

Lessons learned

The EU and its Aviation Directive

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With debates on unemployment, growth, and sovereign debt dominating government agendas, global warming in the United States is a topic relegated to the cold. Yet, as the global aviation community can testify, climate policy remains hot in at least a few jurisdictions. From January 1, 2012 onward, new European rules require all aircraft landing and departing from European territory to participate in Europe's cap and trade greenhouse gas permitting system, commonly referred to as the EU ETS (European Union Emissions Trading System).

The EU Directive

Under Directive 2008/101/EC, the legislation that includes aviation in the ETS, known as the Aviation Directive, EU and non-EU airline operators purchase allowance permits to "pay" the EU for carbon emitted over journeys beginning or ending in the EU, even if the portion of the journey in EU airspace is minimal. The EU allocates operators sufficient allowances to cover 97 percent of aircraft emissions (as measured from a 2004 to 2006 baseline and falling to 95 percent in 2014). Initially, 85 percent of the allocated allowances will be free, and 15 percent of the carbon allowances will be auctioned. Operators monitor total greenhouse gas emissions from flights that land or depart from Europe and surrender permits covering that amount back to the EU annually. Participants who are unwilling or unable to reduce emissions can purchase unused permits thus creating a carbon price signal to incentivize low-carbon investment.

The inclusion of non-EU operators in the ETS provoked legal challenges and broad criticism. The Aviation Transport Association of America (ATAA) and major U.S. airlines recently challenged the plan before Europe's highest court, the European Court of Justice (ECJ), asserting that the extraterritorial regulation of non-EU operators in the ETS is unlawful and breaches customary international law and international agreements. The ECJ, however, recently affirmed the validity of the Aviation Directive. Addressing the international agreements, the ECJ found that only the Open Skies Agreement qualified as a legal basis for the challenge, but the ECJ ultimately ruled that, "Application of the emissions trading scheme to aviation infringes neither the principles of customary international law at issue nor the Open Skies Agreement."

The non-European Community's responses

Although this particular case is settled, the controversy rages on. China's Aviation Administration has ordered Chinese airlines to boycott the ETS. U.S. Secretary of State Hilary Rodham Clinton, in a December 2011 letter to EU officials, strongly objected to the ETS on legal and policy grounds and urged the EU to "halt or, at a minimum, delay or suspend application" of the Aviation Directive, explaining that "absent such willingness on the part of the EU, we will be compelled to take appropriate action." Additionally, India and China reportedly have threatened to use retaliatory trade measures, disruption of future climate change negotiations, and the cancellation of large commercial purchases.

In October 2011, twenty-six countries (including the United States) sought the intervention of the United Nations' International Civil Aviation Organization's (ICAO), which

issued a non-binding declaration of October 2011 calling on the EU to exempt international aircraft operators from the ETS. Observers speculate that ICAO may also be host to the drama's next act. Under Article 84 of the International Civil Aviation Convention (Chicago Convention), contracting states bring disagreements over application of the Chicago Convention before the ICAO Council for a vote. If the EU were to lose such a vote, appeal to an ad hoc arbitral tribunal or to the International Court of Justice would be possible. Breach of the Chicago Convention could result in suspension of the EU Member States' ICAO voting rights.

Aside from the aviation industry controversy, the ETS is widely seen as ailing. Emission allowances currently trade far below the amount analysts say will drive low carbon investment. Nonetheless, policymakers in the European Commission's Climate Action Agency (DG Climate Action) continue to draft and adopt new emission reduction legislation. For example, the Commission is currently investigating the possibility of including maritime emissions in the ETS. Reviewing the creation and adoption of EU climate change policy could provide helpful insight into how the Commission might proceed as it continues to develop such policies. To that end, the creation of the Aviation Directive is explained below along with a summary of key lessons to be learned.

The creation of the Aviation Directive

In general, EU nations have agreed to address shared environmental problems at the European level. To put this into practice, the Council of the EU (representing the Member States), the European Parliament (representing the electorate), and the European Commission interact within a complex system that differs significantly from the American system. Importantly, although the Parliament and the Council approve legislation, only the Commission, staffed by civil servants in different policy divisions, called Directorates Generals (DGs), has the right to draft and introduce legislation.

