

APPEAL OF G5 EXECUTIVE AG

UNDER THE AVIATION GREENHOUSE GAS EMISSIONS TRADING SCHEME REGULATIONS 2010

1. I have been appointed by the Secretary of State for Business, Energy and Industrial Strategy to determine this appeal by G5 Executive AG (“G5”). The appeal concerns a civil penalty notice served by the Environment Agency on 24 March 2016 in respect of the failure by G5 to surrender the requisite number of allowances in respect of aviation emissions in the 2012 Scheme year. The deadline for surrender for that year was 30 April 2013.
2. The duty to surrender arises under regulation 26 of the Aviation Greenhouse Gas Emissions Trading Scheme 2010 Regulations, and regulation 38 sets a civil penalty of 100 euros per tonne of carbon dioxide emissions. This penalty is mandatory and is derived from Article 16(3) of Directive 2003/87/EC as amended in 2008 to apply to aviation, which I shall call the EU ETS Directive.
3. G5’s verified emissions required it to surrender 4638 allowances (for 4638 tonnes), and it did not surrender until 22 April 2015, nearly two years after the deadline of 30 April 2013.
4. The civil penalty notice is in the sum of £393,186.45, the sterling equivalent of 4638 x 100 euros.
5. As it is entitled to do, G5 wished there to be an oral hearing of this appeal. After the service of submissions, witness statements and documents, the oral hearing took place on 8 June 2017. G5 was represented by Tim Marland of counsel, instructed by Mr Mark Bisset of Clyde and Co (who was kind enough to provide his firm’s facilities for

the hearing). The Environment Agency was represented by Gwion Lewis of counsel, instructed by Jo Welsh.

6. I heard no live evidence. Thanks to the economical presentation of the appeal by counsel, the hearing took the morning, rather than the full day for which it was listed.

The issues

7. There were two issues. First, under Ground 1, G5 said that it was entitled to the *de minimis* exception in the Directive, in that G5 was not the aircraft operator of one particular aircraft, a Gulfstream G550 registered as M-TFKR, emissions from which had taken G5 over the 10,000 tonnes threshold. Secondly, under Ground 2, even if G5 was the operator of that aircraft, it was entitled to rely on the defence of *force majeure* arising out what it says was late decision-making to include flights to and from Switzerland within the EU ETS scheme, even as modified by the Stop The Clock decision.

The history

8. A large Polish company Tele Fonika Kable (TFK) purchased the aircraft M-TFKR in June 2009 for use by its business executives. It engaged a series of aircraft management companies in respect of the aircraft. The first was International Jetclub Limited, the second (from March 2011) was AMAC Aerospace Switzerland Limited, and the third (from 31 May 2012) was G5.
9. I shall return to the terms of the aircraft management agreement between TFK and G5 below.
10. The aircraft M-TFKR is registered with the Civil Aviation Authority of the Isle of Man. It was kept in a hangar in Ostrava-Mosnov airport (rented by AMAC) in the Czech Republic.
11. In 2012, the rest of G5's fleet consisted of 3 other Gulfstreams and a Legacy. Unlike the M-TFKR aircraft, these 4 aircraft were either owned or leased by G5. G5 operated

these aircraft under its Swiss Air Operator Certificate. They were registered in Switzerland, and based there. They were chartered out to customers.

12. TFK was entered in the European Commission's April 2011 List of "aircraft operators that performed an aviation activity": see Commission Regulation 394/2011 of 20 April 2011 (the List). This Regulation amended an initial Regulation 748/2009 of 5 August 2009, which, as recital (3) records, was based upon data provided by Eurocontrol "*using records of flight plans*", and which itself had followed a Commission Notice 2009/C 36/10 of February 2009, attaching a preliminary list based upon the same material derived from aviation activities undertaken since January 2006.
13. The entry in the 2011 (and indeed the 2012) Lists must relate to M-TFKR, because as far as I am aware, TFK has not owned other aircraft in the relevant time period.
14. The List in the 2011 Regulation assigned TFK to Poland as the administering state under the EU ETS Directive.
15. The List assigned G5 to the United Kingdom, hence the Agency's role in regulating G5 under the EU ETS Directive.
16. In January 2010, the Agency issued an Emissions Plan to G5, followed by a Benchmarking Plan in May 2010. The Agency says ([32] of its skeleton argument of 23 May 2017) that G5 missed out on an allocation of free allowances for the 2012-2020 period, because G5 did not submit a relevant Tonne-Kilometre Data report by the relevant date.

