OPPORTUNITY GREEN

The growing legal risks of the EU's tax giveaway to airlines

Legal briefing | November 2025

Executive summary

- Current EU rules on aviation fuel taxation, as laid out in the Energy Taxation Directive, expose Member States and the aviation sector to significant legal uncertainty and litigation risks.
- This briefing finds that tax exemptions for intra-EU flights on certain routes across the EU present a significant legal risk of constituting state aids which affect the ability of high-speed rail to compete with airlines on a level playing field. Under EU state aid rules, such tax exemptions should have been notified before their implementation and are therefore likely to be unlawful and subject to recovery by Member States and/or damages claims by competitors.
- Because the Trade and Cooperation Agreement between the UK and EU allows for the taxation of aviation fuel for flights between these regions, there is a clear inconsistency between the Energy Taxation Directive (which does not allow for taxation on international flights) and the TCA. The UK can introduce a fuel tax on flights to the EU without the EU having the ability to respond, thus leaving EU Member States at a competitive disadvantage and potentially vulnerable to litigation.
- We recommend addressing these risks by clearly and unequivocally authorising the taxation of aviation fuels both for intra-EU and international flights through a revision of the ETD. We also recommend that Member States notify the European Commission of any remaining tax exemptions for aviation fuel as state aids.

Introduction

Aviation fuel has '*traditionally had a privileged tax regime*'.[1] In the European Union ('**EU**'), commercial aviation fuel is generally exempt from taxation under the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (the '**Energy Taxation Directive'** or '**ETD'**), whereas fuel for non-commercial private flights[2] is not covered by the exemption so is subject to the minimum taxation levels set out in the ETD. However, in relation to commercial flights, a Member State can tax fuel used for:

- domestic flights; and
- intra-EU flights where it agrees to do so with the other relevant Member State(s).[3]

Member States cannot, however, tax fuel used for international commercial flights. As at the date of this briefing, whilst some Member States tax fuel used for domestic flights, no Member States have agreed to tax fuel used for intra-EU flights.

This complex regime has led to a situation which is potentially conflicting with several other legal frameworks. In this briefing, we explore potential conflicts with (i) the EU state aid regime and, (ii) the provisions of the Trade and Cooperation Agreement between the United Kingdom ('**UK**') and EU (the '**TCA**').

Our legal analysis demonstrates that there is a risk that tax exemptions for aviation fuels for domestic and intra-EU flights constitute unlawful state aids; and that there is a legal asymmetry between the ETD's prohibition on tax for international aviation fuel and the TCA. To address these risks, we recommend a revision of the ETD to clearly and unequivocally authorise the taxation of aviation fuels both for intra-EU and extra-EU flights.

[1] European Commission, *'Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast)'*, COM (2021) 563, Recital 21.
[2] Private pleasure flying' is defined as *'the use of an aircraft by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities*.' See Council Directive 2003/96/EC restructuring the Community framework for the taxation of energy products and electricity [2003] OJ L 283/51, art 14(1)(b).
[3] Opportunity Green, 'Clearing the air on how we tax aviation fuels' (2024) https://www.opportunitygreen.org/publication-clearing-the-air-on-how-we-tax-aviation-fuels accessed 4 November 2025.

Legal Analysis

Part A: Tax exemption for aviation fuels and the EU state aid regime

The EU tax exemption for aviation fuels

The ETD sets out the EU framework for the taxation of energy products and electricity by Member States, including aviation fuel. Article 14(1)(b) of the ETD provides that Member States shall exempt from taxation '*energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying*'.

However, this general exemption is subject to Article 14(2) which provides:

> *Member States may limit the scope of the exemptions provided for in paragraph 1(b) and (c) to international and intra-Community transport. In addition, where a Member State has entered into a bilateral agreement with another Member State, it may also waive the exemptions provided for in paragraph 1(b) and (c). In such cases, Member States may apply a level of taxation below the minimum level set out in this Directive.*

A Member State therefore may, at its discretion:

(i) levy a tax on aviation fuel used in domestic flights; and

(ii) levy a tax on aviation fuel used in intra-EU flights, where the relevant Member States bilaterally or multilaterally agree to do so.

