Aviation and aerospace
February 2012

CLYDE&CO

Aviation Bulletin

Content:

EU Emissions Trading Scheme – the European Court rejects the ATA challenge
Page 1

Q. When is a policy limit not a policy limit? A. When Texas law applies
Page 3

Air France flight 447 - Breyer decision round 2: United States still *forum non conveniens*
Page 5

The changing horizon of employment law in the aviation sector
Page 6

Holiday pay
Page 7

Air passenger duty – continuing controversy
Page 8

Cookies: time running out to comply with the law
Page 11

Airline payment surcharges – update
Page 12

Next generation civil aviation: unmanned air vehicles - applicable legislation and shortcomings
Page 14

Corporate manslaughter – what's new?
Page 16

The new EU Regulation on the provision of food information – its application to airlines
Page 17

Proposed changes to the rules on airport slots
Page 19

EU Emissions Trading Scheme – the European Court rejects the ATA challenge

On 21 December 2011 the Court of Justice of the European Union (CJEU) gave its much awaited judgment in the case brought by the Air Transport Association of America (ATA) and certain US airlines to challenge the validity of the European Union Emissions Trading Scheme (EU ETS). As expected, the judgment did not differ substantially from the report issued by the Advocate General at the CJEU, Professor Juliane Kokott, on 6 October 2011. The report and the judgment are very dismissive of the case brought by the ATA and do not concede any points at all to the ATA and the US airlines.

As the report itself acknowledges, the judgment is "of fundamental importance not only to the future shaping of European climate change policy but also generally to the relationship between EU and international law."

Introduction

In essence, the US airlines are challenging the Directive incorporating airlines within the EU ETS (Directive 2008/101) on three grounds:

- they contend that the EU is exceeding its powers under international law by not confining the EU ETS to wholly intra-European flights
- they maintain that an emissions trading scheme should be negotiated under the auspices of the ICAO
- they are of the view that the emissions trading scheme amounts to a tax or charge prohibited by international agreements

Extraterritorial effect

In the opinion of the Advocate General, Directive 2008/101 "*does not contain any extraterritorial provisions*" as "*it is only with regard to … arrivals and departures that any exercise of sovereignty over the airlines occurs*". Account is taken of events that take place over the high seas or in the territory of other countries, but there is no concrete rule regarding the conduct of airlines outside the EU.

The judgment affirms that "*the fact that…certain matters contributing to the pollution of the air…of the Member State originate in an event which occurs outside that territory is not such as to call into question…the full applicability of European Union law in that territory.*"

With reference to specific international agreements, the Advocate General and the Court are both of the view that the EU ETS does not infringe the Chicago Convention (Articles 1, 11 and 12), or the Open Skies Treaty (Article 7).

The merged firm of Clyde & Co and Barlow Lyde & Gilbert

Kyoto Protocol

The US airlines have also argued that Article 2(2) of the Kyoto Protocol prohibits the EU from pursuing the restriction of greenhouse gases outside the framework of the ICAO. The Advocate General finds this argument "unconvincing". In her view Article 2(2) does not give ICAO exclusive competence and, even if it did, ICAO cannot be expected to be given an unlimited period of time to address the issue. In Professor Kolkott's report, she is of the view that the Kyoto Protocol cannot anyway be relied on by individuals as the basis for bringing a claim at law, especially when the claimants are from a country that did not ratify the Kyoto Treaty. These views are substantially reiterated by the Court in the judgment.

Taxes or charges

In the view of the Advocate General no fees or charges are exacted from airlines under the EU ETS, as it is a market-based measure. "*It would be unusual, to put it mildly, to describe as a charge or tax the purchase price paid for an emission allowance, which is based on supply and demand accordingly to free market forces*". The judgment concurs, pointing out that the scheme "*is not intended to generate revenue for the public authorities*" and does not in any way enable the establishment, applying a basis of assessment and a rate defined in advance, of an amount that must be payable per tonne of fuel consumed (unlike, for example, the Swedish environmental tax discussed in the *Braathens* case).

The claimants take the view that the EU ETS introduces an excise duty on fuel that is prohibited under Article 11(2)(c) of the Open Skies Treaty and Article 24(a) of the Chicago Convention. The Advocate General is not persuaded. In her view Article 11 and Article 24 protect airlines from one Contracting State from having their aircraft and stores treated as "imported" when they merely land in other Contracting States.

In the view of the Advocate General, under the EU ETS there is no direct and inseverable link between fuel consumption and emissions. "*Fuel consumption per se does not permit any direct inferences to be drawn as to the greenhouse gases emitted in the course of a particular flight; instead, an emissions factor must additionally be taken into account according to the fuel used… this may be zero, as in the case of biomass*". The judgment concurs: "*there is no direct and inseverable link between the quantity of fuel held or consumed by an aircraft and the pecuniary burden on the aircraft's operator in the context of the allowance trading scheme's operation…[indeed it may be the case that] an aircraft operator…will bear no pecuniary burden resulting from its participation in the allowance trading scheme, or will even make a profit by assigning its surplus allowance for consideration*".

Applicability of international laws and treaties

There is extensive discussion in the report and the judgment as to applicability of the Chicago Convention, the Open Skies Treaty and the Kyoto Protocol. Summarising the conclusions briefly:

- the Chicago Convention cannot be relied on in contesting the validity of EU legislation as the European Union is not a party to the Chicago Convention, although the principle that each State has sovereignty over its airspace may be relied on as a principle of international law
- the Kyoto Protocol is not sufficiently unconditional and precise so as to confer on individuals the right to rely on it in legal proceedings
- the Open Skies Treaty does establish certain rules designed to apply directly to airlines and therefore confers upon them rights and freedoms which are capable of being relied upon against the parties to the Treaty, for example Article 7 relating to the operation and navigation of aircraft, Article 11(1) relating to exemption of fuel from taxes and Article 15(3) relating to environmental measures

However, the Court concluded that, even to the extent consideration as to the Directive's validity was permitted, its validity was not affected by such considerations.

Conclusion

Reaction to the judgment from airlines outside the European Union has been almost universally negative, with (by way of example) the Chinese airlines threatening to refuse to comply with the scheme at all. It would appear that the ETS is now out of the legal realm and back where it started, in the world of international politics.

For further information, please contact **Mark Bisset**

Q. When is a policy limit not a policy limit?

A. When Texas law applies

The package of cover provided by an insurer to its insured is ordinarily substantively defined by the maximum level of indemnity or applicable policy limit. The insured will have made a decision as to the extent of insurance it requires, and the insurer how much it is willing to offer, with the level of premium paid and received being assessed against the risk which is being insured. The insurer determines its premium income as against a business model which (across many different policies and risks) allows it to work towards securing a profit. That business model relies upon certainty as to maximum exposure, and hence will not address the potential risk of the policy limit being determined inapplicable, so that the insurance provided is effectively unlimited. However, the Texas courts have developed a tort law doctrine that serves as an overlay to the policy and makes the potential shift of "uninsured" exposure from insured to insurer a very definite reality.

The Stowers doctrine

The so-called Stowers doctrine provides that if an insurer unreasonably fails to accept a demand made by a claimant for payment of "policy limits", the insurer may be liable under tort law for the amount of any subsequent judgment against the insured, even if in excess of the contractual policy limits. Punitive damages are available since the cause of action is a tort. The Texas legislature has incorporated, and in effect duplicated, this doctrine into its Unfair Claims Practices Act, thus allowing for recovery of treble damages for a "knowing" failure to settle when liability is reasonably clear. Attorneys' fees are also recoverable under the statutory version of this extracontractual cause of action.

The Stowers doctrine derives from the 1929 case of *GA Stowers Furniture Company v American Indemnity Company*, in which the Texas Supreme Court established a duty on insurers to "*exercise that degree of care that a person of ordinary care and prudence would exercise under the same or similar circumstances", noting that "a failure to exercise such care and prudence would be negligence on the part of the [insurer]*". Any failure to exercise reasonable care in resolving the claim within policy limits can shift the risk of any excess judgment from the insured to the insurer, thereby rendering the policy unlimited in nature.

Application of the doctrine

The Stowers duty is based upon the fact that the insurer retains control of both defence and settlement pursuant to the terms of its insurance policy. As the Judge noted in the 1990 decision in *Foremost County Mutual Insurance Company v Home Indemnity Company, "the raison d'être for the Stowers Doctrine is that the insurer, when in control of the litigation, might refuse a settlement offer that its client, the insured, would want to accept if it had the option*".