17. The first year for which allowances needed to be surrendered was the calendar year 2012, with the applicable deadline of 30 April 2013. On 18 September 2012, G5 duly opened an Aircraft Operating Holding Account, into which any allowances needed to be transferred before they could be surrendered. On 31 March 2013, it submitted its verified report of aviation emissions for the 2012 Scheme Year. This reported total annual emissions of 10,282 tonnes of CO₂, of which 4,638 tonnes were verified as intra-European emissions. By this report, and because the reported emissions exceeded the de minimis threshold of 10,000 tonnes, G5 was declaring itself to be a qualifying air operator for the 2012 Scheme Year.
18. G5 did not surrender any allowances by 30 April 2013. The Agency chased G5 in June and July 2013.
19. In late 2013, TFK sold the aircraft to G5, but this and subsequent arrangements cannot affect the status of the aircraft during 2012.
20. On 20 February 2014, G5, by Mr Curry, and Mr Sinton of the Agency discussed matters over the telephone, and Mr Sinton invited G5 to advance any reasons why G5 should not be liable to a civil penalty. This elicited a response from Mr Curry on 21 February 2014 as follows: *“We have reviewed our 2012 submission and realised that we have included in our submission emissions for a G550 M TFKR which is owned by Tele Fonika Kable and registered with the Polish authorities. We were simply the management company in 2012.”* This was the first articulation of G5’s current case on Ground 1.
21. The Agency accordingly pressed for and were supplied with the TFK management agreement, and in due course with flight plans in respect of the aircraft. It is common ground that the data from sample flight plans show G5 as the operator.

22. On 18 March 2014, G5 submitted an amended verified aviation emissions report for 2012. This deleted the M-TFKR flights leading to verified emissions of 9,619 tonnes, so under the 10,000 tonnes threshold.
23. There then followed various communications between G5, TFK and the Agency, which I shall summarise below. Their gist is that G5 tried to persuade TFK to write a letter to the Agency saying that TFK was the operator, without ultimate success. The Agency was not persuaded that G5 was not the operator. Following this, G5 surrendered the requisite allowances in April 2015. This could not affect its liability for a civil penalty, if G5 had in fact been the operator in respect of M-TFKR in 2012.
24. On 9 March 2016, the Agency told G5 that it intended to impose a mandatory penalty in respect of the 2012 Scheme Year, and on 24 March 2016, it did so, giving rise to this appeal.

GROUND 1

The applicable definitions

25. The ETS Scheme applies to aircraft operators who perform aviation activities as defined in the Directive.
26. Article 3(o) of the Directive states: “*“aircraft operator” means the person who operates an aircraft at the time it performs an aviation activity listed in Annex I, or where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft.*”
27. Annex I of the Directive identifies as an activity “*flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies.*” It then exempts various flights identified at (a) to (j), (j) being the material one: “*flights which, but for this point, would fall within this activity, performed by a*

commercial air transport operator operator either – fewer than 243 flights per period for three consecutive four month periods, or – flights with total annual emissions lower than 10 000 tonnes per year”. This is the *de minimis* exemption. The phrase “Commercial air transport operator” within (j) “means an operator that, for remuneration, provides scheduled or non-scheduled air transport services to the public for the carriage of passengers freight or mail”: Article 3(p).

