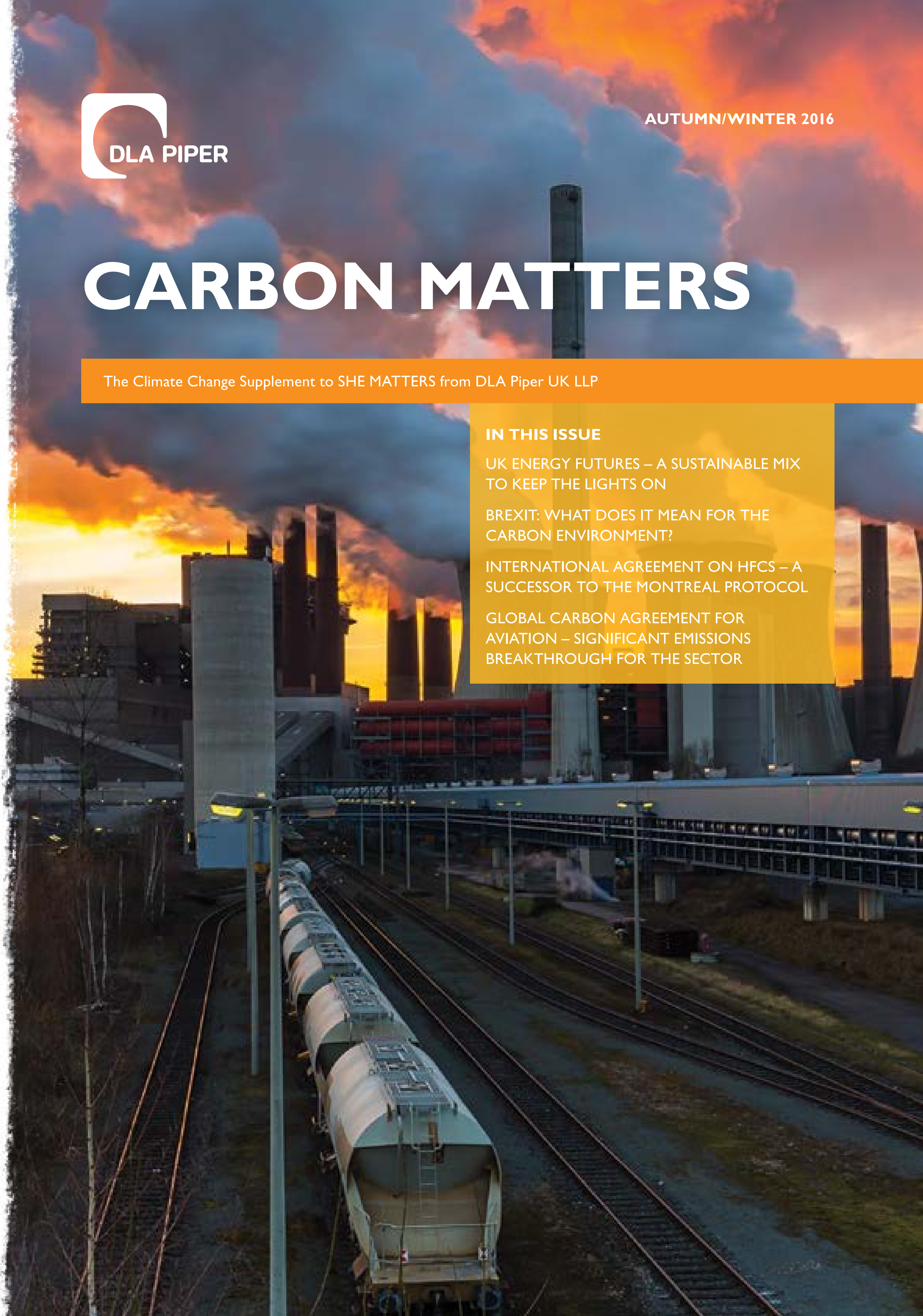

DLA PIPER

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CARBON MATTERS

The Climate Change Supplement to SHE MATTERS from DLA Piper UK LLP

IN THIS ISSUE

CARBON **MATTERS**

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The Annual United Nations Climate Change Conference took place in Morocco against a backdrop of optimism and international agreement to move forward towards a low carbon economy – a significant shift from previous conferences where differences of opinion and uncertainty often appeared to be insurmountable.

Following the momentous Conference of the Parties (COP 21) in Paris, progress towards ratification of the Paris Agreement has been far swifter than those gathered this time last year in France had envisaged. The timeframe agreed in Paris mapped a pathway to ratification and entry-into-force in 2020. Given that international treaties have historically taken a long time to ratify (the Kyoto Protocol was agreed in 1997 and came into effect in 2005) and the UN climate talks have been largely unsuccessful for the past decade, the rapid ratification of the Paris Agreement is almost unprecedented.