The Commission staff began work on potential aviation emissions in 2005, and started with a public consultation. A summary Report of the March 2005 public consultation illustrates the nature of the procedure. Public consultations occur at the earliest stage of the legislative process; questions are consequently vague and can result in apparent "public support" for unclear initiatives. In its aviation consultation, the Commission asked respondents whether they agreed with "the policy objective to include the air transport sector in efforts to mitigate climate change." It is not surprising that 82 percent of respondents "fully agreed." The Commission could then cite this generic statistic to illustrate "widespread support for the policy objective," which ultimately became the Aviation Directive. We doubt that a more specific question, such as, "Should the EU create legislation requiring all aircraft operators that land or depart from the EU to participate in the ETS, including for those portions of the journey not in EU airspace?" would have received as much support.

Following the public consultation on the Aviation Directive, the Commission produced a study and an impact assessment on including the aviation industry in the ETS. Again, impact assessments occur early in the legislative procedure and

according to non-binding guidelines. Conclusions are often high-level problem statements modeling different scenarios rather than assessments of specific policy proposals. For example, the aviation impact assessment dedicated two and a half pages to the question of economic impact on airlines. Drawing on earlier studies, the report concluded that inclusion of aviation in the ETS, “would have only a marginal effect on profitability.” Such initial conclusions, left unchallenged, can be very difficult to reverse later in the process.

In September 2005, the Commission announced its plan to include the aviation sector in the ETS. To that end, the Commission formed an ad-hoc Aviation Working Group (AWG) to “consider and discuss issues” requiring “expert” input. The Commission invited national experts, key stakeholder organizations, and a few individual companies to participate. The AWG’s April 2006 final report lists all organizations that attended at least one meeting. Of the forty-one participants, about half represented EU Member States or the Commission. The rest were primarily European trade associations.

Those European groups may have been coordinating with international organizations outside of the EU, but it appears that the non-EU aviation community was under-represented in the AWG. This factor may explain the absence of reported debate or controversy surrounding the treatment of non-EU operators. According to the Commission’s report, “most participants agreed that there should not be any difference between domestic and international aviation.”

The creation and functioning of the AWG highlights the sometimes ad-hoc and largely unregulated procedural nature of EU decision-making. There are no binding procedural rules that govern the Commission’s preparatory work, so the details of each process are unique. The Commission decides if meetings should be public, who can attend, and whether or not (sanitized) minutes will eventually become public. Consequently, processes, procedures, and possibilities for public involvement vary from one DG and issue to another. Stakeholders must pay attention and pro-actively seek opportunities for participation.

In December 2006, the Commission introduced a draft proposal and, following various amendments, the Commission approved the Aviation Directive two years later. In the meantime, the EU’s focus shifted to protecting its position within the international aviation community. For example, in a June 2007 Statement, the Council instructed the Member States to “do everything they can at the 36th ICAO Assembly [...] to ensure that, [...] any agreement reached in ICAO does not prevent the Community [...] from including international aviation in the European emissions trading scheme.”

Clearly, Europe’s international advocacy regarding the inclusion of aviation in the ETS began well before approval

of that same legislation. This underscores another interesting characteristic of European decision-making. Once set in motion, the Parliament and the Council may tweak a Commission proposal with amendments but adoption in some form is likely. Effective and early advocacy at the Commission level is essential: Waiting until it “looks like it will really go somewhere” is frequently too late.

Lessons learned from the Aviation Directive

What can the development of the Aviation Directive teach stakeholders about public participation in EU decision-making? Pay attention to early rumblings! Engage when the Commission announces its intent to conduct new studies or consultations. Analyze all assumptions and models and comment on them, offering concrete examples or additions. Document such engagement. Review any studies, including those that the Commission may rely upon, identify their strengths and weaknesses, and consider developing advocacy strategies regarding them. This might include critical analyses of existing studies or conducting additional studies to address deficiencies.

For public consultations, stakeholders should not limit their contributions merely because the Commission might impose length restrictions or try to format questions to address a particular topic. Commentors must provide valuable comments, insights, and data even where the consultation asks incorrect questions or omits key issues. Consider submitting input directly to the relevant policy unit. Although the DG is not required to consider such input, experience shows that Commission civil servants are generally receptive to industry’s input and welcome data and constructive dialogue.

The inclusion of aviation in the ETS teaches stakeholders to be early, be dogged, and never assume that “it will only apply to EU countries.” Do not wait for a legislative proposal. Identify the relevant policy unit at the first sign of a Commission study or consultation, initiate a constructive dialogue, and map out the anticipated procedures. This requires detective work, but dogged commitment will increase one’s chances of meaningful participation in EU decision-making.

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