28. Assistance with the detailed interpretation of “aviation activities” and the exemptions in Annex I is provided by Commission Decision 2009/450/EC, and its own Annex. At 2.7, various propositions about exemption (j) are set out including, at 31 “*For the application of the de minimis rule, the characteristic of being commercial is linked to the operator and not to the flights in question. That means in particular that flights provided by a commercial operator shall be taken into account for deciding whether that operator falls above or below the exemption thresholds even if those flights are not provided for remuneration.*”
29. Mr Lewis for the Agency relied upon this provision. I consider that it is not aimed at the present problem, and does not help us with its resolution. It is to cover “free” flights provided by an acknowledged (commercial) operator, which it confirms are to count for purposes of the 10,000 tonnes threshold. But the problem here is whether G5 was or was not the operator at all in respect of M-TFKR – not the commerciality of the flights in question.
30. I was also directed to some “*Questions and Answers on historic aviation emissions and the inclusion of aviation in the EU’s ETS*” produced by the EU. From Answer 17, I get the common-sense view that use of a ICAO flight designator may indicate the identity of an operator, and from Answer 22, the view that management companies who file flight plans and/or pay route charges and/or “*provide services related to the ETS obligations of their clients*” are “*not aircraft operators...unless they also operate flights covered by Annex I of the EU ETS Directive*”. This tells me no more than that all these features may point towards the identity of an operator but none of them are

conclusive. It emphasises that not all management companies will be operators; that will depend on the circumstances.

31. I was also asked to consider the dictionary definition of “operate” as to “control the functioning of (a machine, process or system), and the US Federal Aviation Administration’s definition of “operate” as “*use, cause to use or authorise to use aircraft, for the purpose... of air navigation including the piloting of aircraft, with or without the right of legal control (as owner, lessee, or otherwise).*”
32. As Mr Marland submitted to me, the ultimate question as to who was the operator of this aircraft during the (second half of) the 2012 Scheme Year is one of fact.
33. TFK were the registered owner of this flight, and the aircraft was being used to further TFK’s business, by flying its executives about.
34. But did TFK’s arrangement with G5 mean that G5 became the aircraft operator for EU ETS purposes?

The aircraft management agreement

35. Dated 31 May 2012, the aircraft management agreement between TFK and G5 provided that G5 would manage the aircraft “*for, on behalf of and on the full account of the Owner*” in accordance with all necessary approvals and permits of the Isle of Man CAA” : clause 1. TFK warranted that the aircraft would only be used for private flights of TFK and would not be chartered out to third parties or for commercial purposes: clause 2(e). This provision was included, I infer, because the Isle of Man authorities prohibit use of IoM registered aircraft for commercial air transport (under the Air Navigation (Isle of Man) Order 2015).
36. Under clause 3, G5 would provide pilots and other crew for the aircraft, and G5 would ensure that the aircraft would be able to fly from its base on 24 hours notice.

G5 would maintain the crew, including its licences and training. Under the heading “Operational Arrangements,” clause 4 provides that G5 would ensure that the aircraft was used in accordance with TFK’s instructions, and would not allow any flight not authorised by TFK. G5 would also coordinate with TFK to ensure a smooth operation: clause 4(b)(iii). G5 would organise route and flight planning (including flight plans): clause 4(c). G5 would maintain the aircraft, using a third party maintenance provider (clause 5) and would insure the aircraft (clause 7).

37. Clause 10 contains G5’s “Additional Obligations”. It would maintain TFK’s registration of the aircraft with the Isle of Man CAA (10(a)(v)). By clause 10(b). G5 “shall exercise all the obligations and duties that are to be fulfilled by the “aircraft operator” according to [the EU ETS Directive]. The Manager shall provide the Owner with a statement certifying that the Manager performs the duties of the “aircraft operator” in line with [the EU ETS Directive]”.

38. Clause 15 declared that the applicable law was German, but, in answer to a question from me, counsel agreed that, given that there was no evidence before me that German law differed from English law, I should interpret the agreement in accordance with the principles of English law.

39. On 24 July 2012, Mr Curry of G5 signed a statement. It is very formal, and reads like a lawyer’s statement, and I infer that it was drafted by TFK’s inhouse lawyers. It declared on behalf of G5 that “we are the operator of” M-TFKR; that “we perform the activities of the operator of the aircraft.” These activities included “technical and operational services” “passenger services (inter alia scheduling the flights, route reservation in accordance with the requirements of [TFK]”, providing the crew and ground services. It mistakenly said that greenhouse gas “fees” are paid by G5 in Switzerland – mistakenly because G5 was registered for EU ETS purposes in the UK.

