Guest Commentary

EU ETS challenged by airlines

By Deborah Storey Simmons, association, Jones Day

The EU's extension of its ETS to the aviation sector holds significant financial implications for aircraft operators and aerospace suppliers.

Requirements for carbon allowances under the regulations will be implemented in January 2012, while other aspects of the regulations (such as reporting) are already in place.

Because the EU ETS aviation regulations effectively span the globe by covering certain emissions of foreign-registered aircraft outside of EU airspace, they have been controversial from the start.

It is therefore hardly surprising that three US airlines and the US airline industry's principal trade association contested the application of the EU ETS regulations to airlines outside the EU. Their lawsuit was originally filed with the UK's high court, as the UK is administering the regulations applicable to the airline claimants. The challenge will ultimately be heard, however, by the EU Court of Justice, and the parties and interveners recently submitted written observations to that court.

The challenged regulations have two essential components. First, they cap total allowances for all flights that "depart from or arrive in an aerodrome situated in a member state," without regard to flight time or amount of emissions in EU airspace. Second, they obligate airlines to obtain and surrender allowances equal to their emissions in the preceding calendar year, again without considering flight time or emissions in EU airspace. Thus, the regulations implicate the entirety of flights that arrive in or depart from EU member states, not just the portion of those flights within EU airspace.

As with other businesses covered by the EU ETS, airline operators whose emissions exceed their allocated allowances will be required to purchase extra allowances from the carbon market.

The airlines argue that the aviation-related EU ETS regulations violate long-established principles of international law, breach international obligations requiring a consensual resolution within the framework of the UN-chartered International Civil Aviation Organisation (Icao), and contravene the Chicago Convention and EC-US Open Skies Agreement. The claimants further contend that applying the scheme to emissions outside of EU airspace breaches sovereignty laws applicable to aviation, and that the collection of allowances violates a Chicago Convention rule limiting aviation charges to cost-based recovery.

The defendant, the UK Secretary of State for Energy and Climate Change, opposes the substantive grounds advanced by the airlines but did not oppose the EU Court of Justice hearing the dispute, given the considerable international significance of the issues, the complex and relatively immature interrelationship between international and EU law, and the fact that most non-EU governments have questioned the legality of applying the EU ETS to airlines based outside the EU.

Represented by Jones Day, the International Air Transport Association (Iata) and the National Airlines Council of Canada (Nacc) have intervened and argue that the extension of the EU ETS to international aviation emissions is simply an attempt by the EU to impose its will on other nations regarding a common global issue, climate change. Noting that such unilateral action will damage the regime of aviation law long founded on cooperative principles of mutuality, accommodation, and sovereign noninterference embedded in customary international law, Iata and Nacc also contend that the regulations would inhibit the development of environmental law and multilateral solutions to potential environmental threats.

Iata and Nacc argue that regulation of aircraft emissions in this manner ignores the role of the Icao, which was given exclusive responsibility by the Kyoto protocol for reducing greenhouse gas emissions from the international aviation sector.

Other EU member states may file comments, but which countries choose to do so will not be known until all written submissions to the EU Court of Justice are released in 2011. Thereafter, an oral hearing will be conducted by the court and the court's advocate general. Several weeks after the oral hearing, the advocate general will deliver an opinion containing a legal analysis and suggestion for how the court should rule. The judges will then deliberate, a process that often takes several months. The parties have requested priority handling of the dispute, in an effort to resolve the issue before the 2012 implementation date, but that decision is committed to the discretion of the court's president.

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