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Briefing note Summer 2017

Global Environment Newsletter

Welcome to the Summer edition of our Global Environment Newsletter. This edition covers the following topics:

We hope that you find this issue of our Global Environment Newsletter of interest. If you have any topics that you would like to see covered in future editions or if you have any comments on previous issues please let us know.

EU

Combating Climate Change in the Aviation Industry: *Development of the 'stop the clock' provisions, the global market-based measure and the EU Emissions Trading System*

Three major recent developments on addressing climate change impacts from aviation will be of interest to airlines and investors:

- the decision of the ECJ on the so-called "stop the clock" provisions (STC Provisions);
- the response of the EU to the recent development of the "global market-based measure" (GMBM) proposed by the International Civil Aviation Organisation (ICAO); and
- the vote of the European Parliament to support proposals to introduce reforms to the EU Emissions Trading System (EU ETS) to increase the rate of reductions in emissions in the EU and to amend the how the proposed market stabilisation reserve will operate.

The ECJ's decision on the STC Provisions

Emissions from aviation were excluded from the coverage of the EU ETS until 2012. Since then, airlines operating in Europe have been required to monitor, verify and report their emissions, and to surrender allowances to match those emissions. However, as a consequence of industry backlash, and assurances from the ICAO that a global measure would be proposed to address aviation emissions, the EU took the decision in 2013 (and introduced regulations in 2014) to "stop the clock" in relation to the application of the EU ETS to flights to, and from, most non-European Economic Area (EEA) nations.

In 2014, Swiss Air sought permission from the High Court in the UK to have the regulations that transposed the STC Provisions into UK law judicially reviewed. Simultaneously, it sought permission to have the case referred to the European Court of Justice. The High Court refused both requests, but following an appeal to the Court of Appeal in the UK, the question of the legality of the STC Provisions under EU law was referred to the ECJ.

Swiss Air argued that there is a general principle of EU law that the EU will treat non-EEA countries equally. This would mean that not applying the STC Provisions to Switzerland in the same way as they are applied to other third countries would be a breach of this principle. Accordingly, the question considered by the ECJ was whether the STC Provisions breached a general EU principle of law – that non-EEA countries be treated equally. The ECJ confirmed in its decision published on 21 December 2016 that there is no such principle and, as a result, no breach.

The ECJ's decision was based on its finding that such a principle would adversely affect the EU's ability to conduct itself in the international sphere, and therefore, it could only exist if there was express EU legislation giving effect to it (and there is no such legislation, nor is there any EU case law supporting the existence of such a principle).

EU response to the GMBM for the aviation industry

In late 2016, the ICAO decided to establish the GMBM which will be a measure for the offsetting the emissions from international aviation (as opposed to a so-called "cap and trade" emissions trading scheme such as the EU ETS) [1]. Since then, the ICAO has not significantly progressed the design of GMBM and there is limited publicly available information about how it may look, but it remains the intention that it will be introduced in 2020.

As a result of the GMBM proposal and the imminent expiry of the STC Provisions at the end of 2017, an impact assessment was produced for the European Commission on the STC Provisions considering the impact that the GMBM might have on the EU ETS. The assessment was published in January 2017 and addressed two time periods:

- **Pre-implementation period (up to 2020) –** two options in this period were assessed, namely whether the STC Provisions should be allowed to expire or whether to renew them. The assessment concluded that the most appropriate

[1] For more information see our article see our article ICAO Global Market-Based Measure for offsetting emissions from aviation contained in the Winter 2016/2017 edition of the Global Environment Newsletter.

option was to renew the STC Provisions, as the system was already in place and, consequently, the costs would be lower than in alternative scenarios; and

- **Post-implementation period (beyond 2020) –** a number of options in this period were assessed but given the absence of detail regarding the design of the GMBM, the assessment concluded that it would be prudent to carry out a further assessment once more detail on the GMBM is available.

In response, the Commission put forward a response in February 2017 to extend the STC Provisions and to reassess the impact of the GMBM on the EU ETS in due course. This proposal was then placed before the Council of the European Union. In June 2017, the Council of the European Union agreed to the main elements of the Commission's proposal. It is expected that the European Parliament's Environmental Committee will vote on the draft proposal on 11 July 2017, with the plenary vote to follow at some point in September.