The Agreement legally took effect on November 4, following a concerted push by national governments to ratify through 2016, with the world's two largest emitters – the US and China – playing a leadership role.

Political uncertainty in the US was one of the drivers for rapid ratification, to ensure that any potential backsliding wouldn't derail the international agreement and Donald Trump's victory creates substantial uncertainty as to what role the US will (or won't) play in the UN process in the next four years. Other major players including the EU and India also ratified last month and it now seems that, notwithstanding the not insignificant question mark hanging over the US, there is international consensus that acting on climate change is now imperative.

The US and China each represent around 20% of total global greenhouse gases (GHGs) and the threshold set for entry into force was ratification by countries representing at least 55% of total global GHGs (and a minimum of 55 countries). At the time of writing (the number is going up rapidly!) 125 parties have ratified of 197 parties to the Convention, representing over 80% of global emissions. In the event that a party seeks to withdraw from the Paris Agreement it must serve a four-year notice period, although the Paris agreement also states that any country that withdraws from the 1992 UN Framework Convention on Climate Change (UNFCCC) treaty “shall be considered as also having withdrawn” from the Agreement.

The success in Paris was based on obtaining a high level agreement to a framework of national commitments to action and discussion in Marrakech was focused on implementation, namely how do countries honour their commitments and enhance them to ensure the agreed threshold of 1.5-2 degrees of warming is met. Progress was made on reporting and transparency frameworks, with significant discussion on what national governments plan to do to honour their obligations under the Agreement. Another key ongoing focus for the negotiations is the transfer of funds from developed to developing nations to enable them to adapt to the impacts of climate change and invest in low carbon energy and infrastructure.

Although existing commitments under the Paris Agreement still fall someway short of what needs to be done to limit the most adverse impacts of climate change, two other landmark international agreements also give grounds for optimism. The Kigali Amendment – a successor to the Montreal Protocol – saw the international community finalise a deal to phase out HFCs (potent greenhouse gases) and the aviation sector also agreed to an international commitment to zero carbon growth beyond 2020 (more on these agreements later in Carbon Matters).

In the UK, as noted below, despite the uncertainties thrown up following the outcome of the referendum on Brexit, Government and Parliament appear to remain committed to the ambitious targets set out in the Climate Change Act, and the the UK has also ratified the Paris Agreement.

We certainly live in interesting and uncertain times but the business case for a low carbon economy has never been stronger.

UK ENERGY FUTURES
A SUSTAINABLE MIX TO KEEP THE LIGHTS ON

Theresa May's Government may have abolished the Department of Energy and Climate Change and merged it with Business to form the new Business Energy and Industrial Strategy (BEIS) department, but all the signs are that low carbon energy generation remains a priority.

Energy security and affordability are ongoing official buzzwords and the challenge for the UK is ensuring that sufficient new capacity comes on line in a timely fashion, while also remaining within the carbon budgets established under the Climate Change Act.

There have been a number of significant developments in the UK energy market in the relatively short time since Prime Minister May took office, with major announcements regarding nuclear, hydraulic fracturing (fracking), carbon capture and storage, renewables and coal.

After initially reviewing the deal to build new nuclear capacity at Hinkley Point in partnership with the French and Chinese governments, the project was finally given the green light, meaning that the UK will have a significant new source of low-carbon energy generation towards the end of the next decade (assuming that planned build-times are met).

Cuadrilla has also been granted a license to extract shale gas at sites in Lancashire, in what is seen as a significant ruling for the fracking industry, with the Government overturning a previous ruling that had blocked the project. Fracking has attracted significant local opposition although it is deemed by the Government to be a potentially important source of reduced carbon energy generation in the short-medium term as coal power is phased out. The Committee on Climate Change estimates that fracking can act as a "bridge" until around 2030 while still enabling the UK to keep within carbon budgets. Thereafter fracking would have to play a rapidly diminishing role. Questions remain regarding methane leakage and the latest BEIS Energy and Climate Change Public Attitude Tracker reported UK support for fracking to be at its lowest recorded level, with net support at – 17%. The same survey found that 79% of the public support the development of renewables, with only 5% opposed.

In September a high-level advisory group chaired by Lord Oxburgh provided recommendations to BEIS in relation to the future role of carbon capture and storage. BEIS is now considering recommendations that the Government set up a new state-backed company to support the construction of the infrastructure necessary to pipe emissions into exhausted oil and gas fields under the North Sea.

BEIS has also launched a consultation on approaches to put into effect the closure of unabated coal power stations by 2025. The Government also set out plans to upgrade UK energy infrastructure and increase clean energy investment, including details on the first £290 million of Contracts for Difference (CFDs) funding for renewable electricity. The Government reaffirmed its commitment to spend £730 million supporting renewable electricity projects over this parliament, with the aim to produce enough renewable electricity to power one million homes and reduce carbon emissions by around 2.5 million tonnes per year from 2021/22 onwards. The application process for the CFD allocation round will open in April 2017.