All tax exemptions provided in the ETD, including the one for aviation fuels, might constitute state aids and be subject to the EU State aid regime. This is explicitly mentioned at Article 26 of the ETD (emphasis added):

> *Measures such as tax exemptions, tax reductions, tax differentiation and tax refunds within the meaning of this Directive might constitute State aid and in those cases have to be notified to the Commission pursuant to Article 88(3) of the Treaty.*
>
> *Information provided to the Commission on the basis of this Directive does not free Member States from the notification obligation pursuant to Article 88(3) of the Treaty.*[4]

[4] Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity [2003] OJ L 283/51, art. 26.

What is 'state aid' under the EU State aid regime?

The legal classification of a public subsidy as 'state aid' bears significant consequences, as any state aid in the EU is subject to the EU state aid regime and is deemed unlawful unless notified and approved by the European Commission (**EC**), or exempted of notification.[5]

To classify as a state aid, a public subsidy must meet the criteria laid down in Article 107(1) of the Treaty on Functioning of the European Union (**TFEU**):

(i) **Imputability to a Member State**: It must be "*granted by a Member State or through State resources in any form whatsoever*".

(ii) **Selective advantage**: It provides a selective advantage to a company or a sector over others.

(iii) **Distortion of competition:** It distorts or threatens to distort competition.

(iv) **Impact on trade**: It must affect trade between Member States.

We address each of the criteria in turn below to show that there is a significant legal risk that the EC or EU courts could find that the tax exemption for aviation fuel for intra-EU flights constitutes a state aid. If so, because these tax exemptions have not to our knowledge been notified to the EC, they would be considered unlawful from a procedural standpoint, given the obligation under the EU state aid regime to obtain prior approval before granting a state aid. The same conclusion has also been reached in an academic article on the compliance of the ETD with the EU state aid regime and the polluter pays principle.[6]

Condition 1: Imputability to a Member State

The first condition laid down in Article 107(1) TFEU is broad, and tax exemptions have previously been considered as being imputable to Member States and constituting state aids, provided that certain conditions are met. For a tax exemption to be imputable to a Member State, the Member State must have had a margin of discretion in deciding whether to award the tax exemption or not.

In 2006, in a case brought in relation to Directive 92/81 (the legislation that preceded the ETD), the General Court ('**GC**') determined that the German fiscal policy exempting aviation fuels for intra-EU flights did not constitute a state aid

[5] Under EU state aid rules, certain categories of state aids are exempted from the obligation of notification. This notably covers aids falling below a certain threshold (*de minimis*), or aids covered by the General Block Exemption Regulation (GBER) or other sectoral regulations. The tax exemption regime for aviation fuel is unlikely to fall under one of these exemptions.

[6] Antoine Bailleux, 'Fueling the Debate: Is the EU's Energy Tax Exemption Regime for Aircrafts and Ships Truly Legal?' (European Law Blog, 14 October 2025) <https://www.europeanlawblog.eu/pub/8079tseb/release/1> accessed 3 November 2025.

because it considered that Germany did not have any margin of discretion under Directive 92/81 to waive the tax exemption.[7] The GC found that Directive 92/81 imposed "*a clear and precise obligation not to levy the harmonised excise duty on fuel used for the purpose of commercial air navigation*",[8] and that therefore, the Directive did not provide Member States any margin of discretion as to the tax exemption.

The GC's legal analysis was however conducted in the context of Directive 92/81. In its ruling, the GC specifically refers to the ETD and hints that its conclusion might have differed under the (then) new directive:

> *Article 14(1)(b) of [the ETD] provides for an exemption which applies to 'energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying'. It is clear from Article 14(2) of that directive that a Member State may, firstly, limit the scope of the exemption provided for in Article 14(1) to international and intra-Community transport and, secondly, waive the exemption where it has entered into a bilateral agreement with another Member State. Therefore, the national measures for transposing Article 14 of Directive 2003/96 are measures in respect of which States enjoy a margin of discretion, which explains why monitoring of their compliance with the provisions concerning State aid is provided for by Article 26(2) of that directive.*[9]

As such, in our view, the EC or EU courts may, when considering tax exemptions under the ETD and the relevant transposing laws, come to a different conclusion to the one in *Deutsche Bahn*, given that Member States enjoy a margin of discretion as to the tax exemption for domestic and intra-EU flights. It seems therefore likely that any such tax exemption for domestic and intra-EU flights **is** subject to the state aid regime.

