Re. the ability of EU Member States and/or the UK to implement a kerosene tax on international aviation fuel under the Energy Taxation Directive and the Trade and Cooperation Agreement

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OPINION

INTRODUCTION

1. By instructions dated 16 September 2025, I was asked by Opportunity Green ("**Those Instructing**") to undertake a review of the Energy Taxation Directive 2003/96/EC ("**ETD**") and the Trade and Cooperation Agreement ("**TCA**"), with particular reference to the inconsistency between the current kerosene tax exemption under the ETD and the TCA (which itself permits fuel taxation), and such relevant legislation, case law and international law or agreements (including Air Services Agreements) as required to advise on the ability of EU Member States and/or the UK to implement a kerosene tax on international aviation fuel.

2. Specifically, Those Instructing wish to ascertain whether the discrepancy between the TCA and the ETD lends itself to a plausible argument that the EU Commission needs to remove the prohibition on the taxation of aviation fuel in the ETD to comply with its international law commitments.

SUMMARY OF ADVICE

3. In summary, for (and subject to) the fuller reasons set out below, I consider that the asymmetry between the ETD and the TCA does not mean that the EU must amend the ETD as a matter of law to comply with its international law commitments. The risks appear to me to be more political and economic than strictly legal.

4. However, for the reasons set out below, the discrepancy does carry certain legal risks and uncertainty. In my view, it would therefore be desirable for the EU Commission to remove the prohibition on the taxation of aviation fuel in the ETD or introduce a suitable carve out to minimise this risk and uncertainty. Not least because the ETD exemption remains binding on the EU unless it is amended, thereby preventing the EU from acting on any permissive reciprocity clauses under the terms of Air Service Agreements

("**ASA**") and the TCA. This legal asymmetry places the EU at a significant disadvantage by rendering it vulnerable to the imposition of fuel taxes without having a corresponding ability to impose fuel taxes of its own.

5. As an alternative to removing the exemption, the ETD could be sensibly amended to state that any exemption relating to the taxation of fuel for international flights is without prejudice to international agreements entered into by the EU which allow such tax.

LEGAL BACKGROUND

The ETD

6. Article 14(1)(b) of the ETD provides that EU Member States shall exempt aviation fuel from tax. Article 14(2) clarifies that Member States may limit the scope of this exemption to international and intra-Community transport. This means that although flights between EU Member States and flights outside of the EU are subject to exemptions, Member States can tax fuels used for domestic flights and can agree bilaterally with another Member State to waive the exemption.

7. There is currently no scope under the ETD for EU Member States to tax fuel used in extra-EU flights through bilateral agreements or other measures.

Air Service Agreements

8. The EU has entered into various international treaties which govern fuel tax for international flights to and from the EU. These are called Air Service Agreements ("**ASA**"). Although most of these ASAs are behind a paywall, most provide that fuel shall be exempt from tax '*on the basis of reciprocity*'. The meaning of the phrase '*on the basis of reciprocity*' has been discussed in a legal opinion provided by Estelle Dehon KC and Dr Lois Lane which finds that ASAs including this provision essentially amount to an agreement that fuel will be exempt from tax unless either party introduces a fuel tax, in which case, the other party can also introduce a fuel tax without breaching the terms of the agreement.

The Chicago Convention

9. Modern ATAs find their origins in the Convention on International Civil Aviation of 7 December 1944 ("**Chicago Convention**"). This multilateral convention sets out a range of rights of States with respect to flights over or in their territory by civil aircraft. The

provisions of the Chicago Convention are often reflected in bilateral ATAs. Most notably for present purposes, Article 24 of the Chicago Convention provides:

"Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores 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. This exemption shall not apply to any quantities or articles unloaded, except in accordance with the customs regulations of the State, which may require that they shall be kept under customs supervision." (emphasis added)

10. In other words, Article 24(a) prohibits taxation of fuel already on board an aircraft arriving from another contracting state. However, the taxation of fuel uplifted onto an aircraft before departure is not exempt from taxation under the Chicago Convention.

