

Implementation of Kerosene Fuel Taxation in Europe

Part I: Legal Foundations and Issues

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The first part of the legal presentation focuses on the legal foundations of and potential issues to the implementation of kerosene fuel taxation in Europe.

The option to implement a kerosene fuel tax for intra EU flights on the basis of a bilateral agreement of at least two Member States of the EU is explicitly provided by the EU Energy Taxation Directive (Art. 14 paragraph 2 ETD). Such a taxation is in compliance with the laws of the Convention on International Civil Aviation (Chicago Convention). The Chicago Convention only bans the taxation of fuel on board an aircraft on arrival in the territory of a state (Art. 24 of the Chicago Convention). It doesn't ban taxing fuel which is uplifted. Further going resolutions of the ICAO Council are not legally binding but soft law.

The implementation of a taxation for a flight between Member States of the European Union or the European Common Aviation Area (ECAA) including also EU neighbouring states which complies with the European aviation rules requires a bilateral or multilateral agreement between the participating states setting out the conditions with regard to the taxation of fuel uplifted for flights between those states. Such a taxation has to comply with existing Air Services Agreements (ASAs). Some ASAs include exemptions for kerosene fuel taxation for operators of the ASA agreeing states. Hence, some foreign carriers from non-EU countries which have to be exempted from taxation due to an ASA may not be subject to a fuel taxation for intra-EU flights.

1. Legal Foundations

The implementation of kerosene fuel taxation in Europe, especially for flights between two Member States of the European Union, is subject to the European Law. Due to Art. 14 paragraph 2 ETD (European Directive 2003/96/EC) Member States are entitled to waive the taxation exemption of kerosene fuel for intra-European flights between their territories. To tax kerosene fuel for intra-EU flights, Member States have to enter into a bilateral agreement on a kerosene fuel taxation. Without such agreement the European Law states that Member States shall exempt kerosene fuel from taxation, Art. 14 paragraph 1 lit. b ETD.

On the international level especially two legal sources have to be considered.

First of all, the Chicago Convention sets out the international legal framework for civil aviation. It contains the convention text, the Annexes including their Amendments as well as other acts/resolutions of the ICAO and is the constitutive act for the International Civil Aviation Organisation (ICAO) itself. All Member States of the European Union are Convention parties, but the European Union itself is not a party to the Convention and has only received observer status in ICAO meetings. Therefore, from a Chicago Convention perspective intra-EU flights, in particular flights between two EU/ECAA Member States, are considered as international flights and the Chicago Convention is applicable.

Secondly, Air Services Agreements (ASA) are agreements establishing the conditions covering air services between the agreeing states. Some of them contain taxation exemption clauses, hence operators from foreign countries may not be taxed. Others (e.g. the EU-US Open Skies Agreement) may contain rules with regard to Art. 14 paragraph 2 ETD or allow expressis verbis the taxation of kerosene fuel.

2. Legal Issues

All legal issues caused by an intra-EU kerosene fuel taxation on the basis of a bilateral agreement according to Art. 14 paragraph 2 ETD can be resolved in accordance with all relevant international law.

2.1 Fuel Taxation is not a breach of the Right of Transit (Art. 15 of the Chicago Convention)

Art. 15 of the Chicago Convention states that *“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.”*

Under the English version it can be discussed whether “taxation” can be subsumed under “fee, due or other charges”. With respect to the French and Russian text version which expressis verbis include taxes, the term may be subsumed under “other charges” even though the English wording is inexact. However, since the taxation of kerosene fuel shall be imposed for refuelling it is obviously not in *“respect solely of the right of transit”* and, thus, Art. 15 of the Chicago Convention is not applicable.

2.2 Chicago Convention does not ban the taxation of uplifted fuel in a legally binding way

Art. 24 of the Chicago Agreement states that *“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.”*

Hence, Art. 24 of the Chicago Convention only addresses fuel on board an aircraft. Whether or not fuel taxes which are principally excise duties can be subsumed under “*customs duty*”, they are to be understood as “*similar national or local duties and charges*”. Even if this should not be the case at hand, the term includes the taxation of kerosene fuel at least due to an agreeing and subsequent practice in the application of the Chicago Convention by the contracting states according to Art. 31 paragraph 3 lit. a, b VCLT.

