

Court/Tribunal: European Court of Justice; Grand Chamber

Case: *Air Transport Association of America et al. v. Secretary of State for Energy and Climate Change*

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The Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., and United Airlines Inc., (collectively “ATA et al.”), brought proceedings against the Secretary of State for Energy and Climate Change challenging the validity of procedures designated to implement Directive 2008/101/EC as adopted by the United Kingdom of Great Britain and Northern Ireland. Directive 2008/101/EC amends Directive 2003/87/EC to include aviation activities in the scheme for greenhouse gas emission allowance trading. The specific objective of the amendment was to reduce the impact that aviation has on climate change by including aviation emissions in the scheme to reduce total Community greenhouse gas emissions.

Background Information

The Air Transport Association of America is the principal trade and service association of the United States airline industry and its members operate flights in the United States, Europe, and the rest of the world. In 2009, ATA et al. brought judicial review proceedings against the Secretary of State for Energy and Climate Change, asking the referring court to reject the measures implementing Directive 2008/101 in the United Kingdom as invalid. ATA et al. argued that the directive was unlawful in light of international treaty law and customary international law. The High Court of Justice of England and Wales, Queen’s Bench Division decided to stay the proceedings and refer the following questions to the European Court of Justice (“ECJ”):

- 1) whether any international treaties or customary international law are capable of being relied upon in this case to challenge the validity of Directive 2003/87/EC as amended by Directive 2008/101/EC;
- 2) whether Directive 2008/101 is invalid as it applies the Emissions Trading Scheme to those parts of flights that take place outside the airspace of EU Member States per customary international law;
- 3) whether Directive 2008/101 is invalid as it applies the Emissions Trading Scheme to those parts of flights that take place outside the airspace of EU members per the Chicago Convention or the Open Skies Agreement; and
- 4) whether Directive 2008/101 is invalid as it applies the Emissions Trading Scheme to aviation activities.

Court’s Analysis

The Court started its analysis with a discussion of Article 216(2) of the Treaty on the Functioning of the European Union (“TFEU”), which states that

where the EU accepts international agreements, they are binding upon its institutions and, consequently, the international agreements prevail over acts of the EU. Therefore, it is possible that the validity of an EU act may be affected by the fact that it is incompatible with such provisions of international law. In order to determine whether the validity of an EU act may be assessed in light of the rules of international law, the Court outlined a three part test: (1) the EU must be bound by the rules; (2) the validity of an EU act can only be examined in light of an international treaty where the nature and broad logic of the treaty do not preclude it; and (3) where (1) and (2) are satisfied, the treaty provisions that are relied upon must be unconditional and sufficiently precise regarding their content.

Question 1:

The Court first addressed whether any of the international treaties outlined would suffice to assess the validity of Directive 2008/101. The Court held that the EU is not bound by the Chicago Convention, and therefore, the Convention cannot be used to determine the validity of Directive 2008/101. Next, the Court held that although the EU is bound by the Kyoto Protocol, the specific provisions of the Protocol were not unconditional and sufficiently precise in their objectives for reducing greenhouse gas emissions and, therefore, could not be used to assess the validity of Directive 2008/101. Further, the Court held that the Open Skies Agreement bound the EU, the nature and logic of the agreement's articles did not preclude the assessment of EU law's validity, and the agreement's articles in question contained unconditional and sufficiently precise obligations that could be relied upon for a preliminary ruling for assessing the validity of Directive 2008/101.

Second, the Court analyzed the claims based in customary international law. The Court found that, as embodied in the current state of customary international air law, 1) each State has complete and exclusive sovereignty over its airspace; 2) no State may validly purport to subject any part of the high seas to its sovereignty; and 3) States have freedom to fly over the high seas. However, the Court held that there was not enough evidence to establish the principle that aircraft flying over the high seas are subject to the exclusive jurisdiction of the State in which they are registered. Then the Court analyzed whether and under what circumstances the former three customary international law principles could be relied upon. The Court held that because a principle of customary international law "does not have the same degree of precision" as that of an international agreement, the judicial review of the principle must be limited to the competence of the EU in adopting Directive 2008/101 and whether in adopting Directive 2008/101, the responsible EU institutions made "manifest errors of assessment."

Questions 2-4:

The second, third, and fourth questions attempt to discern whether Directive 2008/101 was meant to apply the allowance trading scheme to flights or parts of flights that take place in airspace outside of the Member States.

The Court first discussed whether and to what extent Directive 2008/101 applies to the parts of international flights that are performed outside the airspace of the Member States. The Court first noted that Annex I of Directive 2003/87, which was directly amended by Directive 2008/101, inserted a category headed “Aviation” and added a statement that “from 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies” shall be included in the airline carrier’s emissions report. Consequently, the Court noted that the Directive was not intended to apply to international flights over Member States or third States, when the flights do not arrive at or depart from an airport situated within one of the Member States. On the other hand, the Court noted that flights departing from airports in third States that do arrive in Member States’ territories or flights where the destination is located in third States, are required by Annex IV, as amended by Directive 2008/101, to report their emissions. Accordingly, the Court held that Directive 2008/101 applies to international flights that arrive at or depart from airports located in the Member States.