Reform of the EU ETS

In February 2017, a "Report on the functioning of the European carbon market" by the EC was presented to the European Parliament. That report reviews the operation of the EU ETS, and includes proposals for reform. The European Parliament has now voted to support the proposals.

In brief, the proposals will increase the "linear reduction factor" (LRF) (the rate at which the number of allowances in the EU ETS reduces annually) from 1.74% to 2.2% by 2021. This means that the total number of allowances (i.e., the "cap" in the cap and trade scheme under the EU ETS) will decrease more quickly. The LRF does not apply to the aviation industry. The cap on the aviation industry is 95% of average emissions between 2004-2006 and will remain so until 2020. As part of the Council's vote in June 2017, referenced above, it was agreed that there will be a review of the aviation industry's cap, and a decision will be made on how to further reduce the number of aviation allowances in the EU ETS.

The proposals will also alter the implementation of the market stabilisation reserve which will begin operation in January 2019. This will be a store for excess allowances designed to address the current surplus and to improve the resilience of the EU ETS to major shocks by adjusting the supply of allowances to be auctioned. The intention is to increase the percentage of the total market for allowances under the EU ETS that can be transferred to, and released from, the market stabilisation reserve from 12% to 24%.

James Shepherd
Tel: +44 (0)20 7006 4582
Email: james.shepherd@cliffordchance.com
Clifford Chance, London

Reforms to EU Health and Safety Legislation: *New workplace exposure limits for 7 additional chemicals proposed and tightening of existing limits*

The European Commission has launched an initiative to reform its health and safety framework legislation, with particular emphasis on preventing workplace cancer and reducing the administrative burden on businesses. The Commission published a proposal for a directive amending Directive 2004/37 (on the protection against exposure to carcinogens or mutagens) ("**CMD**") which has the objectives of reducing EU workers' occupational exposure to carcinogenic chemical agents, increasing the effectiveness of the EU framework and providing a "better level playing field" for economic operators.

The CMD aims to protect workers from work-based chemical exposure. However, the Commission concluded that a revision was necessary as it does not take into account the available scientific evidence, improvements in measurement techniques, and risk management measures factors. In May 2016, the Commission took a first step to addressing these issues by adopting a legislative proposal to amend the CMD with a view to introducing exposure limit values for 13 chemical agents that are recognised as carcinogens in countries outside the EU or by international organisations, but that are not yet classified under the current EU system. The latest proposal looks to establish exposure limits for a further 7 additional chemicals as well as revising some of the existing limit values so as to reflect the latest scientific evidence.

There is little indication in the proposal itself as to how the amendments will achieve the stated objectives of increasing the

effectiveness of the EU framework and levelling the playing field for economic operators. According to the Commission, the introduction of EU-wide occupational exposure limits ("**OELs**") would help employers avoid costs that could arise in the case of non-compliance and thus negatively affect their businesses in the long-term. Further, since national OELs already exist for several of the chemical agents covered by the proposal, establishing the limit values provided for in the proposal would not impact companies in those Member States that have equal or lower limit values. Only companies in Member States that have higher limit values would be faced with additional operating costs.

As well as amending the CMD, the Commission intends to increase the availability of free online tools and publish further guidance to help small and microenterprises in conducting risk assessments. In addition, the Commission has stated that it will work with Member States and social partners to remove or update outdated rules within the next two years to simplify and reduce the administrative burden on companies.

Michael Coxall
Tel: +44 207006 4135
Email: michael.coxall@cliffordchance.com
Clifford Chance, London

Public Access to Information on Emissions v. Business Secrecy: *The European Court of Justice has provided some clarity on the extent of the business secrecy exemption from environmental disclosure*

The European Court of Justice has given a series of new rulings on how the Aarhus Convention rights operate in relation to disclosure of environmental information by public bodies.[2] This judgment has implications for all companies required to disclose environmental information to public bodies.

The rulings concerned the production of glyphosphate, a herbicide, which is regularly used in agricultural activities, and, as a result gets dispersed into the environment. Its placement onto the market had to be approved by the European Commission under the plant protection products Directive (now replaced by the Regulation No 1107/2009). Under the authorisation process, several producers provided relevant information on the substance to EU bodies. A number of Environmental NGOs requested disclosure of, among other things, the information submitted by the producers on identity and quality of impurities in the substance in order to discern its effects on health and the environment. The producers sought to prevent the Commission from disclosing the information as they considered it contained sensitive business secrets, such as the composition of the substance.