With regard to the taxation of uplifted kerosene fuel, Art. 24 of the Chicago Convention itself doesn't state any obligation or prohibition.

Nevertheless, “ICAO's Policy on Taxation of International Air Transport” (current version: Third Edition – 2000, Doc 8632) resolved by the ICAO's Council bans expressis verbis the taxation of kerosene fuel taken on board an aircraft. For this reason, the legal quality and effects of this Policy have to be analysed with respect to the legal framework set out by the agreement text of the Chicago Convention:

As stated by Assembly Resolution A1-31, Doc. 4411 (A1-P/45), adopted in 1947 ICAO's acts/resolutions can consist of (legally obligatory) International Standards and (legally non-binding) Recommended Practices. The Council's right to adopt rules in the field of “*air navigation*” derives primarily from Art. 54 lit. I in conjunction with Art. 37 of the Chicago Convention. Annex 9 extends this practise for other acts, namely for the facilitation of international air transport (see Chapter 1, Section B, 1.1 of the Annex 9). In accordance with Art. 54 lit. I and Art. 90 lit. a of the Chicago Convention International Standards and Recommended Practises may be designated as Annexes to the Chicago Convention (see Art. 54 lit. I of the Chicago Convention).

The ban on kerosene fuel taxation for uplifted fuel can be understood as an International Standard due to the wording (“*shall*”).

Since Art. 24 of the Convention is systematically located in Chapter IV “*Measures to Facilitate Air Navigation*” and ICAO's Policy on Taxation expressis verbis extends the scope of Art. 24 of the Convention and since taxation of kerosene fuel is a monetary act under Art. 24 of the Convention (see above) ICAO's Policy on Taxation is a measure to facilitate air navigation. Hence, Art. 37 of the Chicago Convention may be the legal basis for ICAO's policy on taxation.

Especially a resolution about the ban of kerosene fuel taxation may be legally based on Art. 37 lit. j of the Chicago Convention (“*Customs and immigration procedures*”). Evidently it is doubtful whether the taxation of kerosene fuel is by wording a “*Customs [...] procedure*”. However, since Art. 24 of the Convention is entitled “*Customs duty*”, as fuel taxation is a measure under Art. 24 of the Chicago Convention, kerosene fuel taxation may be subsumed as “*Customs [...] procedure*”. Even if such arguments may not be able to overcome the wording, ICAO's Policy on Taxation is at least covered by Art. 37 of the Chicago Convention due to an agreeing and subsequent practice of the contracting states according to Art. 31 paragraph 3 lit. a, b VCLT.

With respect to Arts. 22, 23, 28, 37, 38 of the Chicago Convention which state that contracting states only have to implement International Standards as far as they find it practicable to do so and with regard to the flexibility of adoption of International Standards principally contracting States have no strict obligation to comply to International Standards.¹ Hence, in principal International Standards have to be considered as “soft law”.

Exceptions from the qualification as “soft law” may derive from Art. 12 (referring to rules of the air, Art. 37 lit. c), Art. 33 (recognition of certificates and licenses) and Art. 34 (duty to maintain a journey log book) of the Chicago Convention which cause a stronger legally binding effect at least for International Standards within the scope set out by these clauses.

Furthermore, one might argue that Art. 90 lit. a of the Chicago Convention causes a stronger legally binding effect for Annexes to the Convention and their amendments.

However, since ICAO’s policy on taxation is not adopted as an Annex yet nor under the chapeau of Arts. 12, 33 and 34 of the Chicago Convention, ICAO’s policy is just “soft law” and contracting states don’t have a strict obligation to comply with the ban of kerosene fuel taxation for uplifted fuel.

