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The possibility of introducing a kerosene tax on domestic flights in Germany

Legal opinion
commissioned by
the Federal Environmental Agency

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A) The remit of the legal opinion

For a long time, the situation regarding tax exemption in EC law on excise duties precluded any possibility of taxing kerosene.[1] However, Council Directive 2003/96 EC, which entered into force on 31.10.2003, now allows the EU Member States to levy a tax on kerosene used in domestic aviation.[2]

Against the background of these changes in the legal position under Community law, this opinion was commissioned to explore the various options for designing a national kerosene tax and explore what legal constraints would need to be taken into consideration.

The fact that most EU Member States do not currently levy a tax on kerosene and do not intend to do so in the foreseeable future means there is a risk that introducing a levy of this kind in Germany would, depending on the level of taxation, prompt airlines to refuel elsewhere. Evasion strategies of that kind would lead to a considerable drop in the quantity of kerosene taken on board in Germany, without achieving any real reduction in jet fuel consumption. On the contrary, carrying extra kerosene could even bring about an increase in kerosene consumption in real terms. The fiscal interests the Federal Republic of Germany is pursuing in imposing a levy on kerosene would no more be served than would the additional intention of creating an ecological incentive effect.

In looking at the question of how to design a tax on kerosene, it is therefore of particular importance to explore whether it would be possible to levy the tax on all the kerosene actually used within the territory of the Federal Republic of Germany, independent of the place of refuelling. For that reason, we must therefore examine not only a tax that is related to the purchase of kerosene in Germany (described below under C.) but also the possibility of an estimate-based scheme for taxing kerosene, under which - taking into account various factors relevant to consumption - a certain quantity of kerosene would be considered to have been used on each domestic flight and would be used as the basis for taxation (described below under D.). As a third option, which would also counteract tankering strategies, the airlines

[1] This tax exemption situation was regulated in Art. 8 I b) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, Official Journal L 316 of 31.10.1992, pp. 0012 – 0015.

[2] Cf. Art. 14 of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity; OJ L 283 of 31.10.2003, p. 51.

could be obliged to notify the tax authority of the quantity of fuel actually used for flights within Germany (described below under E.).

In examining the legal permissibility of each of these conceivable options, the following legal frameworks must be taken into account:

What is known as the Chicago Convention[3] forms the legal framework for international civil aviation. Articles 15 and 24 of this multilateral agreement contain provisions on charges and duties. In addition to that, the International Civil Aviation Organisation (ICAO), which was established by the Chicago Convention, has commented on questions of levying taxes in the aviation sector in numerous documents.[4] At the level of international law, a number of bilateral aviation agreements concluded between the Federal Republic of Germany and all the major aviation countries, which regularly include exemption of aviation from specific charges, have to be taken into account.

At the level of Community law, it is necessary to review whether taxing kerosene is compatible with the fundamental freedoms guaranteed under the EC Treaty. As well as that, general stipulations on consumption taxes contained in secondary legislation must be observed, as well as the particular requirements that apply to kerosene tax detailed in the new Council Directive 2003/96 EC mentioned above.

At national level, the financial system described in Art. 104a ff. of the Basic Law must be taken into account; furthermore we must examine the question of how the different options for levying a tax on kerosene tax could appropriately be integrated into the existing system underlying the national legislation on consumption tax and mineral oil tax.

Following this, the legal and practical advantages and disadvantages of the different options for imposing a tax on kerosene are explored and summarised; concrete proposals for action are developed for the option identified as preferable (described below under F.).

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[3] Convention on International Civil Aviation (Chicago Convention) of 7 December 1944 (BGBl. 1956 II p. 411); in the version of the protocols relating to amendments of 14.6.1954 (BGBl. 1959 II p. 69); 21.6.1961 (BGBl. 1962 II p. 884); 15.9.1962 (BGBl. 1964 II 217); 12.3.1971 (BGBl. 1972 II p. 257); 7.7.1971 (BGBl. 1978 II p. 500); 16.10.1974 (BGBl. 1983 II p. 763); 6.10.1980 (BGBl. II p. 1777); 10.5.1984 (BGBl. 1996 II p. 219); 26.10.1990 (BGBl. 1996 II p. 2501).

[4] Cf. in particular ICAO document 8632 (ICAO's policies on taxation in the field of international air transport, 3rd edition 2000), which summaries the contents of numerous past comments of the ICAO on this subject.

Finally, the additional question of whether the current legal position would also permit not only taxation of purely domestic flights but also of flights between Member States of the Community will also be explored. (Described below under G.).

B) Factual background

As an indispensable background to making any legal evaluation, we shall begin by outlining in brief the current tax privileges granted to aviation, the environmental problems caused by aviation and predicted trends in aviation.

I.) Tax privileges granted to aviation

We believe it to be particularly important to stress at the very outset of this opinion that introducing a tax on kerosene would not constitute a discrimination against air transport, but would establish an, at least partially, equal treatment of air transport and other forms of transport.

At present, aviation enjoys a privileged tax situation in various respects: firstly, under Section 4 I No. 3 a) of the Mineral Oil Tax Act, airlines do not pay tax on aviation fuel purchased for commercial use, whereas under Section 9 II of the Electricity Tax Act (StromStG) the railways are entitled to only a reduced rate of tax on the electricity they use and are subject to the same rate of tax when purchasing diesel fuel as road transport. The same applies to long-distance coach transport.

Secondly, under Section 4 II of the VAT Act (UstG), airline tickets for international flights are not subject to VAT, whereas rail tickets for long-distance transport, i.e. over 50 km, are liable for the full VAT rate of 16%; however, the full VAT rate of 16% is payable on domestic flights.

Against this background, the introduction of a tax on kerosene would seem to be a step towards fulfilling the precept of tax equity[5] in the transport sector to be inferred from Art. 3 of the Basic Law.

