Domestic aviation fuel tax in the EU

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Summary

This paper will consider the legal possibilities for imposing a tax upon the fuel used in EU Member State domestic aviation. It will consider the relevant treaties and laws: the Chicago Convention, the EU ETS, the Energy Taxation Directive, and the Excise Duty Directive. It reaches the conclusion that taxation can be imposed on fuel used in domestic aviation without legal impediment. It should be noted at the outset that this question has been considered before by the UK Parliament[1] and by Prof Eckhard Pache for the German Federal Environment Agency,[2] both of which came to the conclusion that taxing domestic aviation fuel in the EU was perfectly legal.

1. The Energy Tax Directive

The Energy Taxation Directive 2003/96/EC permitted as from 2003 Member States to tax fuel used in domestic aviation. Article 14 in relevant part states:

"(1)...Member States shall exempt the following from taxation…(b)energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying…(2) Member States may limit the scope of the exemptions provided for in paragraph 1(b) and (c) to international and intra-Community transport."

This allows Member States to place a tax on fuel supplied for domestic aviation, i.e. limit the tax exemption to just intra-EU and international flights. The Netherlands, Switzerland and Norway[3] have domestic fuel taxes on aviation fuel. Internationally, the US, Japan, India and Brazil, amongst others, have domestic fuel taxes. There are no intra-EU aviation fuel taxes.

2. The Chicago Convention

The Chicago Convention provides no obstacle to placing a tax on domestic aviation fuel. The Convention bans parties from imposing taxes on fuel already on board an aircraft when it lands in another country but it contains no prohibition on taxing the fuel sold to aircraft in a country. Further, the Chicago Convention is not applicable to domestic aviation.

It is often suggested that the Chicago Convention exempts aviation fuel from taxation.[4] However, the Chicago Convention only exempts fuels already on board aircraft when landing, and retained on board

[1] Ninth report: Reducing carbon emissions from transport, 7 August 2006 HC 981 2005-06 para132
[2] https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/2905.pdf
[3] Norway is a member of the European Common Aviation Area (ECAA) as part of which, has agreed to be bound by the provisions of the ETD with regard to aviation, this is discussed in more depth in section 2 on bilateral aviation agreements. Domestic flights no longer operate in The Netherlands.
[4] See for example the Commission website on Excise Duties:
https://ec.europa.eu/taxation_customs/business/excise-duties-alcohol-tobacco-energy/excise-duties-

when leaving, from taxation. Article 24 states: *"Fuel ... on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges."*

Therefore it can be seen that Article 24 does not prohibit the taxing of fuel taken on board in a particular country but rather prohibits the taxation of fuel that was already on board the plane when it landed, i.e. Member States cannot tax aviation fuel purchased in another country that arrives on board the aircraft.

Another article of the Chicago Convention that is sometimes said to ban taxes in Article 15. This article states: *"No fees, dues or other charges shall be imposed by any contracting State 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."*

Therefore, it prohibits only those charges which are levied solely for transit, entry into or exit from a particular country. A domestic fuel tax would not be levied to grant transit rights but rather for general revenue raising reasons, along (probably) with an environmental component, meaning that the tax would not be on the basis of transit, entry into or exit from a country and so not fall foul of the Article 15 ban.

Second, the tax would not be a 'charge' - a charge is a levy imposed on the basis of a service rendered as opposed to a tax which is levied without any service given in return. It could be questioned whether a tax would come under the definition of 'fee' or 'due' but the wording makes clear that 'fee' and 'due' are simply types of charges. Indeed, ICAO itself has distinguished between taxes and charges in numerous policy documents, for example in the 5th recital of the "Council Resolution on Environmental Charges and Taxes" of 9 December 1996:

"Noting that ICAO policies make a distinction between a charge and a tax, in that they regard charges as levies to defray the costs of providing facilities and services for civil aviation, whereas taxes are levies to raise general national and local governmental revenues that are applied for non-aviation purposes."[5]

Therefore, it is clear that Article 15 does not prohibit the levying of general taxation without a service provided, i.e. it does not prohibit the imposition of a tax on fuel for domestic aviation either to raise general revenues or for environmental purposes.

ICAO has produced various policy documents that suggest that no taxes should be placed on aviation fuel.[6] However, none of these are legally binding and thus will not be examined here.

