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Press and Information

Advocate General's Opinion in Case C-366/10
The Air Transport Association of America and Others

According to Advocate General Kokott the inclusion of international aviation in the EU emissions trading scheme is compatible with international law

EU legislation does not infringe the sovereignty of other States or the freedom of the high seas guaranteed under international law, and is compatible with the relevant international agreements

In 2003 the European Union decided to introduce a scheme for greenhouse gas emission allowance trading[1] as a cornerstone of European policy on climate change. Greenhouse gas emissions resulting from aviation activities were originally not covered by the EU emissions trading scheme. In 2008, however, the EU legislature resolved to include aviation activities in the scheme as from 1 January 2012[2]. Thus, 2012 is the first year for which all airlines – including those from third countries – will have to acquire and surrender emission allowances for their flights from and to European airports.

Several airlines and airline associations whose headquarters are in the USA or Canada lodged a claim for judicial review in the High Court of Justice of England and Wales, challenging the measures taken by the United Kingdom to implement the Directive on the inclusion of aviation activities in the EU emissions trading scheme. They submit that, by including international aviation – and transatlantic aviation in particular – in its emissions trading scheme, the European Union is in breach of a number of principles of customary international law and of various international agreements. They maintain that the Directive contravenes the Chicago Convention[3], the Kyoto Protocol[4] and the 'Open Skies Agreement'[5]. Moreover, they claim it contravenes the customary international law principles of the sovereignty of States over their own air space, of the invalidity of claims of sovereignty over the high seas and of the freedom to fly over the high seas.

In her Opinion delivered today, Advocate General Juliane Kokott concludes that the inclusion of international aviation in the EU emissions trading scheme is compatible with the provisions and principles of international law invoked.

In that context Advocate General Kokott finds, first of all, that the claimant airlines and airline associations cannot, as a rule, rely on the international agreements and customary international law invoked. In so far as the international agreements at issue are binding on the European Union at all, according to Advocate General Kokott they primarily concern legal relations between the Contracting Parties, and are not intended to protect the rights or interests of individuals. Only two provisions of the Open Skies Agreement may be relied upon in the present case as a benchmark for review[6]. With regard to the principles of customary international law at issue, the Advocate

[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 2003 L 275, p. 32).
[2] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).
[3] Convention on International Civil Aviation of 7 December 1944.
[4] Kyoto Protocol to the United Nations Framework Convention on Climate Change of 11 December 1997 (OJ 2002 L 130, p. 4).
[5] Air Transport Agreement of April 2007 between the European Community and its Member States, of the one part, and the United States of America, of the other part (OJ 2007 L 134, p. 4).
[6] Article 7 and the second sentence of Article 15(3) of the Open Skies Agreement.

General is of the view that they determine the scope of sovereignty of States and limit their jurisdiction, but do not have an effect on the legal status of individuals.

In addition, Advocate General Kokott takes the view that the Directive on the inclusion of aviation activities in the EU emissions trading scheme is not contrary to international law. The principles of customary international law and international agreements relied on do not give rise to any legal objections, not even in so far as the EU emissions trading scheme extends to sections of flights that take place outside the air space of Member States of the European Union. The Directive is concerned solely with aircraft arrivals at and departures from airports in the European Union, and it is only with regard to such arrivals and departures that the airlines have to surrender emission allowances in various amounts, depending on the flight, and if they fail to comply there is a threat of penalties, which might extend to an operating ban. Thus the Directive does not contain any extraterritorial provision, nor does it infringe the sovereign rights of third countries. Take-off and landing are essential and particularly characteristic elements of every flight; therefore, as a place of departure or destination, an airport within the territory of the European Union provides an adequate territorial link for the whole of the flight in question to be included in the EU emissions trading scheme.

With regard to the provisions of international agreements at issue, the Advocate General takes the view that these also do not affect the validity of the Directive. There is, in that respect, no impermissible unilateral action on the part of the European Union outside the framework of the International Civil Aviation Organisation (ICAO) since, under the Kyoto Protocol, the limitation and reduction of greenhouse gases is not the exclusive competence of the ICAO. The Open Skies Agreement does not rule out the application of market-based measures regarding aviation emissions either.

Furthermore, the inclusion in the EU emissions trading scheme of flights of all airlines from and to European airports is compatible with the principle of fair and equal opportunity laid down in the Open Skies Agreement. Indeed it is precisely that inclusion that establishes equality of opportunity in competition, as airlines holding the nationality of a third country would otherwise obtain an unjustified competitive advantage over their European competitors if the EU legislature had excluded them from the EU emissions trading scheme.

Finally, Advocate General Kokott takes the view that, under the EU emissions trading scheme, airlines are not charged any fees, dues or other charges within the meaning of the relevant international-law agreements. The EU emissions trading scheme is a market-based measure, the purpose of which is environmental and climate protection. Accordingly the emission allowances that have to be surrendered in respect of flights that take off from or land at airports within the European Union are levied in respect of the emission of greenhouse gases, not merely fuel consumption or the persons or property on board.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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