11. The Convention is supplemented by the International Civil Aviation Organization's Policies on Taxation in the Field of International Air Transport (Doc 8632) (Third Edition, 2000). This guidance recommends that states exempt aviation fuel from taxation when taken onboard aircraft engaged in international air services, on the basis of reciprocity. It follows that, as a matter of customary practice, states tend not to tax fuel uplifted onto aircraft on the basis of reciprocity.

The TCA

12. The TCA concluded between the UK and the EU dated 30 December 2020 entered into force on 1 May 2021. Article 430(2) of the TCA provides that '*The following goods shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1: […] (c) lubricants and consumable technical supplies other than fuel introduced into or supplied in the territory of a Party for use in an aircraft of an air carrier of the other Party used in international air transport, even when those supplies are to be used on a part of the journey performed over the said territory*'.

13. It follows that whilst the TCA does not mandate or require the taxation of aviation fuel uplifted for flights between the UK and the EU, it permits the taxation of aviation fuel by explicitly removing it from the list of exemptions.

International Agreements concluded between the EU and non-EU countries/international organisations

14. In the EU, primary law is at the top of the hierarchy of EU norms i.e., the EU's constituent treaties (the Treaty on European Union and the Treaty on the Functioning of the European Union ("**TFEU**")) and its protocols; the Charter of Fundamental Rights and the general principles established by the Court of Justice of the European Union ("**CJEU**"). Next in the hierarchy are international agreements with non-EU countries or with international organisations, followed by secondary law which comprises all legislative and non-legislative acts adopted by the EU institutions, which enable the EU to exercise its powers i.e., regulations, directives and decisions adopted by an ordinary or special legislative procedure (Article 289 TFEU).

15. International agreements are capable of having direct effect in line with Case 26-62 *Van Gend en Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 according to which the obligations must be precise, clear and unconditional and must not call for additional measures.

16. In Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* ECLI:EU:C:1982:7 ("**Becker**"), the CJEU provided further guidance on the meaning of direct effect. It rejected direct effect where countries have a margin of discretion regarding the implementation of the provision in question.

17. *Becker* was about a plaintiff self-employed credit negotiator who claimed an exemption from VAT on the basis of Article 13 B (d) (1) of the Sixth EEC Council Directive 77/388 on the Harmonization of National VAT Legislation ('**Sixth VAT directive'**). The provision she relied on as directly effective stated as follows:

"*Without prejudice to other Community provisions, Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse:*

(d) …

1. The granting and the negotiation of credit and the management of credit by the person granting it;"

18. In arguing that the plaintiff could not rely upon Article 13 B (d) (1), the German and French Governments maintained that the margin of discretion afforded to states under the provision rendered it impossible to attribute any direct effect upon it.

19. However, the CJEU held at [27-29] that "*inasmuch as it specifies the exempt service and the person entitled to the exemption, the provision, taken by itself, is sufficiently precise to be relied upon by an individual and applied by a court (…) Whilst the Sixth Directive undoubtedly confers upon the Member States varying degrees of discretion as regards implementing certain of its provisions, individuals may not for that reason be denied the right to rely on any provisions which owing to their particular subject-matter are capable of being severed from the general body of provisions and applied separately*". The Court therefore rejected the Governments' arguments on the basis that there was no discretion as to whether or not an exemption applied. The discretion merely extended to the measures that states could take to implement the Directive.