Finally, even if Article 24 or 15 of the Chicago Convention banned fuel taxation - which they do not - the Chicago Convention is not applicable to domestic air transport. The Chicago Convention is an international treaty designed to promote and facilitate international civil aviation. This is clear from its official title - "Convention on International Civil Aviation" and from the wording of the preamble which consistently makes reference to developing international aviation. Therefore, only where specific provisions refer to domestic aviation should they be made applicable to domestic flights, neither of the articles referred to in this note do so and therefore it must be assumed that they apply only in relation to international aviation.

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energy/excise-duties-other-energy-tax-legislation_en where it is stated "The EU tax exemption of aircraft fuel is based on the international provisions of the 1944 ICAO Chicago Convention, which was most recently updated in 2006. The Convention establishes rules of airspace, aircraft registration and safety, and exempts commercial air fuels from tax."

[5] https://www.icao.int/environmental-protection/Pages/Taxes.aspx

[6] Such as ICAO's Policy on Taxation https://www.icao.int/publications/Documents/8632_2ed_en.pdf

3. Bilateral Aviation Agreements

All EU Member States have unlimited cabotage rights in all other Member States since 1996 (Regulation (EEC) 92/2408). However, the Energy Taxation Directive was agreed in 2003, after the unlimited cabotage rights were granted. If the member state had needed the permission of other member states to impose a fuel tax on domestic aviation this would have been reflected in the Energy Taxation Directive. Indeed, it is clear from Article 14(2) of the Directive that bilateral agreements are needed to tax fuel used in flights between member states but no such bilateral agreements are needed for the taxation of domestic fuel. This makes clear that the member state can place tax on the fuel of the aircraft of another Member State operating in its territory without the explicit consent of the other Member State.

Another question would be whether bilateral agreements outside the EU preclude the taxation of domestic aviation fuel. The European Common Aviation Area[7] (ECAA) grants all members all nine freedoms of the air.[8] This paper will not discuss all the nine freedoms of the air but it does mean that each of the ECAA countries has the right to fly domestically in every other member of the ECAA, i.e. it grants cabotage rights to all ECAA members. This means that if a domestic fuel tax was imposed in any Member State it could mean fuel taxes being placed not just on national airlines, but ECAA airlines as well. Therefore, it must be questioned whether it would violate any legal agreements to tax fuel used by ECAA member airlines for a domestic flight in another ECAA member.

Article 1 of the ECAA Agreement applies the Energy Taxation Directive (ETD) to all the members of ECAA. As discussed in the introduction, the ETD expressly allows all Member States to apply taxation to domestic aviation fuel. By adopting the ETD into the list of EU laws by which all the members of ECAA must apply, it means that the members of ECAA must also agree that each member is entitled to impose a domestic aviation fuel tax. Further, as mentioned above, both the Netherlands and Norway (both ECAA members) have taxes on domestic fuel, applied without legal challenge.[9] Further, there is a Joint Committee established by Article 17 of the ECAA Agreement which monitors the implementation of the Agreement. There have been no reports of any objections to domestic fuel taxation in the ECAA Joint Committee. Therefore it can be concluded that applying a domestic fuel tax does not violate the ECAA agreement.

No other bilateral agreements have been signed with a country outside the EU which grants that country cabotage rights within Member States. There are agreements (notably the EU-US bilateral) which allow other countries cabotage rights *between Member States but not domestically within a single Member State*. Therefore, bilateral agreements with countries outside of the EU do not preclude taxation of aviation fuel for domestic flights as no foreign airlines have the right to operate domestic flights on which they would have to pay the tax.

4. Excise Duty Directive

Council Directive 2008/118/EC of 16 December 2008 concerning the general arrangements for excise duty (the 'Excise Duty Directive') sets out when and how excise duty can be placed on aviation fuel. Article 1 of the Directive states that it applies "to excise duty which is levied directly or indirectly on the consumption of the following goods (hereinafter 'excise goods'): (a) energy products and electricity covered by Directive 2003/96/EC". Directive 2003/96/EC covers aviation fuel and it thus comes under the provisions of the Excise Duty Directive.