II.) Environmental damage caused by aviation

Emissions from aviation have diverse direct and indirect effects that contribute to climate change.[6] Although the share occupied by pollutant emissions in the overall volume of anthropogenic emissions is only small, the emissions from aviation nevertheless have

[5] On the precept of tax equity cf. for example Tipke/Lang, Steuerrecht, Section 4 with numerous other references.
[6] For a comprehensive overview of this subject the IPCC special report: "Aviation and the Global Atmosphere" published in 1999 is particularly useful.

considerable and disproportionate significance in terms of climate change and the greenhouse effect, because emissions at cruising altitudes have a two- to four times greater impact on the climate than at ground level.[7] In the IPCC report of 1999, a figure of approximately 3.5% was put on international air transport's contribution to global warming. The baseline year for this was 1992. Since then mileage flown has increased by around 40 % and individual effects on climate of aviation emissions are assessed differently today than in the IPCC report. For example, the possible relative share of contrails is estimated today to be lower, whereas the relative share of cirrus clouds compared to the other effects is possibly higher.

As far as environmental damage caused by aviation is concerned, three different processes can be distinguished:[8] the emission of substances that contribute directly to the greenhouse effect (mainly carbon dioxide), the emission of substances that act as precursors for chemical reactions (the emission of nitrogen oxides causes a build-up of ozone, which at the cruising altitudes of aeroplanes acts as a greenhouse gas, and the depletion of methane) whose products in turn intensify the greenhouse effect, and finally the emission of substances that cause a change in the natural process of cloud formation (formation of contrails and cirrus clouds).

III.) Prognosis of trends in air transport

The globalisation process is causing a steadily increasing demand for modes of transport that can convey passengers and freight across long distances in a short time. Aviation is therefore considered to be the growth sector per se in transport.[9]

The current long-term prognoses of the two market leaders in the manufacture of wide-body aircraft, Airbus and Boeing, are assuming an annual growth rate in world demand in passenger air transport for the period 2003 to 2022 (measured in passenger kilometres) of 5.0 % (Airbus) and 5.1 % (Boeing).[10]

By contrast, the ICAO's Committee on Aviation and Environmental Protection (CAEP) is expecting a growth in global air traffic volume for the period 2000 to 2020 of only 4.3 % (also measured in passenger kilometres).[11] The significant difference from the prognoses made by industry is probably largely due to the fact that the period of time used by CAEP includes the

[7] Cames/Deuber, Emissionshandel im internationalen zivilen Luftverkehr, p. 28.
[8] For more detail on the following cf. Cames/Deuber, Emissionshandel im internationalen zivilen Luftverkehr, p. 27 ff.
[9] Mengel/Siebel: Ziviler Flugverkehr und Klimaschutz, p. 281 with further references.
[10] DLR, Luftverkehrsbericht 2004, p. 40.
[11] Data on the CAEP prognosis are taken in their entirety from the DLR-Luftverkehrsbericht 2004, p. 40.

drop in demand following the terrorist attacks of September 11 2001. To be more precise, CAEP is forecasting a growth of only 3.5 % in domestic air transport compared with 4.9 % in international air transport, with a particularly high growth rate expected in the Asian-Pacific region and on routes between East Asia and America, between Europe and South America and between Europe and Asia.
Thus, all prognoses indicate that we can expect the overall volume of global passenger air transport, measured in passenger kilometres, to at least double.

The prognoses of industry for freight transport are considerably less detailed, but suggest a tripling of overall volume, measured in tonne kilometres, by 2022.[12]

Against the background of these growth prognoses, we can expect the worldwide kerosene consumption to continue to increase significantly in the future, despite technical achievements in reducing kerosene consumption per passenger kilometre.[13] By 2020, kerosene consumption is expected to have approximately doubled compared with the baseline year of 1995.[14]
The same is true of carbon dioxide and nitrogen oxide emissions; here, too, despite technical progress and more stringent requirements for engines, we must expect emissions to at least double.[15]

[12] DLR, Luftverkehrsbericht 2004, p. 41.
[13] Cf. Mengel/Siebel, Ziviler Flugverkehr und Klimaschutz, p. 291f; TÜV Rheinland et al., Maßnahmen, p. 82.
[14] TÜV Rheinland et al., Maßnahmen, p. 82 ff., especially p. 89.
[15] For an extensive treatment of this cf. TÜV Rheinland et al., Maßnahmen, p. 82 ff.

C) Permissibility of a tax linked to the purchase of kerosene

Based on the system underlying current mineral oil tax law, we shall first examine whether kerosene tax could be linked to the purchase of kerosene in Germany and whether a tax of that kind would be legally permissible.

I.) Description of the specifics of this option and the legal framework

In this section we shall first give a brief outline of the current mineral oil tax law as the setting for describing in more detail the specifics of this option.

1.) Overview of current mineral oil tax law

In the fiscal territory of the Federal Republic of Germany mineral oil tax is levied on a number of mineral oils. Mineral oil tax is a consumption tax (cf. Section 1 I 3 of the Mineral Oil Tax Act);[16] it is imposed on the consumption and use of mineral oils.

a) Mineral oil tax as a form of indirect taxation[17]

For reasons of administrative economy, the tax is not directly linked to consumption per se, but to the release of the mineral oils for consumption. It is therefore not the end consumers, but manufacturers, importers and keepers of tax warehouses who are liable to tax. In their pricing policy, they pass on the tax burden to the next immediate purchaser, so that there is a divergence between the statutory taxpayer and the economic taxpayer. The fact that the tax burden is passed on to the end consumer in this way is what characterises mineral oil tax as a form of indirect taxation.

b) Legal basis

The legal basis for levying mineral oil tax is the Mineral Oil Tax Act, the content of which is determined to a great degree by the provisions of Community law set out in the Excise Duty Directive[18] and the Energy Products Directive.[19]

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[16] On the categorisation of mineral oil tax see Teichner in Teichner et al., Energiesteuerrecht, foreword. MinöStG Mn. 1 ff.
[17] Cf. Teichner in Teichner et al., Energiesteuerrecht, Foreword. MinöStG Mn. 7 f.
[18] Council Directive 1992/12 EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products; OJ L 076 of 23.12. 1992 p. 001.
[19] Council Directive 2003/96 EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity; OJ L 283 of 31.10.2003 p. 51.

c) Objects of taxation[20]

The definition of mineral oils as set out in Section 1 II of the Mineral Oil Tax Act is based on the Combined Nomenclature, the EU's classification system for customs purposes. Section 1 III of the Mineral Oil Tax Act determines which mineral oils are liable to mineral oil tax. Kerosene has the code number 2710 in the Combined Nomenclature, which means that as defined in Section 1 II No. 4 of the Mineral Oil Tax Act it is a mineral oil for the purposes of the Mineral Oil Tax Act; pursuant to Section 1 III No. 2 of the Mineral Oil Tax Act it is subject to mineral oil tax.