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BREXIT:

WHAT DOES IT MEAN FOR THE CARBON ENVIRONMENT?

Shortly before the Brexit referendum, the different groups in DLA Piper were asked to provide a briefing for clients on the likely implications of Brexit on the law in their subject areas.

The Safety Health and Environment Team took the view that radical change in UK laws relating to the Safety Health on environment was not very likely in the short to medium term. Against the background that a very high proportion of the legal provisions in this area are now interlocked with EU legislation, it would be likely that in the event of Brexit that legislation would have to be kept in force as UK legislation for a significant period, and there would likely be little appetite for radical change, for the following reasons:

Significant aspects of the EU corpus of legislation on these topics were originally inspired by UK developments.

Ongoing engagement with the single market might well demand a future commitment to comply with EU laws, and the Government would have much more immediate concerns to address than radical amendments to regulatory law on Safety Health and the environment.

Furthermore international commitments outside the EU would continue to be binding. That would be a particularly relevant consideration as regards commitments on climate change, as the UK is a party to the UNFCCC Treaty and to the Paris Agreement, which it ratified at the time of the Marrakesh Conference of the Parties.

These views were confirmed following the referendum, with the Government's announcement of a "Great Repeal Bill". Despite its name, this will keep in force as UK law, after the UK leaves the EU most EU regulatory law, including environmental law, on an indefinite basis. There was a slight stir in October, when Andrea Leadsom suggested that there were significant elements of EU environmental law which it would not be practicable to "nationalise, on technical grounds. However, it seems that what she had in mind were the "monitoring" elements, e.g. provisions requiring the EU Commission to monitor the implementation of Directives, and receive reports from

Member States. That would not affect the substantive provisions. Clearly there would be a significant change if Brexit resulted in the UK Government becoming the chief arbiter of its own compliance with important areas of environmental law. It is however, by no means self-evident that that would be the consequence.

Despite the passage of time, there remains considerable general uncertainty as to the UK's future relations with the European Union. However, early indications from the newly formed Department for Business, Energy and Industrial Strategy (BEIS) suggest that the Government is committed to the decarbonising of the economy necessary to meet its obligations under the Climate Change Act and the Paris Agreement. It seems that a significant element in this is the Government's desire to reassure investors in the low carbon energy that the UK is a stable place to do business in the long term.

One important question posed by Brexit is continued membership of the EU ETS. That system provides an important control on the larger-scale emissions of greenhouse gases. One option might be for the UK to negotiate continuing membership notwithstanding Brexit. However, should this prove politically unpalatable, either to the UK or to the rest of the EU, another option might be withdrawal, but with the continued parallel operation of a similar scheme. That would not be difficult, as prior to Phase III of the system it effectively operated as a system of parallel schemes in each Member State.

Leaving aside the EU ETS, it is not clear to what extent the UK Government is likely to follow the European Commission's proposals for a "Winter Package", after Brexit and how it intends to keep within future budgets under the Climate Change Act.

One point the Government will have to bear in mind is that ClientEarth, which recently scored a High Court victory over the UK Government in relation to Air Quality (see current edition of SHE Matters) has expressed an interest in testing the enforceability of the Climate Change Act in the event of any backsliding of the Government.

Brexit may lead to less rigorous enforcement of EU environmental legislation (as transposed Post Brexit). However it will not affect the powers of the UK Courts to hold the UK Government to any commitments it may have made in national statutes.

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INTERNATIONAL AGREEMENT ON HFCS

A SUCCESSOR TO THE MONTREAL PROTOCOL

170 countries have reached a historic deal to phase out Hydrofluorocarbons (HFCs) after years of protracted and at times seemingly intractable negotiations. Senior politicians meeting in Kigali, Rwanda accepted an amendment to the Montreal Protocol that will see developed countries reduce their use of HFCs from 2019.

HFCs are potent greenhouse gases with a significantly higher global warming potential than carbon dioxide and are widely used as refrigerants, aerosol sprays and in solvents. HFCs have been widely used as an alternative to Chlorofluorocarbons (CFCs) since the Montreal Protocol came into effect to prevent ozone depletion.

It is estimated that the current mix of HFCs being widely used have an impact 1,600 times stronger than CO2 per tonne emitted. The current atmospheric concentration of HFCs account for 1% of the total warming caused by all greenhouse gases, but consumption rates are increasing significantly as global temperatures rise and developing countries gain access to electricity and demand grows for refrigeration and air-conditioning. Under the current trajectory, with usage increasing at over 10% a year, HFCs could account for as much as 19% of global greenhouse gas emissions by 2050. The Paris Agreement has an aspirational goal of limiting global warming to 1.5C and phasing out HFCs could avoid an estimated 0.5C of global warming by the end of the century – a not insignificant contribution.

