Court of Justice of the European Union
PRESS RELEASE No 139/11
Luxembourg, 21 December 2011

Press and Information

Judgment in Case C-366/10
Air Transport Association of America and Others v Secretary of State for Energy and Climate Change

The directive including aviation activities in the EU's emissions trading scheme is valid

Application of the emissions trading scheme to aviation infringes neither the principles of customary international law at issue nor the Open Skies Agreement

In 2003, the EU decided to set up a scheme for greenhouse gas emission allowance trading, as a central element of European policy to combat climate change[1]. Initially, the EU emissions trading scheme did not cover greenhouse gas emissions from air transport. Directive 2008/101 provides that aviation activities will be included in that scheme from 1 January 2012[2]. Accordingly, from that date all airlines – including those of third countries – will have to acquire and surrender emission allowances for their flights which depart from and arrive at European airports.

A number of American and Canadian airlines and airline associations contested the measures transposing Directive 2008/101 in the United Kingdom. They contend that, in adopting the directive, the EU infringed a number of principles of customary international law and various international agreements. According to them, the directive infringes, first, the Chicago Convention[3] the Kyoto Protocol[4] and the Open Skies Agreement[5] in particular because it imposes a form of tax on fuel consumption, and second, certain principles of customary international law in that it seeks to apply the allowance trading scheme beyond the European Union's territorial jurisdiction.

The High Court of Justice of England and Wales has asked the Court of Justice whether the directive is valid in the light of those rules of international law.

In its judgment delivered today, **the Court of Justice confirms the validity of the directive that includes aviation activities in the emissions trading scheme**.

First of all, the Court establishes that **only certain provisions of the Open Skies Agreement and three principles of customary international law** (namely the sovereignty of States over their airspace, the illegitimacy of claims to sovereignty over the high seas and freedom to fly over the high seas) **may be relied upon for the purposes of examination of the directive's validity**. Of the principles and provisions mentioned by the High Court, they alone fulfil the criteria laid down by the Court of Justice's case-law.

In particular, the Court establishes that the EU is not bound by the Chicago Convention because it is not a party to that convention and also has not hitherto assumed all the powers falling within the field of the convention. As regards the Kyoto Protocol, the Court observes that the parties to the

[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, concluded on 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 between the United States of America, of the one part, and the European Community and its Member States, of the other part, concluded on 25 and 30 April 2007 (OJ 2007 L 134, p. 4).

protocol may comply with their obligations in the manner and at the speed upon which they agree and that, in particular, the obligation to pursue limitation or reduction of emissions of certain greenhouse gases from aviation fuels, working through the International Civil Aviation Organisation (ICAO), is not unconditional and sufficiently precise to be capable of being relied upon.

Whilst the Court agrees to examine, within the limits of review as to a manifest error of assessment, the validity of the directive in the light of three of the principles of customary international law relied upon, it finds however, in the case of the fourth principle, that there is insufficient evidence to establish that the principle that a vessel on the high seas is governed only by the law of its flag could apply by analogy to aircraft.

Next, the Court examines whether the directive is compatible with the principles of customary international law and the Open Skies Agreement.

It observes that the directive is not intended to apply as such to aircraft flying over the high seas or over the territory of the Member States of the EU or of third States. **It is only if the operators of such aircraft choose to operate a commercial air route arriving at or departing from an airport situated in the EU that they are subject to the emissions trading scheme**.

In this context, application of the **emissions trading scheme to aircraft operators infringes neither the principle of territoriality nor the sovereignty of third States, since the scheme is applicable to the operators only when their aircraft are physically in the territory of one of the Member States of the EU** and are thus subject to the unlimited jurisdiction of the EU. Nor can such application of EU law affect the principle of freedom to fly over the high seas since an aircraft flying over the high seas is not subject, in so far as it does so, to the emissions trading scheme.

As for the fact that the operator of an aircraft is required to surrender emission allowances calculated on the basis of the whole of the flight, the Court points out that EU policy on the environment aims at a high level of protection. Thus, the EU legislature may in principle chose to permit a commercial activity, in this instance air transport, to be carried out in its territory only on condition that operators comply with the criteria that have been established by the EU. Furthermore, the fact that certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon, the full applicability of EU law in that territory.

Finally, the Court responds to the assertion that the emissions trading scheme constitutes a tax, fee or charge on fuel in breach of the Open Skies Agreement. It holds that the directive does not infringe the obligation to exempt fuel from taxes, duties, fees and charges. In contrast to the defining feature of obligatory levies on the consumption of fuel, in the case of the scheme in question there is no direct and inseverable link between the quantity of fuel held or consumed by an aircraft and the pecuniary burden on the aircraft's operator in the context of the emissions trading scheme's operation. The actual cost for the operator depends, inasmuch as a market-based measure is involved, not directly on the number of allowances that must be surrendered, but on the number of allowances initially allocated to the operator and their market price when the purchase of additional allowances proves necessary in order to cover emissions. Nor can it even be ruled out that an aircraft operator, despite having held or consumed fuel, will bear no pecuniary burden resulting from its participation in the emissions trading scheme, or will even make a profit by assigning its surplus allowances for consideration.

The Court concludes by stating that **the uniform application of the scheme to all flights which depart from or arrive at a European airport is consistent with the provisions of the Open Skies Agreement designed to prohibit discriminatory treatment between American and European operators**.

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.