In general, under the Aarhus Convention, the public bodies must ensure that the public has access to information contained in its documents, generally even if it contains third party information. There are instances, under which the access may be denied. This would occur for example, if disclosure would undermine the protection of commercial interests of a natural or legal person, including intellectual property, unless there is an overriding public interest in disclosure. Nonetheless commercial confidentiality cannot be invoked as grounds for denying access to the "*information relating to emissions into the environment*", because in this case the overriding public interest is presumed.

The decisions have given some additional clarity on applying the balance between disclosure of environmental information and commercial confidentiality:

- The fact that a company does not expressly request the information it provided in relation to the procedure to be treated as confidential, does not preclude the Court from considering, at its own discretion, whether information should be treated as commercially confidential.
- The Court adopted a broad interpretation of "emissions into the environment" stating that it concerns all emissions, discharges and releases regardless of their source, i.e. not just those emissions that emanate from industrial

[2] C-673/13 (associated ruling also at C-442/14).

installations regulated under the Integrated Pollution Prevention and Control regime. Therefore the notion encompasses any emissions, including dispersing of agricultural or other substances, even from minor sources.

- In addition to actual emissions, the obligation to ensure public access to information would extend to foreseeable emissions under normal or realistic conditions of use. This, however, does not include purely hypothetical emissions.
- A balancing act: the Court stressed that the concept of "*information relating to emissions into the environment*" should not be interpreted restrictively, as the main aim of this notion is to give the fullest effect possible to the right of public access to environmentally-related information. However, if the interpretation was too broad, the exception granted for the protection of commercial interests would be virtually redundant. Hence the Court emphasized that the balance that needed to be made between the objective of transparency and protection of those commercial interests, stressing that the notion of "*information relating to emissions into the environment*" is broad, yet not absolute.

Finally, the Court quashed the decision of the General Court on the basis that its interpretation of "*information which relates to emissions into the environment*" was too broad. The case has now been sent back for rehearing at the General Court.

Petr Zákoucký
Tel: +420 22255 5235
Email: petr.zakoucky@cliffordchance.com
Clifford Chance, Prague

Ludvík Růžička
Tel: +420 22255 5255
Email: ludvik.ruzicka@cliffordchance.com
Clifford Chance, Prague

Australia

Climate change policy and renewable power takes centre stage: *The national climate change policy review and South Australian government's new energy plan spark debate*

In August 2015, when the Australian government announced a 2030 emissions reduction target of 26-28 per cent below 2005 levels (which subsequently became Australia's National Determined Contribution for the Paris Climate Change Agreement), it also committed to reviewing the country's climate change policies in 2017.

Following the release of the terms of reference for the review in December 2016, which immediately created controversy in Australia because of the suggestion that sector-based emission intensity schemes were being considered by the review, a formal discussion paper was released for public comment on 24 March 2017.[3] Submissions closed on 5 May 2017.

The discussion paper asks what the potential opportunities and challenges are for reducing emissions for a variety of sectors including electricity generation, resources extraction and manufacturing, transport and agriculture. It also asks:

- How energy and climate change policy can be better integrated – the review of climate change policy is being undertaken at the same time as the independent review of the Australian National Electricity Market and energy security by Australia's Chief Scientist, Dr Alan Finkel AO[4]. The review report was released on 9 June 2017 and recommended that all Australian governments agree to a national emissions reduction trajectory for the electricity sector, supported by a new clean energy target; and
- What factors should be considered by the Australian government when setting the country's long term (post-2030) emissions reduction goals.

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3 A complete copy of the discussion paper is available at: http://www.environment.gov.au/climate-change/review-climate-change-policies/discussion-paper-2017

4 Information about the Finkel Review, including a copy of the final report, is available here: http://www.environment.gov.au/energy/national-electricity-market-review

A clear focus of the discussion paper is the impact that emissions reductions in different sectors might have on investment and trade competitiveness.