d) Chargeability to tax

Mineral oil tax becomes chargeable when mineral oil is removed from an tax warehouse, i.e. from a place at which "goods subject to excise duty are produced, processed, held, received or dispatched"[21] (Section 9 I of the Mineral Oil Tax Act), is imported for commercial purposes from other EU Member States where it had already been released for consumption (cf. Section 19 of the Mineral Oil Tax Act) or imported from a third country (cf. Section 23 of the Mineral Oil Tax Act).[22]

e) Tax privileges

Tax law on mineral oil provides for tax relief, which as a rule is linked to the fact that mineral oils are used for particular purposes.[23] A distinction must be made between tax reductions (cf. Sections 3 and 32 I of the Mineral Oil Tax Act) and tax exemptions as defined by Section 4 of the Mineral Oil Tax Act.

Pursuant to Section 4 I No. 3, mineral oil that is used "by airlines as aviation fuel for the commercial transport of passengers, movement of goods, materials or for the provision of remunerated services, in aircraft belonging to state agencies and the military services for official purposes or to air rescue services using them for the purposes of air rescue" is exempt from tax. Aviation fuels for the purposes of this legislation are "Aviation gasoline of sub-heading 2710 0026, the research octane number of which is not less than 100, light jet fuel of the sub-heading 2710 0037 and jet fuel (medium oil) of sub-heading 2710 0051 of the

[20] For details on this, including the scientific basis see Soyk, Mineralölsteuerrecht, p. 17 ff.
[21] As defined in Art. 4 b) of the Excise Duty Directive.
[22] For further instances of chargeability that are of secondary significance for this report cf. Soyk, Mineralölsteuerrecht, p. 92 ff., p. 177 ff., p. 184 ff.
[23] An exception to this is the "manufacturer's privilege" set out in Section 4 I No. 1, which is linked primarily to a particular group of people and only in a second stage to a particular use. Cf. on this Soyk, Mineralölsteuerrecht, p. 126 f.

Combined Nomenclature when it is used in aircraft" (Section 4 I No. 3 of the Mineral Oil Tax Act).

Anyone wishing to use mineral oil for purposes that enjoy tax privileges requires a permit pursuant to Section 12 of the Mineral Oil Tax Act.[24] Tax is not chargeable on mineral oil that is sold to a permit-holder. In accordance with Section 13 I of the Mineral Oil Tax Act, the permit-holder may use mineral oil only for the purpose specified in the permit. Pursuant to Section 13 II of the Mineral Oil Tax Act, tax on mineral oil becomes chargeable when it is sold or used for a purpose other than that specified in the permit. The taxable person is the permit-holder if he was in possession of the mineral oil before tax became chargeable, otherwise the supplier. In accordance with Section 13 III of the Mineral Oil Tax Act, the person liable for tax on the mineral oil must file a tax return without delay and calculate the tax himself (self-assessment). The tax is payable immediately.

f) Hypothecation of revenue from mineral oil tax[25]

The revenue from mineral oil tax is to a large degree ring-fenced under provisions stipulating that it be used for highways. In accordance with Art. 1, 1st sentence, of the Highways Funding Act, this hypothecation, or ring-fencing, applies to revenue from taxes on all objects of taxation with the exception of heavy oils and purification extracts. In terms of the sums involved, the hypothecation provision applies basically to half the revenue, plus a portion of the additional revenue resulting from an increase in the standard tax rates of 1981.[26] Kerosene comes under the category of medium oils, so that the additional revenue from the introduction of a tax on kerosene would be subject to ring-fencing for road construction.

The hypothecation of the revenue described is not contrary to the tax character of mineral oil tax.[27] Taxes, as defined in the Basic Law and detailed in Section 3 I of the Tax Code, are monetary payments that are not made in remuneration of a particular service and are levied by a public body to generate revenue and to which everyone to whom the liability specified by

[24] Cf. on mineral oil tax the detailed description of the procedure of tax privileges incorporating the provisions of the Mineral Oil Tax Regulation (MinöStV) by Schröer-Schallenberg in Teichner et al., Energiesteuerrecht, Section 12 MinöStG Mn. 28 ff.

[25] Teichner in Teichner et al., Energiesteuerrecht, MinöStG Vorb. Mn. 14 ff gives a detailed overview of this subject.

[26] For details of mineral oil tax cf. the provisions of Art. 1 of the Highways Funding Act (StrFinG) of 28 March 1960 (BGBl. I p. 201), Art. 3 of the Transport Funding Act (VerkFinG) 1971 of 28 Feb. 1972 (BGBl. I p. 201) and Section 10 of the Act on Local Authority Transport Funding (GVFG of 18 March 1971 (BGBl. I p. 239).

[27] Also the opinion of the Federal Constitutional Court in its ruling on eco-tax, cf. 1 BvR 1748/99, 1 BvR 905/00 of 20.4.2004, Mn. 62.

the law relates is subject; the generation of revenue may be a secondary purpose.[28] Hypothecation of the revenue may not, however, be regarded as a remuneration of a service.[29]

2.) Removing the tax exemption on kerosene

Based on the current legal situation, taxation of kerosene used on domestic flights and purchased in the Federal Republic of Germany could be achieved as follows:

In terms of regulatory procedure, it would not be necessary to introduce a completely new tax nor to extend the objects of taxation liable for mineral oil tax since, in accordance with Section 1 III of the Mineral Oil Tax Act, kerosene is already subject to mineral oil tax; all that would be required would be the removal of a tax privilege.

Under this option, to justify a tax liability on kerosene used on international flights, the tax exemption for kerosene under Section 4 I No. 3 a) of the Mineral Oil Tax Act would have to be removed or reduced to apply to the kerosene used "as aviation fuel by airlines for the commercial transport of passengers, materials or for the provision of remunerated services on international flights."

Companies that offer only domestic flights commercially would therefore no longer be granted a permit under Section 12 of the Mineral Oil Tax Act so that tax would become liable on the purchase of kerosene by these companies on its removal from the tax warehouse; the taxable person would be the warehousekeeper (cf. Section 9 I 2 of the Mineral Oil Tax Act).