In *American Physicians Ins. Exch. v Garcia*, the Texas Supreme Court summarised the Stowers elements as follows:

- [T]he claim against the insured is within the scope of coverage [at the time the offer is made]
- the demand is within policy limits
- the terms of the demand are such that an ordinary prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment

While a formal written demand by the claimant has not yet been required by the Texas courts, the settlement offer's scope and terms must be clear and not the subject of dispute. Although the courts have not required that the insured actually demand acceptance of the settlement, this is the typical practice. Thus, even if the insured agrees that the case should not be settled, this is not necessarily a defence to the claim that the failure to settle was unreasonable.

A bona fide dispute regarding coverage has also not been found to be an absolute defence to a Stowers claim - see the 2010 decision in *LSG Technologies, Inc. v. U.S. Fire Ins. Co.*, holding that Stowers does not involve questions of bad faith and thus a bona fide coverage dispute is not a defence to such claims. Moreover, legal advice regarding coverage is not a complete defence, and even claiming it would potentially waive the attorney client privilege. The duty to indemnify must usually wait for conclusion of the underlying suit in order for a court to determine coverage. Thus, insurers must often make an educated guess as to whether there is coverage or not. If insurers guess there is no coverage and it is later found that there is, the insurers are still liable for amounts awarded in the underlying judgment in excess of limits, even if a reasonable insurer would have contested coverage.

Recommendations

When a Stowers compliant demand is received, therefore, it is recommended that the insured be engaged urgently as to its position in respect of such demand. A Stowers letter or demand must fulfill certain requirements in order to be deemed valid. Importantly, such demand must be "unconditional" and must be clear and beyond dispute. A full and complete release must be offered to the insured, including a release from any collateral or related interests such as those of a lienholder.

The difficulty faced by insurers is that in a situation where a Texas court assumes jurisdiction over a claim (even if such jurisdiction may be open to justifiable challenge), and a Stowers demand is made before any jurisdictional challenge is heard, it must be responded to or a catastrophe may ensue. The timing of the demand is subject to a reasonableness test, but that is an issue to be decided by a jury, not as a matter of law. This can lead to a complex risk analysis, particularly in the case of relatively low policy limits, as contrasted with a high value claim. The greater the differential between the limit and the claim, the more likely it is that if Texas courts were to retain jurisdiction, a jury would find an insurer's "refusal" to settle the claim to be unreasonable.

The entry of a judgment in excess of limits creates great difficulty from an appellate standpoint. A supersedeas bond must be filed to prevent execution against the insured during the course of any appeal of the underlying suit. Attempts can be made to modify the amount of the bond, but this is a difficult task fraught with danger and uncertainty. The cost of the bond must typically be paid as a supplementary payment or defence cost in addition to the limits. The bond must be fully collateralized in some form. Thus, to prevent execution and/or an assignment by an insured of its rights against the insurer, the insurer must agree to a bond in excess of its limits. If there is a coverage issue, agreeing to bond even a judgment within limits waives the coverage defence because the money is already committed contractually through the bond.

The failure to bond will result in a voluntary assignment of rights against the insurer from the insured to the claimants or an involuntary turnover of the causes of action against the insurer to the claimants. As the Stowers duty is owed only to the insured, claimants may only sue for amounts up to the policy limits as a judgment creditor and in their own name. Any extra-contractual amounts would require an assignment or turnover.

Conclusion

The application of the Stowers doctrine through the Texas courts is a real issue, and from our experience increasingly common. Although developed as a means of protecting an insured from possible abuse by its insurer, with the requirement of Texas law for disclosure of policy documentation (and hence limits) significant scope exists for plaintiff attorneys to exploit the doctrine in the hope of greater financial gain. From a plaintiff attorney's perspective, the best possible outcome in respect of a Stowers demand is the refusal of the insurer to settle at policy limits, as this may serve to increase the potential financial recovery from the claim.

Whilst arguably the doctrine is a concern in relation to any loss globally where a Texas involvement could be contended by a plaintiff's attorney, from our experience it is particularly relevant to countries in Central and South America where Texas is geographically one of the closest US states, and hence more likely to have a direct link with an insured's operations or the passengers utilising their services. Insurers should consider carefully the possible impact of Texas law upon the risks they insure, and be alive to the risk of an unlimited policy ruling against them.

For further information, please contact **Alex Stovold** or **Gareth Lewis**

Air France flight 447 - Breyer decision round 2: United States still *forum non conveniens*

Introduction

Readers may recall the report in the February 2011 Bulletin on the ruling by Judge Charles Breyer dismissing claims arising from the 2009 crash of Air France flight 447 on the basis that the US District Court was *forum non conveniens* (FNC). Subsequently, in a bid to circumvent this decision, some of those plaintiffs re-filed suit (the Dardengo and Guennoon actions) against the US manufacturers only, omitting all French defendants. The previously dismissed plaintiffs additionally sought reconsideration of the original decision on the grounds that, if the Dardengo and Guennoon actions were to proceed in the US, so too should the original suits, albeit with the French defendants removed.

Thus the matter was put before Judge Breyer for a second time on 3 June 2011 for hearing of the US manufacturing defendants' motion to dismiss the Dardengo and Guennoon actions under the FNC doctrine and the plaintiffs' motion for reconsideration. In granting the dismissal and denying the reconsideration, Judge Breyer concluded that the US is not the proper forum in the context of this case, once again demonstrating that FNC can be a potent defensive weapon in multi-jurisdictional aviation litigation.

The ruling

Judge Breyer agreed with the defendants' submission that the plaintiffs themselves created the jurisdictional uncertainty complained of, and could therefore not rely on that uncertainty to defeat the dismissal motion. Furthermore, in the alternative, dismissal under FNC would be appropriate because France still presents an available forum. The decision was based on the following line of reasoning:

The plaintiffs cannot make France unavailable by artificially declining to name French defendants

In the 2009 case *In re Compania Naviera Joanna S.A.* it was stated that '[a] party should not be allowed to assert the unavailability of an alternative forum when the unavailability is a product of its own purposeful conduct'. In the AF447 case, the plaintiffs re-filed suits that omitted the French Defendants despite the fact that they had previously alleged them to be liable, and still seemed to hold them at least partially responsible. Furthermore, the court in *Castillo v Shipping Corp. of India* noted that '[i]t would be a strange world if a litigant could "bootstrap" himself into a [United States] court…' by purposefully defeating the availability of a foreign forum. Moreover, in both *In re Compania Naviera Joanna S.A.* and *Castillo* the foreign fora were no longer open as the statutes of limitation had run, whereas there is a stronger case for FNC in this instance as France is still available (see below).

The plaintiffs cannot re-file in the US with the purpose of defeating a prior FNC dismissal

Of the 30 plaintiffs in the Dardengo and Guennoon actions, 18 were subject to the original FNC dismissal order. A further seven had filed cases naming French defendants by the time of the first FNC dismissal order and so would have been subject to the order once their actions were consolidated into the multi district litigation. Crucially, there was absent a meaningful change in facts regarding liability to justify the change in parties. The plaintiffs should therefore have litigated in the foreign forum in good faith and not contrived to defeat its jurisdiction.

France remains an available forum

Although a French court would not hear the Dardengo and Guennoon actions as pleaded, "availability" turns on the existence of a remedy rather than a plaintiff's ability to bring the exact same action filed in the US in the foreign forum. Indeed, in *Lueck*, '[t]he district court was not required to ask whether plaintiffs could bring this lawsuit in New Zealand, but rather, whether New Zealand offers a remedy for their losses'. The plaintiffs here would undoubtedly have a remedy in France, including against the US manufacturing defendants. They could either have re-filed the dismissed actions in France or filed the Dardengo and Guennoon actions there and added one or more French defendants. Requiring the plaintiffs to name the additional parties could hardly be considered onerous given that they previously identified them in the same matter.

A French court would not sua sponte dismiss the Dardengo and Guennoon actions

The issue of *sua sponte* dismissal (dismissal by a court of its own motion) was crucial because the defendants had agreed to submit to French jurisdiction and the plaintiffs would be obliged, under US law as a condition of an FNC dismissal, not to contest French jurisdiction. However, given consideration of Article 92 of the French Code of Civil Procedure and the plaintiffs' lack of convincing authority that a French appellate court would sua sponte dismiss the Dardengo and Guennoon actions, France is confirmed as an available forum.

Private and public interest factors

In Judge Breyer's prior ruling, the private and public interest factors were held to favour dismissal. The Plaintiffs acknowledged that none of the changes to their current suit affected this. Moreover, since that first ruling further physical evidence had been discovered and was held in France where it was thus more easily accessible.