The release of the discussion paper by the Australian government came hot on the heels of the announcement by the South Australian government of that State's new energy plan.[5] South Australia has been aggressive in its pursuit of its renewable energy objectives and nearly 50 per cent of the State's electricity is generated from renewable sources (mainly wind and solar) with the balance being drawn from the national electricity grid. However, this strategy was sharply criticised following a State-wide blackout in late September 2016 during a massive thunderstorm event which damaged a number of transmission lines throughout the State. This ultimately caused the main interconnector between South Australia and the national electricity grid to trip, separating the State from the grid and a leading to a complete loss of electricity supply to the State.

The South Australian government responded to these events by saying that the National Electricity Market no longer worked for the State and set out a plan to take greater control of the State's energy security. Elements of the plan include:

- A A$150 million fund focussed on developing energy storage solutions – the first project to be funded will be a grid-connected battery to provide 100MW of storage;
- Construction of a gas-fired power station in the State – the State closed its last remaining (coal-fired) power station only 5 months before the blackout;
- New powers for the State Energy Minister to direct the National Energy Market Operator to manage the electricity flow across the interconnectors; and
- Establishing an energy security target to require retailers to source electricity from clean generators and local sources.

Since the Australian government's climate change review is not expected to be completed until the end of 2017, it is certain that climate change and renewables, particularly in the context of energy security and supply, will not take a back seat in Australian domestic politics this year.

Robyn Glindemann
Tel: +61 89262 5558
Email: robyn.glindemann@CliffordChance.com
Clifford Chance, Perth

China

Update on the national Emissions Trading System: *A new Cap Setting and Allowance Allocation Framework Plan has been approved*

In March 2017, the State Council approved the Cap Setting and Allowance Allocation Framework Plan ("**Plan**") of China's new national emissions trading system ("**ETS**"). The first phase of the national ETS will run for three years commencing from the end of 2017. This will allow the regulator to identify and resolve outstanding issues before the national ETS is extended and fully implemented from 2020 onwards. Originally anticipated in mid 2017, it is now expected that the national ETS will be launched at some point after November 2017. The delay is mainly due to incomplete data and gaps in the ETS laws and regulations.

As discussed in the Winter 2016 edition of the Global Environment Newsletter, China will establish a dual-level management system such that the central authority will determine the total national carbon emissions cap and the emissions allowance allocation rules, while the local authorities will implement these rules and monitor compliance. The Plan sets out the central authority's general principles in guiding the design, methods and procedures for allocation. Free allocation will be mainly based on sectoral benchmarking and historical GHG intensity of relevant emitters. The National Development and Reform

5 Full details of the plan are available at http://ourenergyplan.sa.gov.au/

Commission ("NDRC") has so far approved the establishment of nine exchanges to act as the official trading platforms for the national ETS, including seven in the original pilot regions and one in each of Sichuan and Fujian provinces.

While the ETS regulation was not listed in the 2017 legislative work plan of the State Council, the NDRC is working towards attaining State Council's approval of the ETS regulation this year. The NDRC has submitted the draft ETS regulation to the Legislative Affairs Office of the State Council, which is currently revising it based on an intensive consultation process. The NDRC is also working on rules that will allow for greater transparency on reporting and verification of emissions.

The NDRC is currently revising the provisions of the Interim Regulation of Voluntary Greenhouse Gases Emission Trading which it originally issued in 2012 to encourage and provide some guidance on voluntary greenhouse gas emission reduction projects. The revision aims to control the quantity and quality of China Certified Emissions Reduction ("CCER") credits which are issued to qualifying GHG reduction projects, as well as to clarify the role of CCER credits in the national ETS. All CCER registration applications are suspended at the moment and will only resume once the Interim Regulation has been revised. The applications which have already been submitted but yet to be approved will be reviewed and granted by the NDRC as soon as the revised Interim Regulation is issued.

Amy Ho
Tel: +852 2825 8993
Email: amy.ho@cliffordchance.com
Clifford Chance, Hong Kong

Chlorophyll Yip
Tel: +852 2826 3426
Email: chlorophyll.yip@cliffordchance.com
Clifford Chance, Hong Kong

Peter Zhao
Tel: +86 212320 7373
Email: peter.zhao@cliffordchance.com
Clifford Chance, Shanghai

The Netherlands

A New Nature Protection Act: *A new streamlined nature protection Act will improve clarity of the protection regime and allow environmental protection and economic expansion to proceed together*

On 1 January 2017 the new Dutch Nature Protection Act ("*Wet natuurbescherming*") entered into force. This act replaces three acts which previously implemented the European Habitats and Birds Directives (the Nature Protection Act 1998, Forest Act, and Flora and Fauna Act), and provided for certain nature protection obligations under Dutch domestic law.