[7] http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1512580462445&uri=CELEX:42006D0682

[8] For a breakdown of the nine freedoms of the air, see

[9] Norway's State Action Plan to ICAO: https://www.icao.int/environmental-protection/Lists/ActionPlan/Attachments/64/Norway_StateActionPlan_5Aug16.pdf

In substantive part the Excise Duty Directive states in article 7(1) that “Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.” Aviation fuel gets released for consumption at the airport, as the aircraft is fuelling. This would mean that the tax should be charged at that point. This means that a domestic fuel tax system cannot ask airlines to submit all their domestic flight information once a year (for example) but rather the tax must be imposed as the aircraft fuels. However, the Excise Duty Directive also contemplates reimbursements under Article 11 “for the purpose of preventing any possible evasion or abuse.” This would allow a country to impose a domestic fuel tax where the tax is payable on any aviation fuel that might be used in a domestic flight and via information provided by the airline, refund any tax paid on fuel not used in a solely domestic flight. Alternatively to avoid fuel for non domestic flights being taxed, airlines should take on fuel for the non taxed flight at the airport where the domestic flight terminates.

5. The Emissions Trading System

The ETS seeks to account for the CO2 emissions of aviation. Therefore a question could be asked whether it would be permissible to impose a fuel tax as it could be primarily an environmental measure and thus seen as duplicating the ETS.

There is nothing in the ETS which says it can be the only charge on the carbon emissions from entities covered by the ETS. Indeed, Recital 23 of the ETS Directive situates the ETS within the wider context of “a comprehensive and coherent package of policies and measures implemented at Member State and Community level.” And recital 26: “Notwithstanding the multifaceted potential of market-based mechanisms, the European Union strategy for climate change mitigation should be built on a balance between the Community scheme and other types of Community, domestic and international action.” So these recitals allow for additional measures imposed as well as the ETS.

In general EU law, Directives (such as the ETS) are intended to be minimum harmonisation measures only, i.e. Member States have the possibility to enact further or more stringent measures in addition to the legislation in the Directive. This is especially so with regard to the environment measures where the right for Member States of "maintaining or introducing more stringent protective measures" for the environment is explicitly retained in Article 193 of the Treaty on the Functioning of the European Union. However, it must be noted that there are certain conditions attached to enacting policies under Article 193:

1. The additional measures must actually result in a level of protection of the environment that is higher than the one pursued by the EU measure.
2. It must fall within the field of application of the EU measure by following the same objectives.
3. It must not frustrate the secondary objectives of the EU measure.
4. Where such an additional measure would affect other EU provisions, it must not violate the principle of proportionality.
5. And it must be notified to the European Commission.

None of these should present a problem for any Member State wishing to impose a fuel tax. Importantly the Netherlands and Norway already tax domestic aviation fuel and Norway even labels its fuel tax as a “CO2-tax”.[10]

In three cases the CJEU has looked at the objectives of the ETS[11] and found that the protection of the environment by reducing GHGs is the ETS's principal, overarching objective and the secondary objectives

[10] Norway’s State Action Plan to ICAO: https://www.icao.int/environmental-protection/Lists/ActionPlan/Attachments/64/Norway_StateActionPlan_5Aug16.pdf

were cost-effectiveness and economic efficiency. The imposition of a fuel tax shouldn't interfere with these objectives other than it could be argued that to the extent that the fuel tax lowered emissions, it would also then lower the ETS price. This could be seen as reducing the economic efficiency for other sectors under the ETS as it would incentivise less emissions reductions. However, as a fuel tax would accord with the primary objective of the ETS and due to the number of domestic flights in the EU, would be unlikely to significantly affect the ETS price, it is unlikely a challenge on the basis of distorting the economic efficiency could succeed.

6. Conclusions

The Energy Taxation Directive permits EU Member States to impose a tax on aviation fuel used in domestic flights. Nothing in the Chicago Convention prevents the imposition of this tax. No bilateral agreements with non-EU countries prohibit this tax. All ECAA members have unlimited cabotage rights in all other EU Member States but this also does not prohibit the tax as the Energy Taxation Directive is included in the ECAA Agreement and clearly contemplates Member States imposing a tax on domestic aviation fuel without requiring the agreement of other Member States. The Netherlands, Switzerland and Norway have domestic aviation fuel taxes. The Excise Duty Directive requires a fuel tax to be imposed at the time of release for consumption. There is no reason why a fuel tax and the ETS cannot cover the same EU domestic flights. In conclusion, there is no legal impediment to EU Member States imposing a tax on aviation fuel used in domestic flights.

Further information

Bill Hemmings
Director, Aviation and shipping
Transport & Environment
bill.hemmings@transportenvironment.org
Tel: +32(0)2 8510211

[11] Case T-374/04 Germany v Commission [2007] ECR II-4431; Case C-127/07 Arcelor [2008] I-09895; Case T-183/07 Poland v Commission [2009] ECR II-03395