Conclusion

This bid to manipulate artificially the potential availability of multiple fora in international disputes has been rejected. For a second time in the context of the Air France litigation, Judge Breyer has allowed an FNC motion to thwart 'forum shopping' in the US. The decision has been appealed.

For further information, please contact **Joe Goodridge** or **Anna Brown**

The changing horizon of employment law in the aviation sector

During 2011, the Court of Justice of the European Union (CJEU) delivered two important judgments that will have a considerable impact on the employment rights afforded to airline pilots.

Age discrimination

In *Prigge v Lufthansa*, the CJEU considered whether the compulsory retirement age of 60 for Lufthansa airline pilots, contained in a collective agreement recognised by German law, was contrary to the age discrimination provisions of the Equal Treatment Framework Directive (ET Directive). This was in light of the fact that German and international law fixed the age limit for airline pilots at 65.

Facts

Mr Prigge and two colleagues were employed as pilots by Lufthansa. In accordance with the applicable collective agreement which was recognised by German law their employment was terminated without notice at the end of the month in which they each attained the age of 60. The purpose of this compulsory retirement provision was to ensure air safety. The pilots brought age discrimination claims, and on appeal the German Federal Labour Court referred the matter to the CJEU for a preliminary ruling.

Legal issues

The CJEU considered the impact of the ET Directive, which provides for the prohibition of age discrimination in employment.

The ET Directive incorporates Articles under which age discriminatory treatment might be permitted. The key Articles that were considered during the preliminary ruling were as follows:

- Article 2(5), which provides that the principle of equal treatment is without prejudice to "*measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others*". Consequently, Member States are permitted to authorise social partners to adopt measures within collective agreements on condition those measures fulfil the requirements set out in Article 2(5)
- Article 4(1), which permits Member States to provide that differences of treatment on grounds of age shall not be discriminatory where a characteristic related to age "*constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate*"
- Article 6(1), which permits Member States to allow differences of treatment on grounds of age to be objectively justified "*by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary*"

The CJEU considered whether the requirement to retire pilots at the age of 60 was permitted by Articles 2(5), 4(1) and/or 6(1).

The first issue the CJEU considered was whether the retirement age of 60 was necessary for the protection of public health and security. While Lufthansa had elected a compulsory retirement age of 60, international legislation that had been implemented into German law did not prohibit pilots aged between 60 and 65 from flying commercial aeroplanes. The International Joint Aviation Authorities Code (incorporated into German law) allowed pilots aged between 60 and 65 to fly if there was another pilot on board aged under 60. The absolute age limit adopted by Lufthansa was, however, only 60. Consequently, the CJEU found that the compulsory retirement age was not necessary for the achievement of the pursued objective of public safety and protection of health and therefore the exception provided by Article 2(5) did not apply.

The second issue the CJEU considered was whether there was a genuine and determining occupational requirement within the meaning of Article 4(1) that pilots be under 60. Lufthansa argued that it was essential that airline pilots possess particular physical capabilities, which undeniably diminish with age. Therefore, possessing those capabilities should be considered as a "genuine and determining occupational requirement" relating to age within the

meaning of Article 4(1). The CJEU rejected this argument and held that Article 4(1) of the ET Directive had to be interpreted as precluding a clause in a collective agreement which fixed at 60 the age limit from which pilots were considered as no longer possessing the physical capabilities to carry out their professional activity. This was because national and international legislation fixed that age at 65.

The third and final issue the CJEU considered was whether retirement could be objectively justified under Article 6(1). As set out above, this contains a list of possible legitimate aims including: employment policy, labour market and vocational training objectives. Lufthansa argued that air traffic safety was a legitimate aim for the purposes of justifying direct age discrimination. The CJEU noted, however, that it had previously held that legitimate aims must be social policy objectives, such as those related to employment policy, the labour market, or vocational training. Therefore, an aim such as air traffic safety was not a legitimate aim under Article 6(1). On first reading, this seems an astonishing decision, given the potential risks to employees, passengers and others. However, the CJEU was commenting on the limited circumstances that apply under Article 6(1) and that focus on social policy objectives as opposed to other objectives, which are in fact protected by the exceptions provided by Articles 2(5) and 4(1).

Conclusion

This ruling shows that a compulsory retirement age will fall foul of the ET Directive, where it does not follow the age limit imposed by domestic and international law.

For further information, please contact **Peter Roser**

Holiday pay

In *Williams v British Airways,* the CJEU considered whether pilots' holiday pay entitlement should be limited to basic salary.

Facts

Under collective agreements incorporated into their contracts, British Airways pilots were entitled to basic pay plus two supplementary payments (a "flying pay supplement" and a "time away from base allowance"). However, in periods of statutory annual leave the pilots were only paid basic pay. The pilots claimed that the two supplements should have been included in their holiday pay calculation and brought claims in the Employment Tribunal.

Legal issues

The UK Supreme Court had to consider the underlying European instruments and how these had been implemented into UK domestic law.

The first instrument to consider was the Working Time Directive (WTD). Article 7 of the WTD gives workers the right to paid annual leave but does not specify how holiday pay should be calculated; that is left to national legislation or practice. Article 14 then goes on to state that the WTD does not apply where other EU instruments contain more specific working time requirements for certain occupations. In this case, the pilots were covered by a specific aviation Directive, which, like the WTD, did not specify how workers' pay should be calculated while they are on annual leave.

Consequently, in order to address the claims brought by the pilots seeking holiday payments in respect of flight and other supplements over and above their basic pay, the Supreme Court had to refer a number of questions to the CJEU. These questions focussed on the extent European law defined or laid down requirements as to the nature and/or level of the payments required to be made in respect of periods of paid annual leave, and to what, if any, extent Member States may determine how such payments are to be calculated.

The CJEU responded by stating that, in line with the annual leave provisions of the WTD, the aviation Directive requires that airline pilots are entitled not only to basic salary but to "normal remuneration" during statutory annual leave. Its reasoning was as follows:

- The WTD and the aviation Directive are both concerned with the organisation of working time in the interest of workers' health and safety. The principles developed in case law on the annual leave provisions of the WTD apply also to the equivalent provisions in the aviation Directive. Emphasis was therefore placed on the decision in *Robinson-Steele v RD Retail Service Ltd*, where the CJEU

had held that "paid annual leave" in Article 7 of the WTD meant that workers on holiday should receive their normal remuneration. The purpose of holiday payment is to put workers in a position which is comparable to the position they are in during periods of work

- Remuneration that is linked intrinsically to the performance of tasks which a worker is contractually required to perform (in the case of airline pilots, payments in respect of time spent flying), must be taken into account when calculating holiday pay
- In contrast, however, components of remuneration which are intended exclusively to cover ancillary costs arising at the time of the performance of contractual duties (such as costs connected with time that pilots have to spend away from base) need not be taken into account when calculating holiday pay

Conclusion

The CJEU concluded that pilots' holiday pay entitlement under the aviation Directive must correspond to normal remuneration. This means that pilots are entitled to holiday pay in respect of remuneration that is linked intrinsically to the performance of tasks which they are contractually obliged to perform. This case will now return to the UK Supreme Court to determine whether various components comprising the pilots' total remuneration meet the criteria to be included in the holiday pay calculation.

For further information, please contact **Peter Roser**

Air passenger duty – continuing controversy

On 6 December 2011 the UK Government confirmed that Air Passenger Duty (APD) rates will increase by some 8% from April 2012 and that the scope of the APD regime will be extended to include the bulk of business aviation from April 2013 onwards. Northern Ireland has also been singled out for reduced APD rates, principally on the basis of the economic impact that a continued loss of passengers to Dublin Airport could have on Northern Ireland's economy and more specifically US investment.

The travel industry's reaction to the Government's recent announcements has been scathing, not least because, following an extensive period of Government consultation, no changes have been made to the way in which APD is levied on commercial flights, with the problematic distance banding and the arguably disproportionate application of 'standard' (i.e. business/first class) APD rates to those travelling in premium economy being retained.

Background

APD was introduced by the UK Government in 1994, both for supposed environmental reasons and because the government viewed air travel as under-taxed compared with other sectors of the UK economy, particularly given the zero VAT rating applied to commercial air travel and the tax free uplift of fuel on all international and most domestic flights.