In the case of contracting states finding “*it impracticable to comply [...] with any such [referring to Art. 37 of the Convention] international standards*” they have to give immediately notification to the ICAO according to Art. 38 of the Chicago Convention. The right to depart from International Standards which is in principle not justiciable can be triggered by the convention states also after adoption of the International Standard and every state can determine itself if it finds it impracticable to comply with International Standards as long as it acts in good faith.

Art. 38 of the Chicago Convention does presume that contracting states in principal try to comply with International Standards and therefore, International Standard have some factual binding effects. However, this binding effect is not legal as contracting states are able to waive the obligation set out by International Standards.

In conclusion, nor the agreement text of the Chicago Convention nor other acts of ICAO prohibit the right to implement a kerosene fuel tax for uplifted fuel. States aiming to agree on a bilateral or multilateral agreement to implement a kerosene fuel tax with regard to Art. 14 paragraph 2 ETD only have to notify the ICAO according to Art. 38 of the Chicago Convention.

¹ See *Thomas Buergenthal*, Law-Making in the International Civil Aviation Organization, 1969, p. 76 et. seq.; for the historical argument with regard to a comment of Dr. Edward Warner who participated on the draft of the Convention see *ibid.*, p. 78 fn. 64; Eckhard Pache, Möglichkeiten der Einführung einer Kerosinsteuer auf innerdeutschen Flügen – Rechtsgutachten im Auftrag des Umweltbundesamtes, 2005 p. 26 et. seq. , <https://www.umweltbundesamt.de/sites/default/files/medien/publikation/long/2853.pdf> (08.06.2019).

2.3 Taxation Prohibitions in ASAs and Unequal Treatment between Operators

Art. 14 paragraph 2 ETD entitles two or more EU Member States to enter into an agreement (referred to as tax agreement) to implement a kerosene fuel taxation for flights between the agreeing states (referred to as agreeing states). On the other hand, some ASAs may contain taxation exemptions rules, hence, some operators from foreign countries operating between these agreeing states cannot be taxed. This can lead to an unequal treatment between operators. Therefore, in the case at hand, three different situations have to be discussed:

First of all, in principal there is no unequal treatment between operators from the tax agreement agreeing states or concerning operators registered in other EU/ECAA Member States, since Art. 14 paragraph 2 ETD does not distinguish between operator's origin. Hence, the scope of a tax agreement shall include all European operators. However, there are ASAs between EU/ECAA Member States prohibiting the taxation of kerosene fuel. These agreements were entered into force before the implementation of Art. 3 of the European Regulation 92/2408/EC which grants EU-wide cabotage rights. Intra-EU ASAs only established aviation traffic rights for flights between the intra-EU ASA contracting states.

It is questionable whether or not these intra-EU ASAs are in compliance with Art. 14 paragraph 2 ETD. It might be argued that there is no conflict due to the fact that there is a way to comply with Art. 14 paragraph 2 ETD and with any taxation prohibitions contained in intra-EU ASAs by refusing to bilaterally agree a fuel tax. However, this would eliminate the effectiveness of the opportunity of Art. 14 paragraph 2 ETD to implement kerosene fuel taxation in Europe. Therefore, it has to be seen that contrary to Council Directive 92/81/EEC the implementation of Art. 14 paragraph 2 ETD is a conscious decision to provide the opportunity to implement kerosene fuel taxation in Europe. Art. 14 paragraph 2 ETD is to be seen under the light of Art. 3 paragraph 3 TEU and Art. 191 TFEU stating that the European Union aims to protect the environment. Therefore, and due to the primacy of European Law, Art. 14 paragraph 2 ETD and tax agreements based on Art. 14 paragraph 2 ETD take precedence over the provisions (and eventual prohibitions) of the intra-EU ASAs. Thus, intra-EU ASAs cannot prohibit the implementation of kerosene fuel taxation and all EU / ECAA operators may be taxed by kerosene fuel taxation.

Secondly, there is a potential unequal treatment between operators from EU / ECAA Member States subject to fuel taxes and foreign operators exempted under an ASA.