By contrast, companies that also offer other flights would be granted a correspondingly restricted permit allowing them to purchase tax-free mineral oil for use on flights within the Community and on other international flights.

However, since in practice aircraft are normally fuelled directly from the tax warehouse,[30] even for companies with a restricted permit there would still be no problem in making a distinction as to whether it was a tax-exempt purchase for international or intra-Community flights covered by the permit or a purchase for domestic flights that was liable for tax. The tax liability would thus arise when the mineral oil was removed from the tax warehouse to fuel an aircraft for an international flight; the taxable person would be the keeper of the tax warehouse.

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[28] Of the many commentaries on the definition of taxes cf., for example Henneke, Finanzwesen, Mn. 292 ff.

[29] Also the opinion of the Federal Constitutional Court on ring-fencing revenue from mineral oil tax (Federal Constitutional Court of 25.06.1974, ZfZ 1974, 307); in agreement are Maunz in Maunz/Dürig, GG, Art. 105 Mn. 10 and Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, Mn. C 2. For a criticism see Tipke/Lang, Steuerrecht, Section 3 Mn. 14.

[30] Unpublished information from the Federal Ministry of Finance.

Since occasionally, at some regional airports, for example, aircraft are not fuelled directly from the tax warehouse, but from mineral oil receiving warehouses, in which the mineral oil is no longer in tax-free circulation, it would be necessary to determine in individual cases whether non-domestic flights are available at all from these airports. If this is not the case, the operator of the mineral oil receiving warehouse, as a rule the airport operator, would not be granted a permit, so that tax would become liable when the mineral oil was removed from the tax warehouse for transport to the mineral oil receiving warehouse. In this case, too, the taxable person would be the warehousekeeper.

In cases where longer routes are served by a regional airport, it would be advisable to grant the mineral oil receiving warehouse a restricted permit as described above. Refuelling an aircraft for a domestic flight would constitute improper use, so that tax liability would occur subsequently at the time of fuelling, in accordance with Section 13 II of the Mineral Oil Tax Act. The taxable person in this case would be the operator of the mineral oil receiving warehouse, who would be obliged to file a tax return in accordance with Section 13 III of the Mineral Oil Tax Act.

As we have already explained, a large portion of the revenue from a tax on kerosene would be ring-fenced for use in highways. From a political point of view, the question of whether the revenue from taxing kerosene should be removed from this hypothecation by adding an exception clause to Art. 1 of the Highways Funding Act (StrFinG) would have to be explored.[31] The revenue from taxing kerosene would in any case probably not be subject to the hypothecation described in Art. 3 of the 1971 Transport Funding Act (VerkFinG) because it is not a result of the increase in standard tax rates that became effective in 1981.

II.) Compatibility with the Chicago Convention

The Convention on International Civil Aviation (hereafter: Chicago Convention) was concluded in Chicago on 7 December 1944. It is a multilateral treaty anchored in international law, Part I of which contains general provisions on the rights and obligations of the countries with regard to international civil aviation and Part II of which constitutes the International Civil Aviation Organisation with headquarters in Montreal.[32] 188 countries are currently

[31] Cf. the exception clause that already exists in Art. 1, 2nd sentence of the Highways Funding Act (StrFinG) for the additional revenue from various changes to the tax rates. On the permissibility under constitutional law of ring-fencing revenue from kerosene taxation for highways cf. C.) V.) 2.).

[32] Weber in Bernhardt, EPIL, "Chicago Convention;" Ipsen, Völkerrecht, Section 55, for example, gives a brief overview of the genesis and content of the Chicago Convention.

members of the ICAO.[33] For this report, the provisions of Articles 15 and 24 of the Chicago Convention relating to charges and taxes are of relevance, as well as the general discrimination prohibition in Art. 11.

1.) Applicability of the Chicago Convention to domestic flights

The first fundamental question to be considered is whether the Chicago Convention is even applicable to domestic flights. In order to do that, we must define what is meant by domestic flights.

a) On the definition of domestic flights

The definition of domestic flights can be based on Art. 96 of the Chicago Convention, which defines international air traffic and therefore its opposite domestic traffic, stating that "international air service" means an air service which passes through the air space over the territory of more than one state.

The internationality of a flight between Hamburg and Munich operated by a foreign airline can thus not be justified by the fact that an airline from a contracting State is operating a route in another contracting State. Since the flight passes through the air space over the territory of the Federal Republic of Germany, it is a non-international, in other words domestic, flight.

However, it is questionable whether this classification also applies to connecting flights, in other words in constellations, where, for example, a US aircraft flies initially from Chicago to Hamburg and then on from Hamburg to Munich. The problematic aspect of that kind of case is not so much the characteristic of internationality as the definition of the term "air service," in other words whether the route between Hamburg and Munich is a separate air service in its own right or part of the air service from Chicago via Hamburg to Munich.

As defined in Art. 96 of the Chicago Convention, a scheduled air service is any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo. Thus, it is the existence of a particular purpose, namely the remunerated transportation of passengers, luggage, cargo or mail that is decisive for the existence of an air service. From this it can be deduced that in the connection constellation the Hamburg to Munich leg is a separate air service, since a separate transportation purpose is pursued. In other words, there is an air service that should be treated separately whenever the purpose of transporting passengers, luggage, cargo or mail from Hamburg to Munich is pursued. The leg from Hamburg to

[33] Source: http://www.icao.int/cgi/goto_m.pl?/cgi/statesDB4.pl?en; accessed on 23.11.2004.