In its December 2011 response to the consultation on APD reform the Government confirmed that APD is "*primarily a revenue-raising duty which makes an important contribution to the public finances, whilst also giving rise to secondary environmental benefits*". Many commentators continue to question the supposed environmental benefits, not least because APD is payable by operators of qualifying aircraft on a per passenger basis where such aircraft depart airports in the UK and therefore takes no account of the efficient use of or emissions from such aircraft, nor is APD revenue ring-fenced for environmental applications. Furthermore, with aviation now part of the EU ETS, some feel that the justification of APD on environmental grounds is wholly inappropriate and that APD rates should be significantly reduced or scrapped altogether to reflect the additional revenue generated by the Government in the auctioning of EU ETS allowances.

In 1994 APD rates were set at £5 (lowest class of travel) and £10 (other classes of travel) for European destinations and £20/£40 respectively for other destinations. Since then multiple revisions to APD rates have taken place, as well as the introduction of controversial distance bandings (see below). The Chancellor's Autumn Statement of 29 November 2011 confirmed that APD rates will increase as of April 2012. The increase of some 8% will see the APD levied in respect of an economy passenger flying from London to Paris increase from £12 to £13. APD levied in respect of a premium economy passenger travelling from London to Sydney will increase from £170 to £184. These changes constitute increases of 260% and 460% respectively as against the original 1994 rates levied for the same journeys. In practice most operators recover the cost of APD from passengers, thereby making the UK one of the world's most expensive places to fly from. Strong arguments have been put forward regarding the detrimental effect APD is having on inbound tourism and foreign investment, but based on the Government's response to the consultation on APD reform, it seems that such arguments are effectively being ignored.

The FTO challenge

A key challenge to APD was made in the 2007 case of *R (on the application of the Federation of Tour Operators and others) v Her Majesty's Treasury*. The Federation of Tour Operators (FTO), whose members had been prejudiced by the retrospective increase in APD with effect from

1 February 2007, challenged the legality of APD before the English High Court, principally on the basis that APD infringes Art.15 of the Chicago Convention 1944 because it falls within the prohibition of "fees, dues or other charges" which are levied "*in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.*" Various other points were raised, principally on the basis of rights under Art.1 of the European Convention on Human Rights and Art.49 of the European Treaty (now Art.56 of the TFEU).

The High Court held that APD did not infringe Art.15, both because Art.15 did not cover taxes and because APD was not levied 'solely' in respect of the right of transit/entry/exit (principally because it was also payable in respect of domestic flights). The High Court's reasoning was arguably flawed. Firstly, due respect was not given to the various authentic Chicago Convention texts. The final paragraphs of the Chicago Convention (as amended) provide that the texts in all four languages (English, French, Spanish and Russian) are of equal authenticity. The Spanish and Russian texts expressly refer to 'taxes', yet the Judge thought it proper to give 'some primacy' to the English text, which is more ambiguous.

The Judge's emphasis on and analysis of the word 'solely' within the context of Art.15 was also problematic. Firstly, the proposition that APD levied on a passenger departing the UK on an international flight is not levied 'solely' in respect of the passenger's exit from the UK is arguably unrealistic. Furthermore, the Chicago Convention deals with international carriage by air and it is questionable whether the legislators intended for its provisions to be capable of being circumvented by simply applying the same tax to domestic carriage.

The case was (unsuccessfully) appealed, but disappointingly only the human rights point was challenged, and the various arguments dealing with Art.15 of the Chicago Convention were not properly addressed. The legality of APD under the Chicago Convention is arguably open to further challenge, and it is not impossible that a court could come to a different view in a future case, particularly concerning a flight tax.

APD unchanged

Notwithstanding industry criticism of the existing banding structure, in its response to the consultation on APD reform, the Government confirmed that the four band structure based on the distance from London to the capital city of the destination country will remain unchanged. As widely publicised, the present system contains a number of geographical anomalies, such as passengers flying from London to Hawaii paying a lower rate of APD than passengers on much shorter flights from London to Caribbean destinations. Many stakeholders believe that a two band structure would be more effective. In its response the Government has argued that no banding structure will be entirely free of anomalies and said that on balance it has decided to retain the current banding.

The APD treatment of premium economy seating within the same class of travel as first and business ('standard rate') is widely argued to have an impact on the ability of carriers to market and sell these products and there is concern that such treatment may ultimately lead to their removal, to the detriment of consumer choice. The Government has confirmed that no change will be made to the class of travel distinction under the APD regime, arguing that premium economy products vary significantly between airlines and that any attempt to define premium economy would increase the complexity of the APD regime and therefore the administrative burden for both the travel industry and HMRC.

Northern Ireland – a special case?

The Government announced in September 2011 that as of 1 November 2011 APD rates for direct long-haul routes departing from airports in Northern Ireland would be levied at the prevailing band 'A' rate (currently £12 at the reduced rate and £24 at the standard rate). The Government is also taking steps to devolve aspects of APD to the Northern Ireland Assembly. The move was principally triggered by a warning from Continental Airlines that it was considering discontinuing its Belfast-Newark service, being the only direct transatlantic service to/from Northern Ireland. In order to make the route competitive with transatlantic departures from Dublin Airport (where Air Ticket Tax (ATT) is levied at a flat rate of €3 per passenger), Continental had been absorbing the APD rather than passing this on to passengers in the usual manner. However, Continental made it clear that this position was unsustainable and that failing the introduction of an urgent solution there was a significant risk that the route would need to be withdrawn.

Large numbers of air passengers were choosing to travel from the Belfast region to Dublin (less than 90 minutes from Belfast) in order to benefit from the lower ATT as compared with the APD levied on departures from Belfast. By way of example, prior to the introduction of the new measures the APD levied in respect of a family of four travelling in economy class from Belfast to the USA (Band 'B') was £240. The ATT levied in respect of the family of four on the same flight departing Dublin is only €12. It is likely that ATT will be disbanded altogether in the near future as part of a package of measures designed to encourage tourism, which would further increase the disparity between the cost of air travel departing from airports in Northern Ireland and the neighbouring Republic of Ireland.

Numerous stakeholders have argued that the closure of Continental's route would have a significant impact on the ability of Northern Ireland to effectively compete with the Republic of Ireland for US investment. In justifying

the special APD rates for departures from Northern Ireland, the Government has argued that Northern Ireland is geographically isolated from the rest of the UK and is especially dependent on strong air transport links, particularly given the absence of viable alternatives to air travel for connection to the mainland. It seems clear that because Northern Ireland shares a land border with a Member State which levies duty at a materially lower rate, stakeholders in the commercial air transport industry are placed at a significant disadvantage. However, rather than singling out Northern Ireland as a special case, it might be argued that this situation simply constitutes further support for the concerns that have been continually expressed since the introduction of APD in 1994, namely that APD impacts the ability of those in the UK to travel by air, discourages inward tourism and investment and places the UK at a direct disadvantage as against other EU Member States who levy materially lower levels of duty on air travel or no duty at all.

Application of APD to business jets

In line with its intention to bring smaller aircraft and business jets within the scope of APD, the Government has confirmed that the Finance Act 1994 will be amended so that as of 1 April 2013 the de minimis weight limit below which aircraft are not subject to APD will be reduced from 10 tonnes to 5.7 tonnes. It is estimated that this will bring some 50,000 additional flights per year within the scope of the APD regime.

The suggestion in the 2011 Budget that APD would be applied to business jets at a flat rate irrespective of distance travelled has been dropped, with the Government now having confirmed that the same distance banding structure and rates of APD that apply to passengers on board commercial flights will apply to business jets. The Act will also define a combination of weight and seating capacity for business jets (certified authorised weight over 20 tonnes and fewer than 19 seats) considered to be providing a ‘premium service’, with such flights paying a ‘premium’ APD rate of double the prevailing standard business/first class rate of APD.

The definition of ‘agreement for carriage’ under the Act will be amended to take into account the fact that private jet passengers are not always flown in accordance with formal arrangements in the same way as commercial passengers. Changes will also be made to the definition of ‘passenger’ because under the current regime exemptions apply to passengers who are not carried for reward. In practice many passengers in private jets are carried for no reward or fare, particularly in the context of business travel, and under the current wording such carriage would therefore fall outside the scope of the APD regime.

The implementation date of April 2013 is itself a source of considerable controversy as this is seen by some as favouritism in support of those who are more able to pay APD, leaving passengers on commercial flights disadvantaged. The Government argues that the changes will bring a substantial number of new parties within the scope of the APD regime and that additional time is needed to develop rules which are specifically tailored to business aviation. However, given the increase of some 8% in APD rates for commercial passengers from April 2012, the delay in implementing the APD for business jets might be seen as unfair.

