



The EU Emission Trading Scheme, Aviation and the Question of Sovereignty

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Outline:

1. The EU ETS
2. Aviation Emissions and Climate Change
3. Regulatory Framework
4. International Criticism
5. The ECJ and the Issue of Extraterritoriality
6. What's next?

1. The EU ETS – in brief

- EU ETS established by Directive 2003/87/EC
- 3 phases: 2005-2007, 2008-2012, 2013-2020
- Applies to 11.000 power stations and industrial plants (all stationary installations!) in 30 countries and sets a limit (“cap”) on the emission of GHGs.
- At the same time, it establishes tradable units – allowances (EUA's) – in order to increase cost-effectiveness. It also allows for the use of international credits (CERs and ERUs)
- The limit on the total number of allowances available ensures that they have a value.

2. The EU ETS – in brief

- Allocation (“grandfathering”) of allowances by Member States (until 2012), auctioning from 2013
- At the end of each year each company must surrender enough allowances to cover all its emissions, otherwise heavy fines are imposed.
- If a company reduces its emissions, it can keep the spare allowances to cover its future needs or else sell them to another company that is short of allowances.
- The flexibility that trading brings ensures that emissions are cut where it costs least to do so.
- The number of allowances is reduced over time so that total emissions fall. In 2020 emissions will be 21% lower than in 2005.

3. EU ETS Legislation

- [Directive 2003/87/EC of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC \(13 October 2003\)](#)
- [Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms](#)
- [Directive 2008/101/EC of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community \(19 November 2008\)](#)
- [Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community](#)
- [Consolidated version of 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](#)

4. Aviation Emissions and Climate Change

- Aviation has a climate impact
- In the EU, GHG emissions from *international* aviation increased by 73 % from 1990 to 2003
- If continued: emissions from international flights from EU airports will by 2012 have increased by **150 %** since 1990
- International aviation emissions could offset more than 25% of EU reductions

5. Aviation Emissions and Climate Change

- 2 degrees centigrade goal
- EU pledge for 2020: 20-30%
- “...action needs to be taken to ensure that aviation does not undermine, but contributes to, achieving these objectives.”
- “From an economic and environmental point of view, the inclusion of aviation [in the EU ETS] seems the best way forward.”

(Communication from the Commissions to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *“Reducing the Climate Change Impact of Aviation”*, COM(2005)459 final)

6. The Regulatory Framework

- UNFCCC ("memo item")

- Article 2.2 KP

"The Parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation..., working through the International Civil Aviation Organization..."

- ICAO (Environmental Report 2010)

"Ultimately, one of the issues to explore is whether emissions trading and offset approaches may have potential, not only to promote cost-effective reductions in emissions, but also to offer solutions to the difficult issue of how the effort for reducing international transport emissions may be distributed."

- COP 17 (Durban, December 2011)

"...Parties agreed to continue its consideration of issues related to addressing emissions from international aviation ([Outcome of the work of the AWG-LCA](#), p. 14, paragraph 78).

7. The Regulatory Framework

- Directive 2003/87/EC as amended by Directive 2008/101/EC (inclusion of aviation from 1.1.2012)
- Objectives:
 - Reducing climate change impact attributable to aviation, in order to avoid distortions of competition
 - Improving environmental effectiveness
- All aircraft operators have a cap on their emissions (97% of average emissions 2004-2006)
- Allocation of allowances: 85% free, 15% auctioned
- Allocation based on tonne-kilometres
- Each year, operator must surrender a number of allowances equal to their actual emissions
- Penalty: €100 per tonne CO₂

8. International Criticism

- **India:** "Discriminatory", "Violation of international law", "We think that the EU's proposal is illegal because it seeks to charge airlines for the lag of the journey outside its airspace." "This is an extra-territorial principle, which is illegal."(S.N.A. Zaidi, Civil Aviation Secretary) "How can they dictate terms to us and why should we accept it?" (Civil Aviation Minister V. Ravi), Durban negotiations
- **China:** "EU initiative is... an attack on other countries' sovereignty", "We oppose any unilateral and mandatory moves that are taken without the agreement of involved parties..." (Joined Statement by China and Russia, 27 September 2011), stalling order of airbusses, violation of the CBDR principle
- **Russia, Japan, Australia, US:** "Inclusion of aviation in the EU scheme is ... a violation of the cardinal principle of State sovereignty" ICAO Working paper (2.11.2011)
- **US:** The US would respond with "appropriate action" if the scheme went ahead, H. Clinton, 19. December 2011
- **US Airlines:** violation of international law, challenged implementation regulation in court

9. The ECJ and the Issue of Extraterritoriality

- High Court of England and Wales (Queens Bench Division, Administrative Court) request for a preliminary ruling from the ECJ on 8. July 2010 under Article 267 TFEU
- Opinion of Advocate General Kokott, delivered 6 October 2011
- ECJ Judgment, 21 December 2011, C-366/10

10. The ECJ and the Issue of Extraterritoriality

Claim:

- Directive 2008/101/EC invalid, EU infringed various international agreements:
 - Chicago Convention on International Civil Aviation,
 - The Kyoto Protocol to the UNFCCC and the
 - “Open Skies Agreement” – Air Transport Agreement between the USA and the EC)

and several principles of customary international law:

- The principle that each State has complete and exclusive sovereignty over its airspace
- The principle that no State validly purport to subject any part of the high seas to its sovereignty
- The principle of freedom to fly over the high seas
- The principle that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered.