40. It is an irresistible inference that this statement was that required by clause 10(b), to the effect that G5 was performing the duties of the aircraft operator under the Directive.

41. Some doubt was expressed by G5 as to the provenance of this statement (Reply, [29ff]), produced by TFK, partly because it was not to be found in Mr Curry's files. I have little doubt that the statement is genuine. And given the very limited documents from Mr Curry's papers which have been found and disclosed on this appeal (indeed the only one seems to be the firmly self-serving TFK letter of 11 April 2014: see below), I attach no importance to this observation by G5.

The correspondence of March-May 2014

42. On 31 January 2017, after initial rounds of documentation, the Agency invited G5 to abandon this appeal, attaching Mr Curry's statement, as exhibited by a Mr Hassa of TFK to the latter's witness statement. On 3 February 2017 G5 responded, producing a letter, said to have been found in Mr Curry's files, from TFK to the Agency dated 11 April 2014. It said that during the whole of 2012 the aircraft "*was operated by, and under exclusive operational control of [TFK] which was performing aviation activities specified [in the Directive].*" It was apparently signed by a Ms Majerska, whose actual signature can be seen on a May 2016 power of attorney authorising Mr Hassa to act for TFK on this appeal.

43. In a second statement of 24 March 2017, Mr Hassa confirmed that an unsigned Word document in the form of the 11 April 2014 letter was found in a former employee's files. Mr Hassa confirms that this draft letter had then debated internally within TFK, and ultimately TFK, and their lawyers in particular, were unhappy with its contents. Hence, they came up with a far less helpful statement from G5's perspective. Mr Hassa is very sceptical about the signature (apparently that of Ms Majerska) to be found on G5's copy of this letter (and gave his reasons for this), but, despite this, Mr Lewis, on behalf of the Agency, made it clear that he was not alleging fraud by G5 (of which forgery would be a sub-category), and I certainly do not make any such finding.

44. That said, it is odd that G5 produced on this appeal nothing other than this self-serving letter of 11 April. The first thing which would have been apparent from emails from G5's Swiss lawyers (copied to Mr Curry, and to Mr Fried, who was the source of instructions to Clydes on this appeal) was that the content of the original draft sent to TFK came from G5 and its lawyers: see email to Mr Sinton of 24 March 2014. The second is that on 29 April 2014, the Agency was chasing the proposed letter from TFK (in an email again copied into Mr Fried) – this is inconsistent with any settled position being arrived at by 11 April 2014, let alone a signed letter being in circulation either sent or to be sent to the Agency. The third is that on 13 May 2014 (a month after the supposed TFK confirmation) it was plain from G5's lawyer's email that TFK wished to change the contents of the draft letter, an email again copied into Mr Curry, Mr Fried, and G5's lawyers.
45. The upshot of this process however is that TFK produced nothing of any use for G5's attempts to persuade the Agency that TFK, not G5, were the operators during the latter part of 2012.
46. I can understand why Mr Lewis on behalf of the Agency was gravely concerned about the provenance of the "signed" 11 April 2014 letter in Mr Curry's files. As I have indicated, I am concerned about the lack of disclosure of material by G5 both before and after 11 April 2014, which would have put that letter in a rather different light. But ultimately, and as Mr Marland submitted, none of these concerns go to the underlying merits of this appeal, which turns on the contractual and other arrangements governing this aircraft in 2012.

The parties' central submissions

47. The parties both produced full submissions, in G5's case principally via its Reply of 5 May 2017, and in the Agency's case via its skeleton argument of 23 May 2017. I have read them carefully.