Opponents argue that business aviation plays a key role promoting economic growth in tough times and that the extension of APD to incorporate the majority of business aviation will be counterproductive in broader economic terms. The argument that VAT is not levied on flights from the UK, as voiced by the Government in defence of the application of APD to commercial aviation, is not necessarily true in the context of business aviation. One might also argue that the level of service provided to passengers travelling long-haul in first class is largely similar to the experience of passengers travelling onboard a business jets falling within the new category of ‘premium services’. Charging the latter passenger double the rate of APD applied to the former might therefore be seen as unjustifiable.

Conclusion

It is disappointing that, notwithstanding the invaluable input from key stakeholders in the air transport industry during the recent consultation on APD reform, the Government has chosen to leave the bulk of the APD regime unamended, save for the increased rates, future application of APD to business jets and the exemptions for Northern Ireland. The continued use of distance banding which is largely unrelated to actual flight distance is inequitable, particularly in view of the geographical anomalies created by such a system, as is the class of travel structure which sees premium economy and first class travel taxed at the same rate, notwithstanding the fact that the two products are in no way comparable. With other countries such as the Netherlands and Denmark disbanding their respective ‘ticket taxes’, principally in recognition of the damage this was doing to the growth of the air transport sector, it is questionable whether the continued taxation of air travel at one of the highest rates in the world is a sustainable or sensible position for the UK to adopt. Furthermore, notwithstanding the decision in the FTO case, the legality of APD remains questionable and therefore seems ripe for further challenge.

For further information, please contact
Thomas van der Wijngaart

Cookies: time running out to comply with the law

On 26 May 2011, the law governing the use of cookies on websites and similar technologies by a website operator, as a method of gathering information about a website's users, was changed across the EU.

The requirements under the changes to the legislation require website operators to:

- clearly and comprehensively inform users of the purposes behind the use of cookies on their website
- obtain the user's permission before storing any information about that user (whether on the user's device or elsewhere)

Due to the fact that airlines and other operators in the aviation industry rely heavily on website data and the provision of services online (for example, online ticket transactions) websites in this sector often use a large number of different cookies in order to track individual transactions and store information about user history. This has resulted in these websites and operators being directly affected by this change in law.

It is therefore particularly important that airlines and other members of the aviation industry familiarise themselves with the new legal requirements relating to the use of cookies, review and consider their current use of cookies and their privacy policy and take steps to ensure that their websites incorporate appropriate methods of obtaining the user's permission.

Changes

Prior to 26 May 2011, website operators who used cookies were required to inform users of this fact and to clearly and comprehensively explain the reasons for storage of, and access to, information. Operators were also required to afford users the opportunity to refuse the use of cookies. Website operators were, for example, thus well within their rights to store cookies on a user's device as long as the user had not specifically opted out of allowing them to do so.

Before the recent change in legislation, website operators complied with their obligations regarding cookie usage by putting the required information in their privacy policy and giving users the opportunity to 'opt out' of accepting cookies.

The major change in the law (which took place in May 2011) is that website operators were not only required to fully inform the users about the purpose of the cookies which it used but also to obtain the user's permission before storing most types of cookie on the user's device.

There are some limited exceptions to this requirement to obtain the user's consent (including where the storage of information is 'strictly necessary' for a service which has been requested by the user). For example, when a customer books and pays for a flight online, the site will use "session" cookies to store and remember the customer's selections throughout the transaction. In this case, the website operator would not need to ask for the user's permission to use these cookies as they are temporary and expire after the user has ended their browsing session. This means that a main functionality of airline websites will be undisrupted by the change in legislation; having said that, website operators will still have some significant issues which need to be addressed in order to comply with the law where other types of cookie are used.

Compliance

Although the new legislation officially came into force in the UK on 26 May 2011, the UK Information Commissioner's Office (ICO) (which has responsibility for enforcing the law in the UK relating to the use of cookies) has given website operators a period of 12 months to become compliant with the new law before it takes enforcement action. However, the website operator must, when challenged, be able to demonstrate to the ICO that it is using or has used this period to develop a realistic plan to adapt and comply with the legislation. The key message is that inaction is not acceptable.

Clearly then, the first step for operators to take is to assess which types of cookie they use, and how they use them. Thereafter, cookies which are unnecessary or have been superseded as the site has evolved should be removed. Others should be categorised into those which are 'strictly necessary' for site functioning and the provision of certain services, and those which require user permission.

Obtaining consent from the website users

Although a user could signify its consent by changing or setting controls on its internet browser, or using another application or programme which indicates consent, these settings and applications are not necessarily that reliable and should not be relied on (well, not yet in any event) to indicate user consent or the absence thereof (currently, most browser settings are not sophisticated enough to make assumptions about a user's decision on cookies in all circumstances). For the time being at least, website operators need to obtain the user's consent through alternative means.

This is not always that easy given the variety of cookies and the overarching requirement not to degrade or disrupt the user's experience; however, some suggestions for obtaining consent are:

- Pop-up windows. These may prove to be too disruptive if a site is likely to require permissions for a number of different cookies. Pop-ups are also discouraged by the

Web Content Accessibility Guidelines and users can block pop-ups by default, making this method unreliable

- Terms of use. The user could be required to accept the website's terms of use incorporating the required information on the use of cookies, or ask users to accept all cookies when they register to use the website
- Settings-led consent. This can be obtained when a user makes a choice about how a site works for them; for example language choice. The user could, at this stage, be informed that the site can remember their preference, and explain that by choosing this option, they are consenting to the use of a cookie
- Feature-led consent. Some sites store cookies when a user chooses a particular feature of the site (for example, watching a video-clip, or when it remembers a user's previous activities to personalise the experience. Assuming the user is choosing a particular outcome (such as opening a link, clicking a button or agreeing to a functionality being activated), the user can be asked for consent to set a cookie at this time
- Functional uses. Collecting information about how visitors use the site by using analytic cookies requires consent. Whether additional information should be made available to users about what cookies are used and their functions so that the user can make an informed choice about what the user will allow should be considered. If any information gathered is passed onto a third party, this fact must be made clear to the user
- Third party cookies. Airline websites often display content from third parties; for example from an advertising network. In these cases, the third party may store its own cookies on 'your' user's device. All parties should take responsibility for informing users of what information will be collected from them and allowing users the opportunity to consent to this

The ICO's own website (see www.ico.gov.uk) places cookies and now has a consent "opt-in" box at the top of its homepage requiring users to check a box to consent to the placing of cookies. Airlines and other members of the aviation industry need to consider what mechanism for gaining their users' consent would work for them, given the nature and use of their website.

The requirements in the rest of Europe remain as yet unclear as some Member States (for example, Germany) have yet to implement the relevant EU Directive, claiming that full implementation into national laws can only be achieved when technical and industry-led compliance solutions become available.

Penalties for non-compliance

From May 2012 the ICO will determine whether enforcement action is appropriate by considering the impact of the breach of the law on the privacy and other rights of the website user and not just whether there has been a technical breach of the law. Subject to the view of the relevant information authorities across Europe, similar positions may apply across the Community.

Summary

The change in the law relating to the use of cookies has left website operators with the considerable problem of how to ensure compliance with the law by obtaining the user's consent. This has created a situation where the law is ahead of the technical capabilities of website operating systems and so a temporary "fix" needs to be decided on by website operators. All website operators should be considering now the impact of the changes in law and what they need to do to ensure compliance.

For further information, please contact **Alan Meneghetti** or **Rebecca Chant**

Airline payment surcharges – update

In our last bulletin we reported regarding the "Which?" super-complaint and ensuing UK Office of Fair Trading (OFT) investigation into payment surcharges in the passenger transport sector. Since then there have been further developments in this area.

Shortly after our last bulletin was published, in late June 2011 the OFT published its response to the "Which?" super-complaint, following its consideration of the various responses given by 60 interested parties who received a request for information regarding such charges from the OFT. Those parties included UK and other European airlines, tour operators, operators in the rail, road and ferry sector, banks and consumer organisations.

In its response, the OFT stated that on-line trading had created new concerns for consumers and one of the most significant was the concept of "paying to pay". Although the OFT's response considers all modes of transport, it noted that this practice is particularly prevalent in the airline sector because of the high proportion of on-line transactions where customers are unable to pay by cash, cheque or other method. Research conducted by the OFT indicated that UK consumers spent £300 million on airline payment surcharges alone in 2010 demonstrating that the amount spent by consumers on such charges is significant.