Munich must therefore be classified as a separate flight and as non-international whenever the landing in Hamburg is made not only for refuelling purposes, technical maintenance work or disembarking of passengers etc., but also to allow new passengers to board etc.
The term domestic flights thus covers all flights operated between two airports within a country intended to serve a separate transportation purpose between these two domestic airports, thus which are intended to permit at least the transportation of passengers, luggage, cargo and mail solely between these two German airports.[34] It is of no significance whether passengers etc. are actually transported between the two domestic airports; the sole decisive factor is that the airline offers this possibility.

b) Scope of the Chicago Convention

It seems doubtful whether the Chicago Convention applies at all to domestic flights in this sense. The intention of the Chicago Convention as a treaty anchored in international law was obviously to promote and facilitate international civil aviation, not domestic air transport. This is clear both from the official title of the agreement ("Convention on International Civil Aviation") and from the wording of the preamble, which consistently makes reference to developing international aviation. Seen against the backdrop of this general intention of the treaty, it would seem appropriate to interpret its provisions in case of doubt in such as way that regulating domestic aviation is left as far as possible to the contracting States themselves. In certain areas – for example, the validity of air navigation rules – it seems expedient on the grounds of their very nature to treat domestic and other flights in exactly the same way;[35] it could hardly meet the requirements of practice if different traffic rules applied to domestic and international flights within the same air space. However, with regard to imposing taxation it seems not only possible in substantive terms but expedient in terms of transport policy, since there are far more alternative means of transport to domestic flights than is the case with international flights, so that pursuing ecologically motivated incentive goals on domestic air routes seems particularly appropriate.
A further argument for restricting the Chicago Convention as far as possible to international flights can be found in Art. 7 of the Chicago Convention. This provision states that each contracting State has the right to refuse the permission to the aircraft of other contracting States to carry out commercial flights within its territory. Art. 6 of the Chicago Convention

[34] Thus, for example, also the aviation agreement concluded between the Federal Republic of Germany and France, Art. 6 para. V.
[35] Cf. the corresponding provision in Art. 12 of the Chicago Convention.

stipulates that operating an international scheduled air service over or into the territory of a contracting State requires the permission of that State. Taking a synoptic view of these two provisions together and taking into account the genesis of the convention indicates that the intention was to leave the contracting States a greater degree of freedom in regulating domestic flights. While granting traffic rights for international flights requires a separate bilateral agreement, the Chicago Convention also assumes that granting traffic rights for domestic flights is explicitly excluded from this expectation. The fact that even Art. 6 of the Chicago Convention does not oblige the contracting States to grant any kind of traffic rights makes the provisions of Art. 7 seem superfluous. The fact that Art. 7 was nevertheless included in the Chicago Convention therefore emphasises quite particularly the will of the contracting states to leave regulation of domestic flights to the contracting States.
In summary, it can be said that the provisions of the Chicago Convention, at least as far as they apply to imposing charges on air transport, are not applicable to domestic flights. Thus, since the stipulations of the Chicago Convention are not applicable to domestic flights, they cannot be contrary to the introduction of a tax on kerosene on domestic flights.
However, we shall additionally explore in detail the content of the individual provisions of the Chicago Convention and show evidence for the fact that, even if it were applicable, the Chicago Convention would still not preclude the introduction of a tax on kerosene.

2.) Article 15

Art. 15 III 2 of the Chicago Convention 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."*[36]

[36] Only the English, French, Spanish and Russian versions of the Convention are authoritative. Cf. the final clause of the Chicago Convention and the Protocol on the binding force of the Russian language version of 30 September 1977. The French version says: « Aucun État contractant ne doit imposer de droits, taxes ou autres redevances uniquement pour le droit de transit, d'entrée ou de sortie de son territoire de tout aéronef d'un État contractant, ou de personnes ou biens se trouvant à bord. » The German, which is not however authoritative, is: « Die Mitgliedstaaten erheben keine Gebühren, Taxen oder sonstigen Abgaben für ihr Hoheitsgebiet lediglich für das Recht der Durchreise, Einreise oder Ausreise eines Luftfahrzeuges eines Vertragsstaates oder der an Bord befindlichen Personen oder Güter. »

For the question of whether Art. 15 of the Chicago Convention precludes the levying of a kerosene tax, it is of particular interest what type of charges[37] Art. 15 of the Chicago Convention covers and what conditions or purposes for levying charges are permitted or prohibited by this provision.

a) Types of charge covered

In interpreting international treaties the provision of the Vienna Convention on the Law of Treaties (VCLT)[38] must be respected.[39] Art. 31 I of the VCLT states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[40]

If we therefore look at the wording of Art. 15 of the Chicago Convention in isolation, no unequivocal answer will be found to the question of whether the provision covers only fees or also taxes as defined under German tax law.[41] Legal dictionaries as a rule base their definition of the term "fee" on the connection to a service provided in return or correspondingly suggest the German term "Gebühr" as a translation, but there is no similarly clear picture in the case of "dues" and "charges." While "due" generally means some kind of debt, the word "charges" usually suggests a state charge connected with a service provided in return, in other words what German law calls a fee although can also be interpreted as broadly as the German concept of charges. Thus, it cannot be concluded from the ordinary meaning of the terms used that Art. 15 of the Chicago Convention is generally not applicable to taxes.

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[37] In the German financial system the generic term **charges** means all monetary obligations imposed under public law that are intended to give financial power to a public body. Charges must be distinguished from monetary obligations such as fines and penalties etc. that do not serve the purpose of providing revenue for the state. Within the term charges a distinction is made between taxes, fees, contributions and special charges. The distinction is relevant because different conditions apply to the permissibility of the different types of charge. The decisive factor for classifying a monetary obligation in one of the individual categories of charge is not its designation but the substantive content alone.
The main difference between **taxes** and other types of charge is that they are imposed by a public body purely for the purpose of generating revenue; they are not connected with any service provided in return; cf. the definition of tax above under C.) I. 1.) f). By contrast, **fees** are levied in connection with a public service and can be separately allocated to cover the costs of that service. **Contributions** are closely related to fees; however, unlike fees, they are not based on the actual use of a particular service but merely the possibility of using it. Finally, **special charges** are imposed on a homogenous group for a particular purpose and there must be a substantive connection between the group upon whom they are imposed and the purpose pursued.
For more details on this see Henneke, Finanzwesen, Section 9.

[38] Vienna Convention on the Law of Treaties of 23 May 1969 (BGBl. 1985 II p. 926).

[39] Although, pursuant to its Art. 4, the VCLT does not apply to treaties that already existed when it (the VCLT) entered into force in 1980, the Convention nevertheless essentially conforms with the rules of international customary law referring to the interpretation of older treaties, so that it can also be applied by analogy to such treaties. Cf. on mineral oil tax Dahm/Delbrück/Wolfrum, Völkerrecht, p. 514.

[40] For more details on this see Oellers-Frahm in Bernhardt, EPIL, "Interpretation in International Law;" Dahm/Delbrück/Wolfrum, Völkerrecht, p. 640 ff.

[41] Loibl/Reiterer, Rahmenbedingungen, p. 38.