48. In oral submissions, Mr Marland stressed a number of features of the G5/TFK arrangement. G5 had no independent right to use or authorise the use of the aircraft. TFK controlled the aircraft in the sense that the crew were told where to fly to, when the flights should take place, and who should be flown in the aircraft. The various administrative arrangements placed upon G5 by the agreement did not affect the underlying reality that TFK remained in control and was thus the operator. He also directed my attention to the fact that TFK remained in the EU Commission List as operator for 2011 and 2012. He said that clause 10(b) of the agreement meant no more than that G5 was acting on behalf of the operator to discharge the obligations which were placed on TFK as operator, and the statement was only needed by TFK to ensure that G5 discharged TFK's obligations. Put the other way round, there would be no need for the statement if G5 were the operator anyway. The upshot, he said, was that adopting the FAA definition of "to operate", TFK used the aircraft and/or authorised its use and were hence its operator.

49. G5's case on flight plans was that G5's ICAO designator EXH was indeed used, together with 007, at TFK's behest because TFK liked the James Bond association of those numbers. G5 said that this request and its observance reinforced its case about TFK's operational control.

50. By contrast, Mr Lewis said that the management agreement, and the statement produced pursuant to it, was reflective of the reality that G5 was the operator. He pointed out provisions in the management agreement (most of which I have summarised above) to that end. He also relied on the submission by G5 of flight plans as an indicator that G5 was the operator. Inclusion in the Commission list said nothing, about who was the operator as between owner and manager. He also relied on an analogy drawn with (his) use of a taxi; he would tell the driver where to go to, but the driver would remain at all times in control of the taxi and would be its operator. (Mr Marland responded that the analogy did not assist; by contrast, the taxi driver did not have to take the fare at all and did not have to go to where the fare wished to go).

My conclusions

51. I consider that G5 was the operator of this aircraft during the second half of 2012, given its obligations under the agreement, even though TFK retained the ability to direct G5 to fly whom it wanted, when it wanted, and where it wanted. The obligations G5 took on went well beyond the typical backroom services which a management company might perform without becoming an operator. I attach particular importance to the arrangements about crew, training, ground services, and the provision of flight plans (as per the agreement, and as complied with in fact). None of these is definitive but it is the combination of these obligations which makes G5 the operator. The 007-element of the flight plan arrangement does not undercut the fact that it was G5 whose designation was being used during the period of the agreement.
52. This relationship is then confirmed by clause 10(b) of the agreement. I accept that clause 10(b) if construed on its own would not necessarily mean that G5 was the operator. I can imagine circumstances in which the reality of the rest of the arrangement was that the owner was the operator, but that it wished to appoint the manager to perform the operator's EU ETS obligations for it. But the terms of the clause, in the present context, reinforce my conclusion about the rest of the agreement. This agreement, read as a whole, appointed G5 as operator of the aircraft, and confirmed that by clause 10(b). The statement by G5 by Mr Curry of 24 July 2012, which was provided pursuant to the agreement, supports my view that it was intended that G5 be the operator, rather than it simply discharge TFK's operator's functions for it: that is what it said.
53. I attach little importance to the fact that TFK were named in the Commission Lists as operator. The 2011 and 2012 Lists were compiled before the management agreement of 31 May 2012. Their contents were principally be determined by flight data gained from Eurocontrol, and, in the case of any doubt as to who the day to day operator was, TFK would be identified as owner of the aircraft, rather than one of the series of management companies who were involved with the aircraft over the years.

Outcome on Ground 1

54. I find that G5 was the “aircraft operator” of M-TFKR from June 2012 to end December 2012, as that term is used in the Directive.

55. G5 took an additional point in its Reply that the emissions had not been properly apportioned between G5 and AMAC, the previous managers. This was convincingly answered by Mr Lewis’s skeleton at [63], and the point was not argued before me.

56. It follows that G5’s original verified emissions report was correct in identifying 10,282 tonnes reportable emissions, and so the *de minimis* exemption does not apply to the 2012 Scheme Year.

57. G5 should therefore have surrendered allowances in respect of 4638 tonnes by 30 April 2013, and the civil penalty notice is based upon that lack of surrender.

GROUND 2

58. Ground 2 is set out in some detail in G5’s notice of appeal, only briefly in G5’s Reply, and was hardly touched on by Mr Marland in oral submissions. It relies on *force majeure* as a defence to the civil penalty notice.