Condition 2: Selective advantage

Turning now to the second condition laid down in Article 107(1) TFEU, a tax exemption can only be considered as a state aid if it provides a selective advantage to a company or a sector over another company or sector. This requires bringing evidence that:

(i) The tax exemption improves airlines' financial situation on terms differing from normal market conditions.

(ii) The tax exemption favours certain airlines in comparison with other companies "*which are in a legal and factual situation that is*

[7] Case T-351/02 *Deutsche Bahn v Commission of the European Communities* [2006] ECLI:EU:T:2006:104
[8] Case T-351/02, *Deutsche Bahn v Commission of the European Communities* [2006] ECLI:EU:T:2006:104, para. 102.
[9] Case T-351/02, *Deutsche Bahn v Commission of the European Communities* [2006] ECLI:EU:T:2006:104, para. 113.

comparable in the light of the objective pursued by the measure in question".[10]

The tax exemption for aviation fuel can therefore only constitute a state aid on routes where there is an effective competition between airlines and other transport modes that are factually comparable.

Regarding the first requirement, demonstrating that the tax exemption improves airlines' financial situation should not raise any difficulty; this is an obvious consequence of a tax exemption.

For the second requirement, the EC has in the past found the existence of a competitive relationship between high-speed trains and air transport in the context of merger control decisions.[11] It is thus likely that the EC would consider that high-speed rail is currently competing directly with flying on several EU routes. As such, we consider that the requirement for selective advantage would likely be met, particularly on routes that directly compete with high-speed trains.

Conditions 3 and 4: Distortion of competition and impact on trade between Member States

Both of these conditions "*have been interpreted such that they are almost always satisfied. This is the case even where the measure does not have consequential impacts on competition or trade in the internal market. The thresholds for these impact standards are low and the burden on the Commission to reason its conclusions in respect of them is light. There have been relatively few cases where these criteria have proved decisive in determining that a measure does not come within the prohibition in Article 107(1) TFEU*".[12]

For a distortion of competition to occur, it is sufficient that the tax exemption *is liable* to improve the competitive position of the airline relative to high-speed train companies.[13] A distortion of competition within the meaning of Article 107(1) TFEU is generally found to exist when a Member State grants a financial advantage to a company in a liberalised sector where there is, or could be, competition – as is the

[10] Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, para 54.
[11] See for example *Lufthansa/SN Airholding* (Case COMP/M.5335) Commission Decision [2009] OJ C16/8 for the Brussels-London route.
[12] Christopher McMahon, *'Economic Effects and EU State Aid Control: Recalibrating the Impact Standards for the Identification of Aid in Article 107(1) TFEU'* (2025) Journal of Competition Law & Economics < https://academic.oup.com/jcle/advance-article/doi/10.1093/joclec/nhaf012/8118695> accessed 3 November 2025.
[13] Case 730/79 *Philip Morris v Commission* [1980] ECR 2671, paras 11–12; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600–607/97, T-1/98, T-3/98, T-6/98 and T-23/98 *Alzetta and Others v Commission* [2000] ECR II-2319, para 81; Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 187.

case on several routes in the EU where airlines and high-speed trains are competing.[14]

Similarly, regarding the effect on trade, it is not necessary to establish that the aid has an actual effect on trade between Member States but only that the aid *is liable* to affect such trade. In particular, EU courts have ruled that '*when State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-[EU] trade the latter must be regarded as affected by the aid*'.[15] The threshold is particularly low, and even aids granted in small amounts or to small local companies which are not active outside of their Member State can affect intra-EU trade.[16] It is therefore relatively straightforward that EU trade would be affected when considering significant transport companies which are often operating across several EU countries.

How could an investigation be opened on this legal question?