Consequently, in accordance with the interpretation rules outlined above, the context of the provision in question must be taken into account, which, according to Art. 31 II of the VCLT, covers in addition to the text, including its preamble and annexes, any agreement relating to the treaty that was made between all the parties in connection with the conclusion of the treaty. If we initially refer to the heading of Art. 15 of the Chicago Convention ("Airport and similar charges"), it would follow that the intention of this Article is obviously to regulate only those charges that are systematically and structurally comparable to airport fees.[42] However, the very thing that characterises airport fees is that they are connected to a service provided in return, namely permission to use certain facilities. The basically very broad term "charges" is considerably restricted by the addition of the attribute "similar."

Art. 15 I of the Chicago Convention regulates in the first place the right of access to airports and other air transport facilities; paragraphs II and III 1 contain provisions for levying the "charges" *for the use* of that kind of facility. With the exception of paragraph III, second sentence, the whole of Art. 15 refers, as its heading suggests, solely to charges which the German financial system would classify as fees.

Art. 15 III 2 of the Chicago Convention gives an indication that this prohibition refers solely to fees in the sense of the term as defined in German tax law: the fact that it refers to charges "in respect solely of the right of transit over..." implies that a charge solely for this purpose is not permissible, thus that the contracting States may only impose charges with which more extensive or other purposes are being pursued. What is being regulated here are the minimum requirements for purposes that may be pursued with a charge. However, that kind of minimum requirement obviously makes no sense in the case of charges with which no particular purpose is being pursued, so that from this point of view too it can be assumed that this is not a regulation that relates to taxes in the sense of charges that are fundamentally levied without any specific purpose.

In summary, it can thus be established that an overall consideration of Art. 15 of the Chicago Convention leads to the conclusion that Art. 15 III 2 does not refer to taxes but merely to charges connected with a service provided in return. There are no further points of relevance to this in the remaining text of the Convention.

Art. 31 III of the VCLT stipulates that any subsequent agreement between the parties regarding the interpretation of the treaty shall be taken into account in the same way as the context; the same applies to any subsequent practice in the application of the treaty which

[42] Loibl/Reiterer, Rahmenbedingungen, p. 42.

establishes the agreement of the parties regarding its interpretation. A particularly pertinent example of that kind of practice would be the establishment of an international organisation on the basis of the treaty.[43]

The organs of the ICAO distinguish between "charges" and "taxes" in numerous documents.[44] This distinction is made particularly clear 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;"*

Under the generic term "levies" which is comparable with the German term "Abgaben" //[translated above as "charges"]//, this resolution thus distinguishes between "charges," which are intended to cover the costs of providing certain facilities, and "taxes," which are intended to cover the general financial needs of a public body. In 2001, the ICAO Assembly, in which all members of the organisation are represented and have equal rights,[45] made explicit reference to the distinction made in this resolution in two new resolutions: both the 9th recital of Resolution A/33-7 Appendix I and the 1st recital of Resolution A/33-19 App. E refer to the distinction between "charges" and "taxes" contained in the Council Resolution of 1996, with Resolution A/33-19 speaking explicitly of a "conceptual distinction." A number of points of Resolution A/33-7 were amended by the last ICAO plenary in October/November 2004, although the reference mentioned was not affected by this; thus it can be assumed that the distinction between "charges" and "taxes" reflects current opinion in the ICAO.[46]

The Assembly's resolutions are regularly passed by consensus so that it may be concluded from these texts that there is agreement between the contracting states.[47]

Thus, in summary it can be established that there is a consensus of ICAO members that the term "charges" applies only when there is connection with a service provided in return[48] and

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[43] Bernhardt idem, EPIL, "Interpretation in international law," p. 1421; Loibl/Reiterer, Rahmenbedingungen, p. 42.

[44] Cf. the detailed evaluation of numerous past ICAO documents in Loibl/Reiterer, Rahmenbedingungen, p. 43 ff. The authors make a convincing case for the fact that "charges" in the relevant ICAO documents dating from 1949 onwards imply a connection with a service provided in return.

[45] For extensive treatment of the remit and powers of the ICAO organs see C.) II.) 4.) a) aa).

[46] The third recital of the Council Resolution on Taxation of International Air Transport (Section I of ICAO Doc. 8632) and a more recent document adopted by the Council also contain a distinction corresponding to that made in the "Council Resolution on Environmental Charges and Taxes" of 1996.

[47] Loibl/Reiterer, Rahmenbedingungen, p. 45.

[48] Also Loibl/Reiterer, Rahmenbedingungen, p. 45 f.

corresponds to what the German system classifies as fees, whereas "taxes" are levied to cover general financing needs, so that this term corresponds to what German tax law also classifies as taxes.

Art. 31 III b) of VCLT says that this consensus between the contracting states must be referred to when interpreting the word "charges" in Art. 15 of the Chicago Convention, so that, in agreement with the results of the systematic interpretation of the provision, it can be assumed that Art. 15 of the Chicago Convention refers solely to charges connected with a service provided in return and thus does not preclude the imposition of a tax on kerosene intended to cover a general revenue requirement.[49]

b) Circumstances and purposes for levying charges covered

Irrespective of whether the provisions of Art. 15 of the Chicago Convention also cover taxes, taxation of kerosene is also permissible in the light of Art. 15 of the Chicago Convention for the following reasons:

The wording of Art. 15 of the Chicago Convention clearly prohibits only such charges as are levied solely for transit, entry into or exit from a particular country. A kerosene tax would, however, be levied not to grant transit rights but to cover a general revenue requirement and to fulfil the function of an environmental incentive and would therefore for this reason not be affected by Art. 15 of the Chicago Convention.[50]

Finally, it must be taken into consideration - in particular with regard to the taxation option considered here - that the prohibition under Art. 15 of the Chicago Convention refers solely to

[49] That is also the conclusion of Loibl/Reiterer, Rahmenbedingungen, p. 46; TÜV Rheinland et al., Maßnahmen, p. 113. The ICAO Council also comes to the same conclusion. In Doc. 8632 (ICAO's policies on taxation in the field of International Air transport, 3rd edition 2000, Introduction, para. 2) it formulates its conclusion as follows: "The Chicago Convention … did not attempt comprehensively with tax matters. The Convention simply provides (cf. Art. 24 (a)) that fuel and lubricating oils...shall be exempt from customs...." Thus, TÜV Rheinland et al., Maßnahmen, p. 113, which assumes that the ICAO has a different interpretation practice for Art. 15, is not relevant. The passage cited as substantiation from the second edition of Doc. 8632 refers firstly to different wording (namely "customs and other duties") and secondly exclusively to this particular document; it is therefore completely inappropriate for an interpretation of Art. 15.