Given that the adverse impact of HFC use was largely an unintended consequence of the Montreal Protocol, signatories agreed that securing an international amendment to the existing Protocol was the most effective course of action.

Countries agreed to an amendment that will see developed countries start to reduce their HFC use from 2019. The new agreement contains flexibility to cater for the differing capacities of the 170 nations, with three separate pathways.

Developed countries must reduce HFC use by 10% by 2019 from 2011-2013 levels, and 85% by 2036.

A second group of developing countries, including China and African nations, are committed to launching the transition in 2024. A reduction of 10% compared with 2020-2022 levels should be achieved by 2029, and 80% by 2045. A third group of developing countries, including India, Pakistan and Arab Gulf states, must begin the process in 2028 and reduce emissions by 10% by 2032 from 2024-2026 levels, and then by 85% by 2047.

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GLOBAL CARBON AGREEMENT FOR AVIATION

SIGNIFICANT EMISSIONS BREAKTHROUGH FOR THE SECTOR

191 states attending the International Civil Aviation Organization (ICAO) Assembly in October in Montreal reached a landmark agreement to curb the carbon emissions associated with commercial aviation. The Carbon Offset and Reduction Scheme for International Aviation (CORSIA), aims to offset emissions in an attempt to achieve carbon-neutral growth by 2020, regulating emissions at an international level.

This is not the first attempt to regulate airline emissions on a multijurisdictional scale; the European Union (EU) currently regulates intra-community flights through the EU Emissions Trading Scheme (EU ETS). When the Kyoto agreement was signed in 1997, the ICAO, an agency of the United Nations, was tasked with devising a global scheme to combat aviation emissions. After difficulty in agreeing a global deal, the European Commission took steps to implement its own regime. The Commission extended the EU ETS in 2008 to include the aviation sector, which came into force in 2012.

The scheme originally applied to all flights which depart from or arrive in the territory of a Member State. After widespread criticism from international carriers, including legal challenges by US airlines (albeit unsuccessfully), the EU agreed to temporarily halt the application of the scheme to international flights that fly in and out of the European Union. Until 31 December 2016, the scheme currently applies to flights that operate within the European Economic Area (EU plus Iceland, Lichtenstein and Norway) only.

With aviation emissions forecast to triple by 2050, governments, airlines and environmentalists have recognised the need for a consistent approach. Using the momentum of the Paris Agreement, the ICAO has seized the opportunity to agree on a global market-based measure for international aviation.

From 2020 airline operators will have to offset any emissions growth by funding carbon-reducing activities and renewable energy projects – instead of introducing a cap-based system such as the EU ETS or imposing a carbon tax. CORSIA aims to offset around 80% of global airline carbon dioxide emissions above 2020 levels until 2035.

CORSIA allows a phased introduction; a pilot phase between 2021-2023 where countries will have to opt in voluntarily, a first phase from 2024 – 2026 with voluntary participation and a mandatory phase from 2027. It is was originally anticipated that over sixty-five countries, including the US and China and all EU member states, will sign up at the outset in 2021. US involvement may now depend on whether President Trump wins a second term in office, given his stated hostility to international action on climate change. CORSIA also takes into account and alleviates concerns for developing countries and those with low levels of aviation activity as they are exempt from the scheme, however, they are encouraged to participate where possible.

For operators that do not operate flights inside the EU, CORSIA will be a significant change as they begin to start monitoring their emissions levels against regulatory standards. However, as emission levels will be calculated based on 2019-2020 averages, it allows those operators to increase their emissions levels over the next 4 years (assuming they opt into the voluntary phase). Those countries that do not opt-in have additional time to increase their emission levels and prepare for any obligations imposed before the scheme becomes mandatory in 2027. All operators will have to put sufficient plans in place to be in a position to comply with their obligations, irrespective of when they join the scheme.

Operators currently operating within the European Economic Area are already conscious of their emissions levels and may therefore be in a better position to prepare for any changes that the CORSIA imposes. In addition, it must be noted that the CORSIA only applies to international flights (which accounts for only 60% of aviation emissions) and therefore leaves substantial gaps for the EU and individual nations to provide appropriate measures for domestic flights. The European Commission is due to present a report to the European Parliament and Council by the end of the year on the new agreement in the context of its impact on the ETS. ICAO will now spend over two years finalising the technical details of the CORSIA to ensure efficient and effective implementation.

The UK government recently approved a third runway at Heathrow to expand UK airport capacity, subject to public consultation and a vote by parliament, intended to take place in the winter of 2017-18. The Government will have to ensure that it makes significant carbon reductions in other sectors to allow for growth in aviation emissions while still meeting obligations under the climate change act.

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