

## **European Union Court Stays Course on Airline Emissions Rules**

By [Michael A. Nesteroff](#) on December 21st, 2011

The Court of Justice for the European Union has [ruled](#) that airlines operating in and out of EU countries must comply with the union's rules for greenhouse gas emissions starting January 1, 2012. In a decision that was presaged last October by a [preliminary opinion](#) from the Court's advocate general, the Court rejected claims by the Air Transport Association of America and American, Continental and United Airlines that applying the EU's emissions rules to international air carriers violates international law, the 1944 Chicago Convention on international civil aviation and the 2010 Open Skies Agreement under the Kyoto Protocol.

### **Decision**

The Court ruled:

- The EU is not bound by the Chicago Convention because it was not a party to the agreement;
- The Kyoto Protocol does not limit the EU to regulating aviation greenhouse gas emissions only through the International Civil Aviation Organization ("ICAO");
- The Open Skies Agreement does not preclude the EU Court from exercising jurisdiction and, by applying the emissions requirements to all airlines entering and leaving EU airports, the rules do not unfairly burden U.S. airlines in favor of European airlines; and
- Customary international law does not prohibit the regulations.

### **EU Rules**

In 2003, the EU adopted a cap and trade system to regulate greenhouse gas emissions, but did not include air transportation. Subsequently, in 2008, the EU added aviation activities beginning January 1, 2012. The ATA and U.S. airlines brought a challenge to the High Court of Justice of England, which referred the case to the EU Court of Justice.

Under the EU rules, allowances totaling 97 percent of airlines' historic operations will be allocated the first year, declining to 95 percent in 2013. During the first two years 15 percent of the allowances will be auctioned, with the potential for a greater percentage auctioned in subsequent years. Each aircraft operator will apply for the free allowances by submitting verified data on its fuel consumption for the monitoring year. On April 30 of each year airlines will have to surrender allowances equal to their total emissions for the previous year. Those who fail to surrender enough allowances will be penalized 100 Euro for each ton of carbon dioxide equivalent emitted in excess of the number of allowances surrendered.

### **Response**

Days before the ruling, the U.S. and 42 other countries wrote to EU ministers objecting to applying the emissions trading scheme to airlines. The letter urges the EU to work with, rather than against, the international community in a multilateral forum, such as the ICAO, to develop ways to reduce aviation emissions.

We strongly urge the EU and its Member States within their respective competencies to reconsider this current course; halt or, at a minimum, delay or suspend application of this Directive; and re-engage with the rest of the world to find away forward at ICAO to address this important issue. The United States stands ready to engage in such an effort. ***Absent such willingness on the part of the EU, we will be compelled to take appropriate action.***

[emphasis added]

It's unclear what "appropriate action" means, but the U.S. House of Representatives, in anticipation of the EU Court ruling, passed the European Union Emission Trading Scheme Prohibition Act of 2011, [HR 2594](#) (PDF). In early December, Sen. John Thune (R-S.D.) introduced a companion measure, [S. 1956](#). Both bills would require the Secretary of Transportation to prohibit an operator of a civil aircraft of the U.S. from participating in any emissions trading scheme unilaterally established by the EU and directs the executive branch to conduct international negotiations and take other actions necessary "to ensure that operators of civil aircraft of the United States are held harmless" from the EU's emissions trading scheme.

A coalition of aviation groups under the name [Airlines for America](#) says its member airlines will comply under protest but it also is urging the Senate to adopt the bill because the emissions scheme will cost U.S. airlines \$3.1 billion over the next eight years. According to the coalition's letter to Congress:

Airlines and other operators have operated with a razor-thin profit margin over the last 40 years and have lost more than \$55 billion and 160,000 jobs since 9/11. \* \* \* If unilateral emissions schemes, such as the EU ETS, are allowed to proliferate, scarce capital in the aviation industry will be siphoned into foreign governments' general funds inhibiting the industry's ability to improve our mutual goal — fuel efficiency.

With both houses of Congress on holiday recess, it appears that the bill won't be passed before the January 1, 2012, start date of the emissions scheme. It is, however, possible that the Senate could take action on the emissions bill if Senators have to come back to consider changes to the payroll tax extension measure before the new year.

The airlines have advocated for a global approach, through the ICAO. While the EU agrees, no such resolution has emerged after many years of trying. The Court's ruling and EU implementation of the airlines emissions trading scheme could break the stalemate but, in the meantime, the decision is bound to escalate this long-simmering dispute.