Next, the Court addressed whether the EU, while taking into account customary international law determined as reliable in Question 1, was competent to adopt Directive 2008/101. The Court discussed that the adoption of Directive 2008/101 was premised on the idea that because it is applicable only to aircraft registered in Member States or third States that depart from or arrive at airports in Member States, it does not infringe on third States’ sovereignty over their airspace. Because the EU must respect international law and Directive 2008/101 does not apply to aircraft registered in third States that fly over third States or the high seas, the Directive must be limited by relevant international law of the sea and air. Further, the Directive does not affect the freedom to fly over the high seas since not all planes flying over the high seas are subject to the allowance trading scheme. More generally, the Court discussed that the EU may legislate to permit or deny commercial activities conditioned on the fact that the operators comply with the criteria established; here, the EU has legislated to fulfill the environmental protection objectives it has laid out. Consequently, the Court held that the EU was competent in adopting Directive 2008/101 because the mere incidence of pollution of the air, sea, or land of the Member States originating elsewhere was not enough to question the full applicability of EU law.

Lastly, the court decided the validity of Directive 2008/101 in light of the applicable articles of the Open Skies Agreement:

Article 7 of the Open Skies Agreement:

ATA et al. argued that Directive 2008/101 infringed on Article 7 because it required international flight operators to comply with the laws and regulations of the EU when the planes departed or arrived at Member State airports. Further, they maintained that Directive 2008/101 tries to apply the allowance trading scheme to parts of flights over the high seas and third State territories. After reading the wording of Article 7, the Court discerned that legislation such as

Directive 2008/101 applies to any aircraft used by the airlines of the other party to that Agreement and that those aircraft are required to comply with the legislation. Therefore, the Court held that Article 7 does not preclude the application of the allowance trading scheme to airline operators established in third States, when their flights depart from or arrive at an airport in a Member State.

Article 11(1) and (2)(c) of the Open Skies Agreement:

ATA et al. contended that the EU may only impose charges based on the cost of the service provided and that extending the allowance trading scheme to international aviation through Directive 2008/101 infringes on the obligations designated in Articles 11(1) and (2)(c) that require the EU to exempt the fuel load from taxes, duties, fees, and charges. The Court first noted that the ultimate goal of the allowance trading scheme was to protect the environment by reducing greenhouse gas emissions and that the scheme does this by encouraging the “pursuit of the lowest cost of achieving a given amount of emissions reductions.” The quantity of fuel and the resulting fuel consumption are used only to establish a formula to calculate the respective emissions. But the actual cost to the operator, calculated on the basis of fuel consumption, depends just as much on market based factors. Therefore, the Court held that extending the application of Directive 2008/101 to international aviation does not affect the exemption of the fuel load, from taxes, duties, fees, and charges as the allowance trading scheme constitutes a market based measure.

Article 15(3) with Articles 2 and 3(4) of the Open Skies Agreement:

ATA et al. asserted that the Directive, as applied to airlines established in the US, infringes on Article 15(3) because the environmental measure is incompatible with the relevant ICAO standard. In addition, ATA et al. asserted that the Directive violates Article 3(4) because it includes a measure limiting the volume of traffic and frequency of service. The Court noted that neither ATA et al. nor the referring court provided material indicating that the EU infringed on provisions of the ICAO within the meaning of Article 15(3) by applying Directive 2008/101 to aviation. Nevertheless, upon examination of the ICAO provisions, it is clear that there is no indication that schemes such as the EU’s allowance trading scheme would be impermissible. Regarding Article 15(3) and Article 3(4), the Court held that reading the two articles together does not prevent the parties from adopting measures that would limit the volume of traffic and the frequency of service when the measures are adopted to protect the environment. Article 3(4) provides that parties cannot create limitations unless “as may be required for...environmental... reasons.”

Lastly, the Court held that a reading of Article 15(3) in conjunction with Articles 2 and 3(4) provides that when environmental measures are adopted, they must be applied in a “non-discriminatory manner to the airlines concerned.” The preamble to Directive 2008/101 expressly states that the uniform application of the allowance trading scheme as applied to aircraft that depart from or arrive at airports in Member States is mandatory. Therefore, it complies with the non-

discrimination provisions of “bilateral air service agreements with third States” in Articles 2 and 3(4) of the Open Skies Agreement. Accordingly, the Court held that Directive 2008/101 was not invalid with reference to Article 15(3) when read with Articles 2 and 3(4) of the Open Skies Agreement.

Holdings

The Court first ruled on which principles of international law can be used in the main proceedings to assess the validity of Directive 2008/101. Within the limits of review as to the possibility of manifest error by the EU regarding its competence to adopt the Directive, the following principles can be used: each State has complete and exclusive sovereignty over its airspace; no State may validly purport to subject any part of the high seas to its sovereignty; and there is guaranteed freedom to fly over the high seas. The international treaties that can be used are Articles 7 and 11(1) and (2)(c) of the Open Skies Agreement between the US and the EU Member States, and Article 15(3) of that Agreement, read in conjunction with Articles 2 and 3(4).

Second, the Court ruled that the examination of Directive 2008/101 has disclosed no factor that might affect its validity.