11. The ECJ and the Issue of Extraterritoriality

The questions raised concern:

1. The circumstances in which principles of international law and provisions of international treaties may be relied upon in the context of a reference for a preliminary ruling on the validity of a measure, and
2. The validity of Directive 2008/101/EC in the light of international treaties and customary law in so far as that Directive extends the EU ETS to sections of flights that take place outside the air space of the Member States of the EU.

12. The ECJ and the Issue of Extraterritoriality

In the words of Advocate General, the preliminary ruling

“is of fundamental importance not only for the future shaping of European climate change policy but also generally to the relationship between European Union (“EU”) law and international law. In particular it will be necessary to consider whether and to what extent individuals are entitled to rely in court on certain international agreements and principles of international law in order to defeat an act of the European Union.”

(Opinion of Advocate General Kokott, delivered 6 October 2011 in case C-366/10)

13. The ECJ and the Issue of Extraterritoriality

- AG on "direct effect":
 1. EU must be bound
 2. The nature and broad logic of the agreement concerned must not preclude a review of validity
 3. The content of the provisions of the agreement must be unconditional and sufficiently precise
 4. Agreement must be capable of conferring rights which an individual can invoke before the courts
- AG: Applies both to international agreements and *customary principles*

14. The ECJ and the Issue of Extraterritoriality

ECJ on direct effect of customary principles:

1. Does the EU have the competence from the principle to adopt the act in question?
2. Is the act liable to affect rights which the individual derives from EU law or to create obligations under EU law in this regard? (para 107), in general possible for principles!
3. For principles: judicial review is limited to the question whether, in adopting the act, EU institutions made errors of assessment concerning the conditions for applying the principles (para 110)

15. The ECJ and the Issue of Extraterritoriality

- **AG on extraterritoriality:**
 - “The fact that calculation of emission allowances... is based on the whole flight... does not bestow upon the Directive any extraterritorial effect. ... *account is taken of events* that take place over the high seas or on the territory of third states....”
(para 147)

16. The ECJ and the Issue of Extraterritoriality

- **ECJ on extraterritoriality:**
 - “...as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191 (2) TFEU, the European Union legislature may ... choose to permit a commercial activity..to be carried out in the territory of the EU only on condition that operators comply with the criteria that have been established by the EUI and are designed to fulfill the environmental protection objectives which it has set for itself (para 128)
 - 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 in question... the full applicability of EU law in that territory.” (para 129)

17.The ECJ and the Issue of Extraterritoriality

- Distinction between:
 - extraterritorial jurisdiction and
 - domestic measures with extraterritorial implications
- “outward-looking” environmental legislation in order to:
 - discourage poor environmental behaviour beyond their jurisdiction
 - reduce transboundary environmental risks
 - create level playing field

18.The ECJ and the Issue of Extraterritoriality

- Sufficient link necessary?
 - “adequate territorial, personal or universal link” (AG)
 - “Contribution to the pollution of the air, sea or land territories of the Member States” (ECJ)
- Universality principle:
 - AG: “Such an approach reflects the nature as well as the spirit and purpose of environmental protection and climate change measures. It is well known that air pollution knows no boundaries and that greenhouse gases contribute towards climate change worldwide irrespective of where they are emitted; they can have effects on the environment and climate in every State and association of States, including the European Union.” (para 154)

19. What's next?

- China has barred its airlines from participating in the EU ETS (6 February 2012) – airlines cannot join the EU ETS without governmental approval; and considers a claim under the Kyoto Protocol (CBDR)
- ***US House of Representatives*** on 24. October 2011 passed a "*European Union Emissions Trading Scheme Prohibition Act of 2011*", which would render it illegal for US airlines to participate in the EU ETS.
- ***India*** considers WTO claim against EU's "unilateral trade measure"
- Joint Declaration 22 February 2012

20. What's next?

”Trade war”: Challenging the EU ETS measure in the WTO:

- Trade in goods or service?
- GATS: Annex on Air Transport Services
- GATT:
 - Indirect effect on trade in transported goods?
 - Discriminatory treatment? (*de facto* longer flights)
- Art. XX
 - *Chapeau*: flexibility, negotiations, consideration of trade implications?

The Global Carbon Market: Pro and Contra Arguments

Pros:

- More emission reductions for the same money (cost-effectiveness)
- Transfer of technology and financial support to developing countries
- Emission reductions in developing countries
- Income, SD, capacity building

Cons:

- Right way to go?, Artificial global market for pollution rights?
- Are developed countries ‘taking the lead’?
- Hampers development of new technology in developed countries
- Uncertain climate effect
- Abstraction
- Expert field: missing public debate, democratic deficit....





Something New Under the Sun?

- International Climate Law – new and complex field of PIL
- Limitations on States' sovereign rights
- New, innovative market mechanisms on a global scale
- Unprecedented experiment!
- Cost-effectiveness, differentiated commitments, technology transfer, financial assistance
- How to balance equity and efficiency?
- Is it the right way to go?





Something New Under the Sun?

- Primary responsibility of developed countries...
- ...but developing countries' role becomes more and more important
- New rules/ 'cutting edge' i PIL
- Strong interest by states, IOs, economic actors, NGOs,
- Expanding, intense development (§ and \$)
- Challenge for lawyers: complex field, demands multidisciplinary cooperation (with economists, political scientists, natural scientists - and other lawyers...private international law, finance law, patent law, property law, insurance law, human rights law)

