

Competition, Regulation & Networks Briefing

October 2010



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Advocate General Opinion – Compatibility of EU Emissions Trading Scheme with International Law and Agreements

Summary

On 6 October 2011, Advocate General Justine Kokott delivered an opinion to the effect that the inclusion of international aviation within the remit of the European Union (“EU”) emission trading scheme (“EU ETS”) is compatible with the provisions of international agreements and principles of customary international law. Whilst the Advocate General’s opinion is not binding on the Court of Justice, it is persuasive, making it highly possible that the Air Transport Association of America (ATAA) and airlines will fail to succeed in challenging the EU legislature’s extension of the ETS to aviation activities outside the EU.

Background

Directive 2008/101/EC (the “**Directive**”) provides that, as from 1 January 2012, aviation activities are to be included within EU ETS. The ATAA and American Airlines, Continental Airlines and United Airlines (the “**airlines**”) (together “**the parties**”) challenged in the High Court the measures taken by the United Kingdom to implement the Directive, alleging that the inclusion of international aviation in EU ETS is in breach of principles of customary international law and various international agreements, such as the Chicago Convention, the Kyoto Protocol and the “Open Skies Agreement” between the United States and various EU member States.

Rationale

Advocate General Kokott’s view is that the parties cannot rely on the international agreements and customary international law because they relate principally to legal relations between the contracting parties (which are States rather than individuals or corporations within such States).

Also, Advocate General Kokott found that only two provisions of the “Open Skies Agreement” could be relied on by the parties; but these provisions do not affect the validity of the Directive as EU ETS represents a market-based measure designed to protect the environment given that

airlines are not charged fees, dues or other charges directly under the scheme.

In respect of the provisions of the Kyoto Protocol, since the reduction of greenhouse gases is not exclusively within the competence of the International Civil Aviation Organisation ("ICAO"), the Advocate General submitted that the Kyoto Protocol does not affect the validity of the Directive and that the EU is not unilaterally overriding ICAO.

Furthermore, Advocate General Kokott found that the Directive does not infringe the sovereignty of third countries (i.e. countries outside the EU) since the Directive is targeted solely at arrivals to and departures from airports situated within the EU. Thus, as take-off and landing are intrinsic elements of a flight, the airport of departure or arrival within the territory of the EU provides a sufficient territorial link for the whole of the flight to be included in EU ETS.

International Reaction

The Governments of more than 20 countries, including the US, China, Russia and India, have agreed on a joint declaration opposing the inclusion of aviation in the EU ETS. The joint declaration asserts that the ETS is "inconsistent with applicable international law", and that the EU has no right to regulate emissions outside its territory.

Governments outside the EU have threatened to challenge the extension of the EU ETS to aviation in the United Nations, through ICAO in Montreal.

Some countries have threatened further unilateral sanctions against EU member states. For example, Prashant Sukul (the Indian Ministry of Civil Aviation joint secretary) stated that the Indian government will reopen its bilateral air services agreements with EU member States if the EU does not retreat on its current position to unilaterally include all flights by Indian airline carriers to/from EU airports in EU ETS.

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100-000-0879 LON KF KF 11/10/2011