The new Act puts in place an improved nature protection system with the following advantages:

- It integrates and streamlines various procedures, e.g. making permit applications more efficient. Also, there is now one competent authority in respect of habitat protection: the provincial board ("*Gedeputeerde Staten*"). The Minister will in the future only have competence for projects of national interest;
- A clear system for the protection of species. The three pre-existing Acts mentioned above had certain levels of overlap, which created areas of legal uncertainty. By contrast the new Act has three clearly defined types of protection: (i) for birds in line with the Birds Directive, (ii) for species in line with the Habitats Directive and (iii) other species, outside the Habitats Directive, based on national policies. For each type of protection, there is a clear framework of facts and circumstances that need to be considered for obtaining development-related permits;
- The introduction of a National Policy Plan ("*Natuurbeleidsplan*"), which is intended to contain a more integrated vision on the protection and improvement of the quality of species, habitats and valuable landscape;
- A general legal basis for the "Program Approach" ("*Programmatische Aanpak*"). The Program Approach is an instrument, which was originally developed only in respect of nitrogen emissions and air quality. The purpose was to achieve general improvement in respect of nitrogen emissions and air quality (fine dust), in order to create room for an expansion of economic activities (where impacts at one location can be offset by improving environmental protections in another location). The success of this policy has led to approach being applied generally for all relevant aspects of nature protection.

The Nature Protection Act is generally perceived as an improvement, which will facilitate an effective nature protection policy, as well as responsible economic development in the Netherlands.

Jaap Koster
Tel: +31 20711 9282
Email: jaap.koster@cliffordchance.com
Clifford Chance, Amsterdam

UK

£20M FINE FOR WATER POLLUTION OFFENCES: *The Crown Court demonstrates its willingness to impose significant environmental sentences by imposing the largest ever fine for water company pollution in the UK*

A water pollution case has demonstrated the UK Courts' new willingness to fine companies heavily for environmental offences. In March 2017, Thames Water incurred a fine of over £20m, the largest fine ever recorded for water pollution fines by water companies in the UK. The prosecution arose out of a series of significant pollution incidents involving watercourses leading into the River Thames between 2012 and 2014. The Company had caused untreated, or poorly treated, sewage to be discharged resulting in major damage to the watercourses including dead birds, fish and invertebrates, as well as distress to local communities. 6 separate cases were brought by the Environment Agency for illegal discharges of sewage at five sewage treatment plants and one pumping station. The Agency recorded multiple failures in Thames Water's management including the disregarding of risks identified by its own staff and failure to respond to alarms notifying staff of serious problems.

These events followed similar problems at two other treatment works in 2013 for which Thames Water had already been fined a total of £1.4m in 2016. In the present case, the Crown Court Judge decided that Thames Water had been negligent and noted that the pollution incidents were "entirely foreseeable and preventable", calling the conduct of Thames Water disgraceful, demonstrating a "scant regard for the law". The fines for each pollution incident ranged from £150,000 to £9m. The largest fine was awarded for the pollution at Aylesbury treatment works which had already been the subject of a pollution-related prosecution.

This case follows the introduction of new sentencing guidelines for environmental offences in 2014 which sought to increase the level of fines for certain offences. One of the first decisions using the new guidelines involved a water pollution prosecution, again involving Thames Water. In a landmark decision following that case, the Court of Appeal suggested that fines in the millions of pounds would be appropriate for serious environmental offences (and potentially in excess of £100 million in some circumstances) for very large organisations (making a direct comparison with fines applied to financial services market regulation breaches).

Michael Coxall
Tel: +44 207006 4135
Email: michael.coxall@cliffordchance.com
Clifford Chance, London

Editors

Nigel Howorth
Partner, Head of Global Environment Group

T: +44 20 7006 4076
E: nigel.howorth@cliffordchance.com

Michael Coxall
Senior Professional Support Lawyer

T: +44 20 7006 4315
E: michael.coxall@cliffordchance.com