Force Majeure: the law

59. The concept of *force majeure* is not expressly set out in either the EU ETS Directive or the 2010 Regulations, but it is a general and long-standing principle of European Union law. It was also adopted as a potential defence to a failure to surrender case by the Court of Justice of the European Union in the case of *C-203/12 Billerud*, decided in October 2013 in respect of the EU ETS Directive.

60. The Billerud operators had failed to surrender EU-ETS allowances for a stationary installation due to an administrative oversight, despite owning enough allowances which would have enabled it to do so at the critical time. The CJEU said that the fact

that the Billerud companies already had those allowances was no defence to an Article 16(3) breach and to the penalties therein set out.

61. The Court stated that the only potential defence was *force majeure*. For this to apply, there must be an “external cause” which had “*consequences which are inexorable and inevitable to the point of making it objectively impossible for the person involved to comply with its obligations*”. So it had to be shown that the Billerud companies “*despite all due care having been exercised in order to comply with time limits, were faced with unusual and unforeseeable circumstances beyond their control...and that went beyond mere internal breakdown.*” [31] – underlining all mine.

62. Earlier ECJ case law, C-124/92, *An Bord Bainne Cooperative*, had explained that the concept of *force majeure* was not “*limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the trader concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice...*” :[11].

Its application here

63. G5’s case starts with the fact that in November 2012, a future measure known as “Stop the Clock” was announced by the EU Commissioner, Connie Hedgard. This measure would put enforcement of aviation to and from “non-European countries” on hold until after a further round of international aviation negotiations.

64. By November 2012, G5 had already opened its AOHA, which it would or may need in respect of its “own” fleet, irrespective of the position of TFK’s aircraft.

65. The Agency accepts that there was some uncertainty over the next months as to whether flights to and from Switzerland were to be included within the 2012 Scheme Year.

66. In the event, the final decision to include such flights within scope was only taken on 24 April 2013, in the formal Stop the Clock Decision, 377/2013/EU.

67. G5 assert that there was a debate in the European Parliament on 15 April 2013 suggesting that flights to and from Switzerland should be treated as any other third party. It has produced no written evidence in support of this, and as the Agency observes, it seems unlikely given that the next day, 16 April, the EU was proposing what flights to exclude from scope, and these did not include Swiss flights.
68. More fundamentally, there is no evidence whatsoever that developments at EU level played any part in G5's non-surrender by 30 April. As we have seen, it had submitted its verified emissions report on 31 March, which on the face of it brought it within the scope of the Scheme because the 10,000 threshold was exceeded. There is no suggestion that G5 (and Mr Curry in particular, as the man charged with such matters) made any effort to keep itself apprised of EU developments, or indeed that it did anything on or after 24 April 2013 to surrender allowances, now that it had been confirmed that Swiss flights were in scope. Given that its AOHA was open, there was sufficient time after 24 April 2013 for G5 to purchase allowances and surrender them before the deadline.
69. Hence, the potential defence does not get off the ground. It was far from "objectively impossible" for G5 not to have surrendered allowances by 30 April 2013. The inference is that G5 had made no arrangements to surrender, either before or after 24 April. G5 places reliance on the absence of Mr Curry and his files. I attach importance to the fact that the Agency has no record of any evidence that G5 was in contact with the Agency between submission of the verified emissions report and the surrender deadline. Had G5 been prejudiced, one would have thought that it would have made swift complaint of that fact to the Agency.
70. Hence, G5 has not established that its failure to surrender was not caused by its lack of care; indeed my inference is to the contrary. G5 (via Mr Curry) had simply not made any arrangements in advance of the deadline. I also note that Mr Curry did not advance anything approaching this case in response to the various letters and emails

sent to G5 whilst he was still in post. The point appears to have surfaced for the first time in G5's Swiss lawyers' letter of 15 December 2014.

71. In the light of this, Mr Marland was right not to press this argument with any vigour orally before me.

72. The *force majeure* defence is therefore not made out.

My determination

73. For these reasons, I dismiss G5's appeal. The Agency's civil penalty notice of 24 March 2016 therefore stands.

DAVID HART Q.C.

19 June 2017