Interested parties (in particular, competing high-speed train companies) could file at any point a complaint to the EC regarding airlines' tax exemptions, and the EC has an obligation to examine these without undue delay.[17] It is through this route that Deutsche Bahn sent a letter to the EC in relation to the Directive that preceded the ETD. The legal challenge brought by Deutsche Bahn against the EC's answer to this letter resulted in the GC's 2006 ruling mentioned above.

The EC could also initiate an investigation into the aviation sector on its own initiative when sufficient information substantiates a reasonable suspicion of a distortion of competition in the sector.[18]

[14] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union [2016] OJ C262/1, para 187.
[15] Case C-278/92, C-279/92 and C-280/92 *Kingdom of Spain v Commission of the European Communities* [1994] ECR I-4103, para. 40.
[16] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (2016/C 262/01) OJ C 262, 19 July 2016, p 1., para. 192: "*The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected. A public subsidy granted to an undertaking which provides only local or regional services and does not provide any services outside its State of origin may nonetheless have an effect on trade between Member States where undertakings from other Member States could provide such services (also through the right of establishment) and that possibility is not merely hypothetical. For example, where a Member State grants a public subsidy to an undertaking for supplying transport services, the supply of those services may, by virtue of the subsidy, be maintained or increased with the result that undertakings established in other Member States have less of a chance of providing their transport services in the market in that Member State*"
[17] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9, art 12.
[18] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L 248/9, art 25.

What are the consequences of a qualification of a tax exemption as a state aid?

The recovery of unlawful and incompatible state aids

If, following a new investigation by the EC or a judgment by EU courts, the tax exemption regime for aviation fuel in a Member State is considered as constituting a state aid, this would have significant consequences for the Member State and the beneficiary airlines. The tax exemption granted would be deemed unlawful from the moment it was granted due to its lack of notification to the EC, and thus subject to potential recovery.

A state aid which is unlawful because it has not been notified can still be found to be compatible with EU law by the EC following a substantive assessment. The precise consequences for Member States and airlines of the requalification as a state aid would therefore depend on the outcome of the EC investigation on the substantive compatibility of the tax exemption with EU law. Although the EC's substantive assessment is largely focused on competition law considerations, the Court of Justice confirmed in its *Hinkley Point C* ruling[19] that the EC must "*check compliance of the activity to be supported with environmental laws before authorising an aid measure under Article 107(3)(c) TFEU*".[20]

If the unlawful tax exemption is deemed incompatible with EU law by the EC or EU courts, the EC will require the Member State to recover the aid from the beneficiary airlines, with the purpose of re-establishing the situation that existed on the market prior to the granting of the aid.[21] The recovery of the unlawful and incompatible state aid is subject to a 10-year limitation period,[22] and interest on the aid amount unlawfully granted is also to be recovered to eliminate any advantages incidental to the unlawful aid.[23]

Airlines might oppose recovery if such recovery is proven to be contrary to a general principle of EU law, such as the principle of legitimate expectations.[24] However, as detailed above, the ETD is transparent about the risk that tax exemptions under the Directive could constitute state aids. This would tend to indicate that airlines might struggle to oppose recovery on that ground.

[19] Case C-594/18 P *Republic of Austria v European* Commission [2020] ECLI:EU:C:2020:742.
[20] ClientEarth, 'The Hinkley Point C ruling Why and how the Commission must implement the Green Deal in State aid rules' (March 2021) <https://www.clientearth.org/media/fscj42jf/clientearth-legal-note-on-the-hinkley-point-c-ruling_provisional-version-26-03-2021.pdf> , accessed 3 November 2025.
[21] Case C-610/10 *Commission v Spain (Magefesa II)* [2012] ECLI:EU:C:2012:781, para 105.
[22] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, art 17.
[23] Commission Notice on the recovery of unlawful and incompatible State aid [2019] OJ C247/1.
[24] Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union [2015] OJ L248/9, art. 16.