Further, additional market research of the OFT indicated that 87% of consumers in the UK object to credit card charges and 91% to debit card charges.

The OFT identified three main features which it believes result in consumer detriment. First, a lack of transparency where effectively compulsory payment surcharges are revealed towards the end of lengthy on-line transactions - the practice of "drip-pricing", much criticised in the "Which?" super-complaint, so that it becomes difficult for consumers to compare headline prices effectively. Second, the lack of any reasonable, practical alternative which could avoid the payment surcharge. And finally, the fact that payment surcharges often appear to exceed a reasonable estimate of the retailer's actual payment processing costs.

The Payment Services Directive and the Consumer Rights Directive

The OFT made two principal recommendations: First, it suggested that to reduce the detriment of "drip-pricing", the UK government should introduce measures to prohibit debit card charges by traders altogether so that the headline price is apparent immediately for the majority of consumers (debit cards being the most popular payment method according to the OFT's research). It noted that this objective could be achieved through the UK implementation of the Payment Services Directive (PSD) or the Consumer Rights Directive (CRD).

Article 52 (3) of the PSD, adopted on 13 November 2007, gives Member States the right to forbid or limit surcharges taking into account the need to encourage competition and promote the use of efficient payment instruments. However, this particular provision of the Directive was not transposed into UK law and was omitted from the Payment Services Regulations 2009 upon the recommendation of HM Treasury. However, the OFT went on to state that it considers that legislation on the issue would be more effective on an EU-wide level and referred to Article 19 of the CRD, which states as follows:

"Article 19

Fees for use of means of payment

Member States shall prohibit traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means."

The CRD was adopted by the EU Council of Ministers on 11 October 2011, but will not come into force until 2013. In the meantime, the UK government has indicated that it intends to bring forward implementation of the provision in the CRD regarding payment surcharges by introducing new rules in the UK banning "excessive surcharges" on credit and debit cards by most "retail sectors" before the end of 2012. However, in practical terms it may prove difficult to enforce this provision, as it will be necessary to establish what the actual cost to an airline of processing a payment is. Not only would the actual cost paid by the airline to the payment provider need to be considered but also an airline's overheads such as the appropriate part of its staff, telecommunication and property costs would need to be taken into account, and these may not be easy to identify.

The Consumer Protection from Unfair Trading Regulations 2008

The OFT also stated that it would seek to improve transparency and overall presentation of payment surcharges on operators' websites through use of the Consumer Protection from Unfair Trading Regulations 2008 (CPRs), which prohibit misleading practices in consumer transactions that could lead consumers to take transactional decisions they would not otherwise have taken. The OFT stated that some traders have indicated that they are willing to change their practices in line with its recommendations by not charging for debit cards and by improving the transparency of the payment surcharges which they levy. However, for those traders that do not voluntarily make such changes or where commitments to change practices have not been implemented within a reasonable time, the OFT said that enforcement action would be considered.

Proposed Regulations for enforcement of Article 23 of Regulation 1008/2008

As most readers will be aware, the principal legislation in the EU regarding fare transparency is found in Article 23 of Regulation 1008/2008, and its provisions were discussed in our last article on this topic. The UK Department for Transport has appointed both the UK CAA and OFT to enforce Regulation 1008/2008 in the UK, and a Statutory Instrument which is currently in draft form is intended to provide formal enforcement powers to the CAA on pricing issues which were excluded from the main UK implementing regulations adopted in 2009. As noted in the OFT response, currently the CAA is enforcing Regulation 1008/2008 through its powers under the CPRs, under which the penalty on summary conviction for an offence would be a fine not exceeding the specified maximum (currently £5,000), or on indictment a fine or imprisonment for a term not exceeding two years.

The draft Statutory Instrument referred to above (The Operation of Air Services in the Community (Pricing etc) Regulations 2010), which will give the CAA direct enforcement powers in relation to Article 23 of Regulation 1008/2008, makes infringement of Article 23 a criminal offence, with a penalty on summary conviction of a fine not exceeding the specified maximum (currently £5,000).

For further information, please contact **Peter Macara**

Next generation civil aviation: unmanned air vehicles - applicable legislation and shortcomings

Unmanned air vehicles (UAVs) are demanding their place in the civil aviation sector. These remote controlled systems are already widely used for military operations and their development for extensive civil applications is promising.

The advantages of increasing the use of UAVs speak for themselves. Among other things, manned aircraft and helicopters are much more expensive to purchase and maintain; these self managing systems, unlike manned aircraft, can fly longer and do not require a fully licensed pilot; non-fixed wing versions can fly at low altitudes; they are ideal for lengthy routine operations. Presently, the commercial exploitation already stretches from unmanned earth observation and natural resources management to law enforcement, only hindered by technological imperfections.

To be able to incorporate this kind of next generation aviation into the existing infrastructure legal clarity will need to be brought to the regulatory side relating to airworthiness, UAV operations and airspace.

Current legal framework

The 1944 Chicago Convention

The opportunity to grow can only be given to this industry if these operations can be performed outside segregated areas both in national and international airspace. Yet presently the lack of appropriate airspace regulations for UAVs is a market restraint. The Chicago Convention – applicable only to civil aircraft and not state aircraft – already explicitly provided in its original version that pilotless aircraft shall not be flown over the territory of a contracting State without special authorization by that State and only under its conditions. These unilateral conditions could pertain to areas such as airworthiness. The Convention is worded in such a way that provisions on nationality, the obligatory display of marks and carriage of documents such as registration and airworthiness certificates are equally applicable to UAVs.

It will be for domestic legislators to draw up specific regulations relating to the awarding of these certificates. Issues concerning the standards used and multilateral recognition of these particular documents will have to be addressed.

EU Regulations 1592/2002 and 216/2008

The objective of Regulation 1592/2002 (the EASA basic Regulation) and later Regulation 216/2008 was to establish and maintain a high uniform level of civil aviation safety in Europe. The basic Regulation applies to the design, production, maintenance and operation of aeronautical products engaged in civil aviation. Annex 2 provides an exclusion both for “unmanned aircraft with an operating mass of less than 150 kg” and for aircraft “designed for research, experimental or scientific purposes, and likely to be produced in very limited numbers.” These aircraft do not have to comply with the EASA airworthiness requirements. There is ambiguity in the interpretation whether UAVs in general would fall under this Regulation but it is arguable that since only certain UAVs are exempted all others are included. On this basis, save where otherwise provided, the design and manufacture of the UAVs must be in accordance with the relevant certification specifications similar to manned aircraft and they must be issued with a Certificate of Airworthiness.

EU Regulation 1149/2011

This latest Regulation updates Regulation 2042/2003 relating to the continuing airworthiness of aircraft, aeronautical parts and products and related administrative procedures. In it, a wide definition of aircraft is put forward as constituting any machine that can derive support in the atmosphere from the reactions of the air other than reactions of the air against the earth’s surface.

These common technical requirements and procedures for ensuring the continuing airworthiness of aircraft and its components apply if the aircraft is either registered or operated in a Member State.

Nevertheless, the same exception for light UAVs below 150 kg applies and they are thus excluded from EASA responsibility. Also, when the products or the personnel are engaged in military or policing services or the initial design was intended for military purposes only the Regulations do not apply. Precisely because military and other governmental UAVs are exempted from the aforementioned formal airworthiness certifications they could be tested and developed so quickly.

The need for differentiation

UAVs, unlike traditional aircraft, should be approached as remote controlled aircraft integrated in a whole system comprising a control station, a communication link, and a launch and recovery element. Consequently, all these elements should be certified too since they are inherently part of the aircraft’s operational capacity. The JAA, Eurocontrol and EASA have endorsed this position considering the insufficiency of traditional airworthiness requirements for these systems.

Considerations arise as how to approach the airworthiness certificates in case these individual elements would control multiple vehicles or different types of vehicles. These issues are now addressed by the European Organisation for Civil Aviation Equipment (EUROCAE) by way of developing standard technical regulations which embrace the whole UAV operational structure (staff, control stations, traffic controllers etc) and by ICAO's Study Group that especially focuses on the present shortcomings of the Standards and Recommended Practices (e.g. Search And Rescue).

It is arguably important for this industry to attain a set of rules for UAVs and their flight safety which are not too different from the existing ones for traditional aircraft. Safety standards and procedures should be apt for UAVs but they should not be unfairly required to comply with industry-specific higher standards. EASA's view seems to go in to same direction (see JAA - Eurocontrol initiative on UAVs: Taskforce Final Report – A concept for European Regulation for Civil Unmanned Air Vehicles, 11 May 2004).