Thirdly, there is additionally the potential for an unequal treatment between foreign operators exempted from fuel tax under an ASA and foreign operators which aren't exempted under an ASA and therefore may be subject to a kerosene fuel tax.

Art. 11 of the Chicago Convention in general prohibits an (unlawful) discrimination due to operator's nationality. To apply Art. 11 Chicago Convention it has to be mentioned that "*operation and navigation*" under Art. 11 Chicago Convention also include the refuelling

process. However, not every unequal treatment is unlawful. Whether an unequal treatment may be justified by Environmental protection or not, it is unnecessary to rule on this question, as there is a legal possibility to avoid any unequal treatment by implementing a de-minimis clause in the tax agreement. Additionally, a renegotiation of ASAs can be taken into consideration.

2.4 EU-US Open Skies Agreement

The unequal treatment issue in ASAs is discussed with regard to the EU-US Open Skies Agreement. It has to be mentioned that the EU-US Open Skies Agreement does not give an answer to the question whether or not an implementation of kerosene fuel taxation for intra-EU-flights violates the obligations set out by this agreement.

On the one hand Art. 11 paragraph 6 lit. c of the EU-US Open Skies Agreement states: *“There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1 of this Article, [...]:*

[...]

fuel [...] introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;“

On the other hand Art. 11 paragraph 6 lit. c of the EU-US Open Skies Agreement states: *“In the event that two or more Member States envisage applying to the fuel supplied to aircraft of US airlines in the territories of such Member States for flights between such Member States any waiver of the exemption contained in Article 14(b) of Council Directive 2003/96/EC of 27 October 2003, the Joint Committee shall consider that issue, in accordance with paragraph 4(e) of Article 18”.*

A consensus decision of the Joint Committee (see Art. 18 paragraph 4 lit. 3 of the EU-US Open Sky Agreement) has to be awaited whether or not a tax agreement under Art. 14 paragraph 2 ETD is in accordance to the EU-US Open Skies Agreement.

2.5 Conflicts with MBMs

The EU already implemented a market-based measure (MBM) scheme to regulate emissions, the EU Emission Trading System (EU-ETS). Furthermore, ICAO aims to implement a market-based scheme for emissions in the field of aviation, called CORSIA. It has to be discussed whether or not these systems prohibit the implementation of a kerosene fuel taxation.

To answer this question first of all the term Market Based has to be analysed. “Market Based” is to be defined as organized in the way that prices and production are controlled naturally by the supply and demand of goods and services rather than by the government.

The trading of emission certificates as constructed by the EU-ETS and the offsetting system as constructed by CORSIA are market-based approaches of incentive schemes to reduce pollution and thus market-based measures.

On the European level there is no conflict between the EU-ETS and tax agreements under Art. 14 paragraph 2 ETD since none of these Directives claims exclusivity. Hence, the law of the European Union does not exclude the parallel existence and application of the EU-ETS and of tax agreements introducing a kerosene fuel taxation under Art. 14 paragraph 2 ETD.

One might argue that on the international level, CORSIA may establish an exclusive MBM scheme for aviation emissions with regard to the first recital of the ICAO Resolution A39-3 stating that CORSIA is a “global market-based measure scheme for international aviation” as well as the resolution itself, see ICAO Resolution A39-3 19. (“CORSIA is to be the market-based measure applying to CO₂ emissions from international aviation”). Even in the case that CORSIA is exclusive, it only claims its exclusiveness for market-based measures.

Therefore, the question whether or not CORSIA claims an exclusiveness has not to be answered here, since taxation is no market-based measure scheme. A kerosene fuel tax is not organized in the way that prices and production are controlled naturally by the supply and demand of the operators and thus, does not implement a market. In fact, a kerosene fuel tax is a governmental act based on a pre-given tax value which applies independently to all taxable operators.

Neither the EU-ETS nor CORSIA prohibits the implementation of a kerosene fuel tax in Europe.