20. In Case C-366/10 *Air Transport Association of America and others) v Secretary of State for Energy and Climate Change* ECLI:EU:C:2011:864 ("***ATAA***"), the CJEU considered the hierarchy of international agreements over acts of the EU, clarifying at [1] that:

"By virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union. It follows that the validity of an act of the European Union may be affected by the fact that it is incompatible with such rules of international law. Where such invalidity is pleaded before a national court, the Court of Justice ascertains whether certain conditions are satisfied in the case before it, in order to determine whether, pursuant to Article 267 TFEU, the validity of the act of European Union law concerned may be assessed in the light of the rules of international law relied upon. First, the European Union must be bound by those rules. Second, the Court can examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this. Finally, where the nature and the broad logic of the treaty in question permit the validity

of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise."(emphasis added)

21. In Case C-308/06 *Intertanko and Others v Secretary of State for Transport* ECLI:EU:C:2008:312 ("***Intertanko***"), which considered whether Directive 2005/35/EC on ship-source pollution was invalid due to conflict with international treaties, the CJEU held at [42-45] that Community institutions are bound by agreements concluded by the Community and, consequently, those agreements have primacy over secondary Community legislation. Therefore, the validity of a measure of secondary Community legislation may be affected by the fact that it is incompatible with such rules of international law. This is subject to two conditions. The Community must be bound by those rules and the treaty's provisions appear to be unconditional and sufficiently precise.

22. It follows that international agreements concluded between the EU and non-EU countries or organisations do not take automatic precedent over EU acts.

23. The test for whether an international agreement is capable of taking precedence over EU secondary law depends to a large extent on whether it meets the criteria for direct effect. The extent to which discretion is embedded in the international agreement will therefore have a bearing on whether it can take precedence over EU secondary legislation.

ADVICE

24. Article 14(1)(b) of the ETD is clear, precise and unconditional. It imposes an aviation fuel exemption on Member States ("*shall exempt*") under conditions which they shall lay down. In this respect, it closely resembles the wording of the Sixth VAT Directive that was the subject of the *Becker* case. As was the case in *Becker*, Article 14(1)(b) is directly effective as the discretion afforded to Member States merely extends to how the exemption is to be implemented domestically, not whether it will be implemented at all. In addition, by virtue of Article 14(2), the geographic scope of the exemption is sufficiently clear, precise and unconditional.

25. On the other hand, I consider that the discretionary power to impose a fuel tax under Article 430(2) of the TCA is not sufficiently clear, precise and unconditional to have direct effect. Article 430(2) does not mandate aviation fuel taxes. It is entirely at the discretion of the parties whether or not to introduce the tax.

26. As set out above, international agreements will only take precedence over secondary Union legislation in the event of a conflict between the two when the international agreement in question meets the criteria for direct effect. In this case, no direct conflict arises between the ETD and the TCA given the lack of obligation to tax aviation fuel under the TCA. There would, however, be a conflict between them if the TCA make it obligatory for the EU to tax aviation fuel but the ETD retained a prohibition on taxing aviation fuel for intra and extra EU flights.

27. The consequence of this conclusion is that, through the ETD, the internal EU legal order continues to impose a prohibition on the taxation of aviation fuel for international flights. There is no legal requirement on the EU to remove this prohibition in order to comply with its international legal obligations because the EU's obligations under the TCA do not require it to tax aviation fuel.

28. This leads to an unusual situation whereby the discretion to tax aviation fuel under the TCA allows the UK to impose unilateral aviation fuel taxes on the EU. However, the constraints of the EU's internal legal order mean that it cannot reciprocate with taxes of its own.

29. This situation creates a somewhat uncomfortable political and economic situation for the EU that could militate in favour of either removing the exemption from the ETD or introducing an express carve out that states that the exemption in the ETD is without prejudice to international agreements that permit the taxation of aviation fuel. As long as the ETD retains its exemption on taxing aviation fuel, EU Member States would be vulnerable to legal challenge if they decided to tax aviation fuel for flights to the UK on the misunderstanding that the terms of the TCA override the ETD and therefore permit the imposition of such a tax.

CONCLUSION

30. My conclusions are set out in the Summary of Advice above and are not repeated here.

31. Do not hesitate to contact me if I can be of any further assistance.

CLAIRE NEVIN

15 OCTOBER 2025

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