Integration into airspace

Unlike military UAVs, civilian UAVs cannot benefit from segregated military airspace and should make use of common non-segregated airspace. For example, in the UK unmanned aircraft with a mass of more than 7 kg (excluding fuel) must not be flown within controlled airspace, restricted airspace or an Aerodrome Traffic Zone unless permission has been obtained from the relevant air traffic control authority.

With regard to the future, integrating UAVs in greater number into commonly used airspace will involve satisfying some concerns.

In attributing a certain segment of airspace, consideration needs to be given foremost to the categorisation of aircraft in combination with their precise function. It is arguable that categories should not be based on individual characteristics of the vehicle (e.g. equipment) but on parameters such as weight. This would also allow airworthiness requirements to vary depending on the take-off mass of the vehicle, as is the case with traditional aircraft. The combination of both could mean in practice that certain surveillance UAVs which theoretically would qualify to fly in very low airspace could be excluded since their airspeed or weight would be unsuitable.

In addition, efficient airspace management will need to manage not only the flight itself but also the intensity of surrounding traffic. The reserving of airspace segments specifically for UAV traffic may seem an option. However, considering the quantities of traffic at this stage and the applicability of aeronautical requirements that apply to manned aircraft, separate segments seem disproportionate. Nevertheless, the differences in automation, communication and situational awareness might require specific attention. Letting small UAVs operate for example in low uncontrolled airspace, which is unused by general aviation, is no solution either given the lower reaction time in case of signal loss and collision risk. Only the smallest of UAVs with a weight up to a few kilogrammes could be permitted without significant risk. So far, in Europe at any rate, there have been no reported cases of collisions involving UAVs.

Conclusion

It is important for this emerging sector that the present lack of clarity with respect to airworthiness, pilot certification and airspace use is dealt with. A set of requirements should be provided which can be quickly integrated into the existing framework and which approaches pilotless aircraft in a comprehensive system. The adaptation of the existing JARs and ICAO Annexes to include UAVs would be a first step in ensuring a global harmonisation. The different functions and types of UAVs and their interaction with the existing aviation infrastructure can only be addressed by a multi-layered solution that takes into account the relevant considerations.

For further information, please contact **Melchior Schellinck** or **Peter Macara**

Corporate manslaughter – what's new?

Introduction

Anyone who is a leader within an organisation, or has an interest in health and safety, will be following closely the trial due to take place in June involving Lion Steel Equipment Limited (charged with corporate manslaughter) and its three directors (charged individually with gross negligence manslaughter and health and safety failings).

This is only the second prosecution for corporate manslaughter since the inception of the new offence in April 2008. It is worth noting that both cases have also involved directors being prosecuted in their individual capacity.

This article aims to review the impact of any investigation on businesses, give an update regarding recent developments, and look at what a business should have in place if the worst happens.

What are the ramifications of a fatality for a business and its employees?

The consequences of a fatality involving an organisation are wide-ranging and can impact significantly on both its business and its employees in a number of ways:

- The Police and Health and Safety Executive (HSE) will attend site and remain there for some time whilst they carry out their investigations and seek to understand how a business operates and whether any failings have contributed to the death. In our experience, investigations often take a couple of years to conclude
- Witness statements will be taken from employees.
- Company documents may be seized, and equipment retained for testing
- Individuals suspected of committing either gross negligence manslaughter or a breach of health and safety duties face the prospect of being arrested, having their fingerprints/photographs/DNA taken at the Police Station, and possibly charged and prosecuted in the criminal courts. If convicted, gross negligence manslaughter carries a maximum sentence of life imprisonment and health and safety offences attract up to two years custody. This may be thought unlikely to happen, but in numerous corporate manslaughter investigations the Police/HSE have been keen to interview directors and senior managers under caution as suspects to obtain evidence against the company of senior management failings as well as against the directors/senior managers for the individual offence of gross negligence manslaughter and any health and safety offences
- Representatives of the organisation may be invited to an interview under caution. Any subsequent prosecution will also be in the criminal courts, where, if convicted, the company could face a potentially crippling fine
- If that were not bad enough, there is also the associated prejudicial PR which, in its own right, might cause the business irretrievable damage

So what are the Police/HSE looking to establish?

When investigating corporate manslaughter, the Police/HSE will be looking to establish that the deceased's death was caused by the way a business organises or manages its activities, and these failings represented a gross breach of a duty of care owed to that individual. A substantial element of the breach must relate to senior management involvement with the activities under investigation.

As well as looking at corporate manslaughter, the investigating authorities will also explore whether the company has breached any health and safety duties as well as whether any offences have been committed by individuals.

A new level of fines for corporations?

The first corporate manslaughter prosecution involved Cotswold Geotechnical, which was convicted on 17 February 2011 and was fined £385,000 after being found guilty following the death of Alexander Wright, a geologist who was working for the company, when a trench collapsed on him on 5 September 2008.

This prosecution involved a small company and did not tell much about how the new offence will be interpreted by the courts. However, the fine of £385,000 is significant. This is a sum which the court thought was sufficient to mark the gravity of the offence. Whilst the fine represented approximately 110% of the company's annual turnover, the court specifically recognised that it was a "consequence of the serious breach" that the level of fine ran the risk of putting the company into liquidation and that this was "*unavoidable*".

A fine of 100% or more of turnover for a larger organisation would easily equate to an amount well in excess of the Sentencing Guidelines Council's £500,000 starting point.

As well as the company being prosecuted for corporate manslaughter, its sole director, Peter Eaton, was charged with gross negligence manslaughter in addition to health and safety breaches. The prosecution against Mr Eaton was later dropped but only because he was terminally ill and not well enough to stand trial.

Lion Steel – what next?

This matter involves the death of Steven Berry, an employee of the company, who fell through a plastic roof panel at one of Lion Steel's industrial sites.

It remains to be seen whether the prosecution of Lion Steel (which is not a large company) will provide any further guidance on the interpretation of what is the most serious offence that a company can commit.

Whilst the chances of a medium sized or larger company being prosecuted for corporate manslaughter currently remain slight because of the "senior management" test, the prospect of its being the subject of a lengthy investigation for corporate manslaughter with a subsequent prosecution of the company and its directors/managers for health and safety breaches is very high.

Conclusion

With such serious consequences, it is essential that organisations are ready and prepared to deal with possible investigation in the event of a fatality or serious incident.

For further information, please contact **Rod Hunt**

The new EU Regulation on the provision of food information – its application to airlines

EU Regulation 1169/2011 on the provision of food information to consumers was published in the Official Journal of the European Union on 22 November 2011 and entered into force 20 days later. Via the use of transitional periods of 3 and 5 years, its provisions will not become immediately applicable. The Regulation has direct effect in all Member States. Importantly also, its provisions will apply not only to EU airlines and caterers, but also to non-EU airlines whose flights depart from an EU Member State.

The Regulation

The aim of Regulation 1169/2011 is to consolidate, modify, simplify and clarify current legislation on labelling, presentation and advertising of foodstuffs (including nutrition labelling) so that food information can be more easily understood by the final consumer, thereby assisting the consumer to make, for example, particular health choices. The Regulation repeals (amongst others) EC Directive 90/496/EEC on nutrition labelling for foodstuffs and EC Directive 2000/13/EC on food labelling.

Regulation 1169/2011 uses European Commission "delegated acts" to allow for suggested amendments and additions to the Regulation. In this way, the intention is for the Regulation to evolve over time into something that is workable in practice and that can be adapted to the changing social, economic and technological environment. The Commission must also produce reports on how to deal with further issues, such as energy labelling on alcoholic beverages and trans fat (ie, chemically altered vegetable oils used to prolong shelf life, but which have no nutrional value and increase "bad" cholesterol). A watchful eye therefore needs to be kept over these evolving provisions.

Mandatory food information

The main provisions of the Regulation deal with mandatory food information which must be displayed (using a specified minimum font size) on prepacked food. Some of these requirements already existed in the repealed legislation mentioned above. Article 9 of the Regulation sets out the required mandatory food information including, amongst others things, the name of the food, its ingredients, any ingredient or processing aid (specifically identified by the Regulation) which can cause allergies or intolerances, and the date of minimum durability or the 'use by' date. Additional mandatory particulars under Article 10 and Annex III of the Regulation apply to certain specified foodstuffs - for example (amongst other things),

it should be stated that drinks (excluding coffee and tea) with high caffeine content have a high caffeine content and that they are not recommended for children or pregnant or breast-feeding women.