Litigation risks

Given that tax exemptions for aviation fuels have not, to our knowledge, been notified and approved by the EC before being granted, they would be considered unlawful if they are considered to constitute state aids. This unlawfulness would expose Member States to significant litigation risks as any high-speed train company affected by the tax exemption may be able to bring a direct action before the relevant national court for damages, recovery and or injunctive measures, irrespective of whether the state aid is ultimately found compatible with competition rules by the EC or not.[25]

The requalification of the tax exemptions as state aids, which may occur following a complaint brought by airlines' competitors or an investigation by the EC (as described above), would also open a legal avenue for environmental NGOs to challenge these state aids. Since the publication of the revised 'Code of Best Practices for the conduct of State aid control procedures' by the EC in May 2025,[26] environmental NGOs can file requests for internal review against state aid decisions, challenging their lack of compatibility with EU environmental law – including the polluter pays principle or the precautionary principle..[27] Given the significant climate and environmental implications of favouring air travel over train travel through tax exemptions, we argue there is a significant risk such a challenge could be brought.

Part B: The legal asymmetry between the ETD and the TCA between the UK and the EU

While the ETD currently imposes an absolute prohibition on the taxation of aviation fuel for international flights, the Trade and Cooperation Agreement entered into between the EU and the UK following Brexit permits the taxation of aviation fuel by explicitly removing it from the list of goods and services exempted from tax. This results in a clear legal asymmetry between the ETD and the TCA.

As set out in the independent legal opinion of Claire Nevin of Francis Taylor Building Chambers (commissioned by Opportunity Green) accompanying this briefing:

[25] Commission Notice on the Enforcement of State Aid Rules by National Courts [2021] OJ C305/1, paras. 48-49: "*national courts must offer individuals the certain prospect that all appropriate conclusions will be drawn from the infringement of the standstill obligation, including by ordering the recovery of the interest in respect of the period of unlawfulness, in accordance with their national law. It follows that, where a third party seeks before a national court the elimination of advantages linked to the premature implementation of the aid, the court should uphold its action even if the Commission has already declared the aid in question compatible. Any other interpretation would have the effect of allowing the Member States to disregard the provisions of the TFEU and thus deprive them of their effectiveness*".

[26] Communication from the Commission, Code of Best Practices for the conduct of State aid control procedures (C/2025/2810) [2025] OJ C 2810.

[27] Communication from the Commission, Code of Best Practices for the conduct of State aid control procedures (C/2025/2810) [2025] OJ C 2810, para. 77.

> "*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*".

Whilst the provisions of the TCA do not mean that the EU has to amend the ETD as a matter of law (as the taxation of aviation fuel under the TCA is discretionary and not obligatory), this legal asymmetry does present legal and practical risks:

(i) EU Member States are vulnerable to the UK introducing a fuel tax on flights to the EU without having the ability to respond without the amendment of the ETD.

(ii) EU Member States are also vulnerable to legal challenges if they decided to tax aviation fuel for flights to the UK in the belief that the terms of the TCA override the ETD and therefore permit the imposition of such a tax.

(iii) The EU, as a consequence of the ETD's absolute tax exemption, is therefore at a competitive disadvantage, and is left in a '*somewhat uncomfortable political and economic situation*' if it leaves the tax exemption in place.

To address this situation the EU should either remove the exemption from the ETD, or introduce 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. For clarity, and in the interests of the proper implementation of the polluter pays principle in line with Article 191(2) TFEU, the EU should consider removing this absolute tax exemption such that the EU has greater flexibility to tax aviation fuel used for international flights on the terms agreed with other states bilaterally or multilaterally (see further *Clearing the air on how we tax aviation fuels*).

Conclusion

This legal briefing finds that, in its current form, there are significant risks that tax exemptions for aviation fuels as set out in the ETD conflict with both the EU state aid regime and the Trade and Cooperation Agreement entered into between the EU and the UK.

Exempting aviation fuels from taxation therefore exposes EU Member States and the aviation industry to significant legal uncertainty and potential litigation. A revision of the ETD to allow for the taxation of aviation fuels without exception will not only address these legal risks but also allow lower-emitting alternatives to air travel, in particular high-speed rail, to compete on a level playing field with airlines. This is critical not only to ensure fair competition between these two sectors, but also to ensure the EU does not fall short of its own climate commitments.

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