EU Aviation Emissions – ECJ Decision on US airlines' case

On 21 December 2011, the European Union Court of Justice (the "ECJ") handed down its long-awaited judgment on the validity of the extension of the EU emissions allowance trading scheme (the "EU ETS") to aviation emissions. This arose from a referral by the English High Court to the ECJ for a preliminary ruling in relation to judicial review proceedings brought in the English courts by the Air Transport Association of America (the "ATAA") and certain US airlines (the "Airlines") against the UK Secretary of State for Energy and Climate Change over measures implementing the EU ETS in the UK.

Key issues

- EU ETS extension to aviation valid under international law
- EU not bound by Chicago Convention; Kyoto Protocol not applicable; Open Skies Agreement not infringed
- Principles of state sovereignty and territoriality and freedom of high seas not breached
- Scheme takes effect on 1 January 2012

The ECJ was required to determine whether the relevant EU legislation (Directive 2003/87/EC, as amended by Directive 2008/101/EC) contravened international treaty law, including the Chicago Convention, the Kyoto Protocol and the US-EU Air Transport Agreement (the "Open Skies Agreement"), and customary international law. The ECJ took the same position as the Advocate-General in her October opinion and ruled that the legislation was not invalid under applicable international law.

The ECJ held that as the EU is not party to the Chicago Convention (although all its Member States are) and has not assumed exclusive competence in the field of international civil aviation, the EU is not bound by the treaty and, therefore, its rules are not relevant to the question of validity of the EU ETS legislation. This meant that certain treaty provisions regarding extra-territoriality, sovereignty over airspace, nationality of aircraft and duty exemptions were not considered by the court, although many of the issues overlapped with provisions under the Open Skies Agreement and customary principles of international air law which the court did examine.

Useful Links

- ECJ Judgment
- Airlines for America press release
- May 2009 Client Briefing: Implementation EU ETS
- September 2008 Client Briefing: Clearer Skies Aviation and the EU-ETS
- 6 October 2011 Advocate-General's opinion

Although the EU has approved the Kyoto Protocol, the ECJ held that its rules are not unconditional or sufficiently precise to allow individuals the right to rely on it in legal proceedings contesting the validity or legality of an act of EU law. The key Kyoto provision relied upon by the ATAA and Airlines relates to the parties' agreement to work through the ICAO in relation to reduction of aviation emissions.

The ECJ accepted that the EU is bound by the Open Skies Agreement but did not find the relevant EU legislation infringed any of its provisions. In particular, the ECJ rejected the ATAA and Airlines' claim that Directive 2008/101 breaches Article 7 of the Open Skies Agreement by attempting to impose extra-territorial rules regarding

emissions allowances. Article 7 requires aircraft to comply with EU laws only when the aircraft enter or depart a Member State's territory (or, in respect of rules governing operation and navigation of the aircraft, when the aircraft is within the territory). They claimed that the effect of the EU ETS when applied to aviation activities is to impose the scheme on aircraft not only when entering or departing a Member State but during any part of the flight over a third state or the high seas, because allowances are calculated based on fuel consumption during the entire (international) flight. This argument also required the court to consider the principles of a state's exclusive sovereignty over its airspace, that no state may validity assert sovereignty over the high seas and of freedom over the high seas.

The ECJ dismissed the claim on the basis that the scheme does not apply to aircraft registered in third states which only fly over third states, the high seas, or Member States without stopping. Because the scheme only applies to an operator of aircraft registered in a Member State or to an operator of aircraft registered in a third state if such operator chooses to operate routes arriving or departing from Member States, the relevant principles of territoriality and sovereignty of any third states are not infringed. In contrast, those aircraft physically located in the territory of a Member State are subject to the unlimited jurisdiction of the EU.

The ATAA and Airlines also contended that the EU ETS infringes Open Skies exemptions on duties and other charges on fuel loads. The ECJ ruled that the EU ETS is a market-based measure and not a duty or other charge on fuel loads. Further, the court pointed to provisions allowing both the EU and the US to exclude their Open Skies obligations for environmental reasons and emphasised that the scheme applies on a non-discriminatory basis, as required under the agreement.

The ATAA and Airlines have issued a statement that they will "comply under protest" with the ECJ ruling but are pursuing other options in the English courts and through governmental pressures. The scheme comes into force for aviation activities on 1 January 2012.

For further information on the EU ETS and its application to the aviation industry, please refer to our previous briefings or speak to your usual Clifford Chance contact.

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