For non-prepacked food, Article 44 specifies that being able to provide the allergen/intolerances information is mandatory, but that the remaining food information requirements in Articles 9 and 10 and Annex III are not, unless Member States adopt national measures requiring some or all of those particulars to be provided. National measures may therefore differ between Member States for non-prepacked food.

These mandatory food information provisions will apply along with most of the remainder of the Regulation from 13 December 2014, i.e. a transitional period of 3 years has been allowed.

There is a mandatory nutrition declaration (under Article 30 of the Regulation) which must be presented in tabular format on prepacked food. It is to consist of the energy value and amounts of fat, saturates, carbohydrates, protein, sugars and salt, indicated per 100ml or per 100g, and which may additionally be shown on a per portion basis. All of this information is to be displayed in the same field of vision. The nutrition declaration will apply from 13 December 2016, i.e. 5 years after the Regulation's entry into force. However, voluntary implementation of the above provisions prior to their specified applicability date is allowed.

Application to airlines

Under Article 1(3) of the Regulation, its provisions are applicable to "catering services provided by transport undertakings when the departure takes place on the territories of the Member States to which the [EU] Treaties apply". By this wording and as stated in the introduction above, the Regulation therefore applies to all airlines (both EU and non-EU), as transport undertakings, with flights departing from the EU, even when the destinations of those flights are outside of the EU. It is apparent from previous drafts of the Regulation that this provision was inserted at a late stage of the drafting process. Initially, application of the Regulation was to "routes between two points within Union territory" . However, the final version of the Regulation reaches much further and has much wider implications for both EU and non-EU airlines operating from the EU.

EU-based catering companies and all airlines will therefore need to ensure that the Regulation's provisions are complied with after expiration of the transitional periods, where their food is being provided on flights departing from an EU Member State. A potentially big impact will probably be on airlines that accommodate passengers' tastes by loading prepacked food in a non-EU Member State for consumption by passengers on a flight departing from the EU. For example, on long haul flights to Asia prepacked noodles might be loaded in Tokyo for consumption on the leg of the journey departing from the EU. In this scenario, airlines and their caterers will need to ensure that such prepacked food complies with the new Regulation, even though the packaging might be completed by a non-EU based caterer and loaded onto the aircraft outside the EU. Under the Regulation, where the food is imported into the EU for consumption by a final consumer, ultimate responsibility for incorrect labelling will lie not with the non-EU caterer but with the "importer" into the EU market. Although at this stage it is not tested, it looks probable that the airline as the potential "importer" will be ultimately responsible for ensuring that the packaging complies.

The Regulation will have less impact on fresh foods loaded onto aircraft, which are not prepacked, although as stated above, any allergen/intolerances information will need to be known and detailed. One query which surrounds the definition of prepacked food, i.e. "any single item for presentation as such to the final consumer", is whether meal trays will be classed as a whole, as a single prepacked item (thereby requiring the prepacked food mandatory information to be stated), or whether (which is probably more likely) it will be considered to be made up of both non-prepacked and prepacked items.

A further issue is that this Regulation would appear to have some extra-territorial jurisdictional effect. However, as we have seen with the Emissions Trading Scheme (ETS), the EU may argue that the Regulation's provisions only apply if an airline chooses to operate a flight departing from an EU Member State and thereby subject itself to the unlimited jurisdiction of the European Union. The Regulation's provisions will not apply if an airline's flight is merely flying over EU airspace and does not arrive into or depart from an EU Member State. It would appear therefore that, even where an airline is potentially able to monitor its provision of food to its passengers so that this only occurs once the aircraft is outside EU airspace, if that flight is due to arrive into or has departed from the EU the Regulation will need to be complied with.

Regulation 1169/2011 can be found at:

http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0018:0063:EN:PDF

For further information, please contact **Tina Collier** or **Peter Macara**

Proposed changes to the rules on airport slots

The current legal framework governing airport slots in the EU, provided by Regulation 95/93, is built upon the principles of the IATA Worldwide Scheduling Guidelines and has been in place for almost 20 years, although it was amended, in a largely technical way, in 2004. Over this period the Commission has sponsored several studies intended to examine and recommend whether more significant changes are appropriate, but they have not resulted in proposals for action, until 1 December 2011, when the Commission published, as part of its “airports package”, a proposal for a new regulation on the subject, to update and replace Regulation 95/93. While the Commission’s proposal is not as radical as some had feared (or wished, depending upon their point of view), it does nevertheless propose some quite significant changes.

Slot trading

The current Regulation permits airlines to exchange slots with each other. A practice has existed for some years, particularly at Heathrow, whereby slots are effectively bought and sold making use of this facility, with valuable slots being exchanged for “junk” slots plus a payment of money. It had been unclear whether this was consistent with the rules, but following a challenge to this practice by the States of Guernsey, who were upset at losing Guernsey’s link with Heathrow when Air UK discontinued its service and “sold” its Heathrow slots to British Airways, the English High Court in 1999 held that such exchanges were permitted by the Regulation. The Commission at first was unwilling to recognise this judgment, but eventually, in early 2008, grudgingly accepted the practice, recognising that it had assisted US carriers in making practical use of the opportunity for entry to Heathrow created for them by the EU/US open skies agreement. However, the legal basis for such transactions has never been wholly clear, and they have lacked transparency.

The Commission is now proposing to introduce clarity and transparency, by an amendment which would permit, in addition to exchanges, transfers of slots between airlines, with or without monetary or other kind of compensation. In order to introduce greater transparency, air carriers involved in exchanges and transfers of slots would have to give the coordinator details of any monetary or other compensation involved, which would be published on a freely accessible website, and Member States would be obliged to establish a transparent framework to allow contact between carriers interested in transferring or exchanging slots.

If this element of the proposal is adopted, it will bring some welcome certainty to transactions involving substantial value, and throw some light on the hitherto rather murky world of slot trades, particularly as to prices paid for slots, and should assist airlines who wish to buy or sell slots. It will be interesting to see whether such clear legal recognition of the tradability of the rights which airlines have in slots will lead to slot values being included in balance sheets or have any effect on the ability of airlines to use slots as collateral for borrowings - an issue which is currently enjoying topicality.

Grandfather rights

The key principle of the IATA system, and the bedrock of the slot allocation system, and also a key feature of the Regulation, is the principle of grandfather rights. According to this principle, a carrier which has operated a series of slots (ie, a slot at the same time on the same day of the week over a period of 5 weeks) for at least 80% of the time during a traffic season is entitled to be allocated that slot in the following equivalent season (the so-called “use it or lose it” rule). The Commission is now proposing two modifications to this rule:

- the required percentage of use would be raised from 80% to 85%
- the definition of a series of slots would refer, rather than to a 5 week period, to a 15 week period in the summer season and a 10 week period in the winter season

This element of the proposal has aroused a certain amount of opposition from airlines (particularly those with established positions at hub airports), on the grounds that it will reduce their flexibility, as permitted reasons for not reaching the threshold remain very limited, although the Commission would be given a new power to permit exceptions when “justified on imperative grounds of urgency linked to exceptional events”.

Slot abuse

Slot abuse, in the form of airlines deliberately operating at times different from their allocated slot times, has been perceived to be a problem. In order to assist airports to combat it, the Commission proposes that the managing body of an airport should be able to use the airport charge system to discourage such behaviour.

New entrants

In a further attempt to assist new entry, the definition of a “new entrant”, to which some priority is given in the allocation of slots from the pool, would be amended to include a carrier requesting slots for a non-stop service on an intra-EU route on which at most two other carriers operate where, if the request were granted, the carrier would hold fewer than 9 (as opposed to 5, as at present) slots at that airport on that day for that service.

Coordinators

Studies have shown that in some Member States coordinators are not as independent as they should be. Stricter and more specific criteria for independence are therefore proposed.

It is also proposed that Member States should encourage close cooperation between coordinators, initially through the development of common projects, but it is envisaged that in due course the Commission would adopt implementing measures for creating a European coordinator.

Single sky

Greater integration between the slot allocation system and the single sky is proposed, by means of giving the single sky Network Manager a say in calling for a capacity analysis, and making recommendations about capacity, at an airport.

For further information, please contact **John Balfour** or **Peter Macara**

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

Further advice should be taken before relying on the contents of this summary.

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary.

No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.

Clyde & Co LLP is a limited liability partnership registered in England and Wales. Authorised and regulated by the Solicitors Regulation Authority. © Clyde & Co LLP 2012

Clyde & Co LLP

www.clydeco.com

CC000551 - January 2012