[50] For example, also Lienemeyer, EuR 1998, p. 478/484; similarly Loibl/Reiterer, Rahmenbedingungen, p. 49; TÜV Rheinland et al., Maßnahmen, p. 113.

By contrast, it cannot be argued that a kerosene tax would be used to remedy environmental damage or the like. To do that a strict hypothecation would have to be provided for, which is completely alien to the current law on mineral oil tax, and which would result in mineral oil tax no longer being a tax but a fee. In levying a fee, it would also have to be taken into account that the revenue would not be allowed to exceed the costs of preventing and remedying environmentally damage specifically attributable to air transport, something which would be very difficult to ascertain.

charges on goods or persons on board the aircraft and would therefore in no way prohibit imposing a tax on kerosene that was newly taken on board.[51]

c) Interim conclusion

Even if it were applicable to domestic flights, which it is not, Art. 15 of the Chicago Convention does not prohibit taxing kerosene since its provisions apply neither to taxes nor to any other kind of charge that is not related to entry, exit or transit.

3.) Art. 24 of the Chicago Convention

As well as Art. 15, the provisions of Art. 24 of the Chicago Convention must also be given special consideration when looking at the question of the permissibility of various options for taxing kerosene.

a) The wording of Art. 24

The heading of Art. 24 of the Chicago Convention is "Customs duty." The first two sentences of the first paragraph are of particular interest for this report:

> *"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 regulation of the State. Fuel, lubricating oil, 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."* [52]

aa) Fuel taken on board is not covered

Irrespective of whether the types of charge mentioned in Art. 24 of the Chicago Convention cover a tax on kerosene, it can in any case be said that, for a taxation option based on the purchase of kerosene in the Federal Republic of Germany, Art. 24 in its unequivocal wording applies only to the imposition of charges on kerosene taken on board the aircraft in another

[51] Cf. Loibl/Reiterer, Rahmenbedingungen, p. 47 f.

[52] Cf. also the French version: « Au cours d'un vol à destination ou en provenance du territoire d'un autre État contractant ou transitant par ce territoire, tout aéronefs est temporairement admis en franchise de droits, sous réserve des règlements douaniers de cet État. Le carburant, les huiles lubrifiantes, le pièces de rechange, l'équipement habituel et les provisions de bord se trouvant dans un aéronef d'un État contractant à son arrivée sur le territoire d'un autre État contractant et s'y trouvant encore lors de son départ de ce territoire, sont exempts des droits de douane, frais de visite ou autres droits et redevances similaires imposés par l'État ou les autorités locales. »

Contracting state. Thus, Art. 24 of the Chicago Convention does not preclude taxation of fuel newly taken on board.[53]

bb) Types of charge covered

From the point of view of the types of charge covered by Art. 24 of the Chicago Convention, kerosene taxation would also be legally permissible. However, since that does not depend on the option based on purchase, we shall discuss the details of this later under D.) II.) 2.) b).

b) Broader interpretation of Art. 24 of the Chicago Convention?

In a number of different documents, the organs of the ICAO have attempted to prevent the contracting States from taxing fuel taken on board.[54]

It must therefore be examined whether these documents call for a broader interpretation of Art. 24 of the Chicago Convention contrary to its unequivocal wording.

As far as we are aware, no ICAO document explicitly puts forward the hypothesis that Art. 24 should be interpreted in such a way that it also prohibits taxing kerosene when it is taken on board.[55]

An interpretation of that kind would not be compatible with the interpretation rules set out by the VCLT. Although the wording of the "ordinary meaning rule" set out in Art. 31 I of the VCLT does not suggest that it should fundamentally take precedence over the systematic and teleological interpretation, it does, however, make clear that the interpretation of treaties established under international law should take an objective approach based on the actual text.[56] From this objective approach and the ordinary-meaning rule it can be inferred that clear wording that brings about clear and unequivocal understanding with regard to a particular question does not require any further interpretation (the so-called Vattelian principle).[57]

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[53] Also concluded, for example, by Loibl/Reiterer, Rahmenbedingungen, p. 53; TÜV Rheinland et al., Maßnahmen, p. 112.

[54] Cf. in particular the document adopted by the ICAO Council "ICAO's Policies on Taxation in the field of International Air Transport" (ICAO Doc. 8632, 3rd edition 2000), Section I, sub-section 1, to which Resolution A-33/19 App. E adopted by the Assembly refers, urging the States to comply with the principles set out in Doc. 8632. References can also be found in the recitals to Assembly Resolutions A-33/7 App. I and (for the 2nd edition of Doc. 8632) A-32/8 App. H; also in the preamble to the Council Resolution on Environmental Charges and Taxes of 9 Dec. 1996.

[55] On the contrary, Doc. 8632, Section II (Commentary), sub-section 2 explicitly sets out that this Resolution with its tax exemption for fuels taken on board goes beyond the provisions of Art. 24 of the Chicago Convention.

[56] The opposite view, taken equally frequently before the VCLT entered into force, is primarily based on the will of the contracting parties, the so-called subjective approach. For more on this question and the objective concept underlying the VCLT see, Ipsen, Völkerrecht, Section 11 Mn. 4 f.; Dahm/Delbrück/Wolfrum, Völkerrecht, p. 636 ff, especially. p. 640 f.; Herdegen, Völkerrecht, Section 15 Mn. 29; Bleckmann, Völkerrecht, Mn. 368; Verdross/Simma, Universelles Völkerrecht, Section 776.

[57] Ipsen, Völkerrecht, Section 11 Mn. 7.

Here the wording states clearly and unequivocally that only fuel already on board is exempt from any imposition of charges by another contracting State. The clarity of this wording leaves no scope for further interpretation.
An interpretation of Art. 24 of the Chicago Convention that was contrary to this clear wording would thus have to be classified not as an interpretation but as an amendment to the Convention. However, a formal amendment to the Chicago Convention is not possible on the basis of mere comments made in ICAO organs, but solely through the procedure set out in Art. 94 of the Chicago Convention, i.e. by ratification of the amendment by a specified number of contracting States.

c) Interim conclusion

In summary, it can thus be established that even if it were applicable to domestic flights – which it is not - the wording of Art. 24 of the Chicago Convention does not preclude a taxation of kerosene newly taken on board; it is not possible to arrive at any other conclusion through interpretation.

4.) Documents of ICAO organs

As mentioned earlier, the Resolution of the ICAO Council contained in ICAO Doc. 8632, which various Resolutions of the ICAO Assembly reaffirm, prohibits its Member States in certain circumstances from taxing kerosene taken on board. Independently of the detailed provisions of this Resolution, we must first of all consider whether documents of that kind can have a legally binding effect on ICAO Member States. That would fundamentally be possible from two points of view only: firstly, if, as provided for by the Chicago Convention, the Resolutions in question constituted secondary legislation passed by the ICAO organs within the bounds of the powers invested in them; secondly, if the Federal Republic of Germany may have made itself subject to the relevant binding Resolutions by virtue of voting in favour of them.

a) Binding effect of secondary legislation

In clarifying the question of whether the documents in question that were issued by ICAO organs constitute binding secondary legalisation two aspects must be distinguished: are the ICAO organs able to pass legally binding secondary legalisation in the matters of charges and

tax policy? If so, can the documents in question be classified as secondary legalisation in this sense, in other words do they fulfil the necessary criteria?

aa) Secondary legislation passed by ICAO organs

The contractual basis for any legislative activity by the organs of ICAO is located in Art. 37 of the Chicago Convention:

> *"Each contracting State undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures, and organization in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation.*
>
> *To this end the International Civil Aviation Organization shall adopt and amend from time to time, as may be necessary, international standards and recommended practices and procedures dealing with*
>
> *(a) …;*
> *...*
> *(j) Customs and immigration procedures;*
> *...;*
> *and such other matters concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."*

Art. 38 of the Chicago Convention regulates the possibilities for differing from the standards and procedures adopted under Art. 37:

> *"Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard. In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take. In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State."*

To classify these powers in legal terms it is necessary to begin by pointing out that the ICAO is an international organisation in the classic sense and not a supranational organisation

comparable to the EC, for example.[58] Correspondingly, any secondary legislation passed by the ICAO has an entirely different kind of effect from the secondary legalisation the European Community passes in the form of Regulations, Directives and Recommendations. Whereas the Regulations and Decisions of the EC have a direct effect and are directly applicable in the sense that firstly they do not require any transposition act to be valid in national law and secondly not only the EU Member States, but also individuals have rights and obligations as a result of this legislation,[59] the legislation of the ICAO must be qualified as international law in the classic sense, with the result that a transposition act is required for them to be valid in national law.[60] Accordingly, individuals cannot directly invoke the provisions of a standard adopted by the ICAO.

The legislation of the ICAO thus extends the commitments of its Member States in international law in terms of the obligations to which they made themselves subject when they ratified the Chicago Convention, but they do not directly extend the rights and obligations of individuals. By virtue of the fact that the organs of the ICAO may impose obligations in international law on the contracting States without their consent, thus possibly against their will, they represent a massive intervention in the sovereignty of the contracting States, which also includes the right to rule on the extent of their obligations. In view of this, and of the fact that the undivided sovereignty of the states beyond the supranational scope is still of central importance to both the understanding and functioning of the system of international law, the powers of the ICAO organs may not be extended beyond what is stated in the actual wording. On the contrary, the ICAO can only obligate the contracting States to the extent that they have been invested with corresponding authority.[61]

It must also be taken into account that the distribution of powers in a multi-level system of whatever kind must always be identifiable, definable and distinct in order to ensure that the different actors can work together effectively.

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[58] For a short yet precise treatment of the distinction between international and supranational organisations see Schweitzer, Staatsrecht III, Mn. 684 ff. On the supranationality of the European Communities see also Koenig/Haratsch, Europarecht, Mn. 12 f.

[59] For a general treatment of the validity of Community law in the national sphere see Geiger, Grundgesetz und Völkerrecht, Section 44. On the legal validity of Regulations and Decisions in particular cf. Schroeder in Streinz, EUV/EGV, Art. 249 EGV Mn. 52 ff., 132 ff.

[60] For extensive treatment of this cf. Schweitzer, Staatsrecht III, Mn. 418 ff; and also Geiger, Grundgesetz und Völkerrecht, Sections 29 ff.

[61] Under certain circumstances, powers of international organisations that go beyond the text of the treaty in question can also be inferred under the so-called implied-powers theory, according to which an international organisation must always have the powers that are essential to fulfilling its own remit. However, it is not possible to discuss this problem adequately until the powers the ICAO has been invested with by treaty have been established. Therefore, for further details see (5) below.

The provisions of Art. 37 f. of the Chicago Convention must therefore be interpreted on the basis of their wording. An extensive interpretation that goes beyond the wording would not only be detrimental to their definable quality and legal clarity, but also to the sovereignty of the contracting States, and would therefore be impermissible.

(1.) Possible objects of regulation of secondary legalisation passed by ICAO organs

Either Art. 37 (j) of the Chicago Convention or the general clause following the list of areas of competence could indicate the authority to regulate on tax matters. As far as Art. 37 (j) is concerned, it must be assumed that the term customs procedures does not cover tax matters. Firstly, this area of competence is entitled customs *procedures:* there is no mention of *imposing* customs duties*,* thus of their permissibility, the necessary circumstances for doing so etc. Secondly, the Chicago Convention distinguishes between customs duties and fees, taxes and other charges, as in Art. 24 for example. The authority to regulate kerosene taxation can thus not be inferred from Art. 37 (j) of the Chicago Convention.[62]

In determining the scope of the general clause in Art. 37, it is essential to note that the terms safety, regularity, and efficiency are listed cumulatively and not as alternatives, so that according to the wording there must be a relationship to all three areas.[63]

Regulating tax matters by way of these standards and recommended practices can scarcely be reconciled with this wording. While it is conceivable that that kind of question might be concerned with the efficiency of air navigation, it can hardly be construed that a tax on kerosene would be concerned with the safety and regularity of air navigation. It must be conceded that the term "concerned with" is quite a broad one, that, in particular, direct regulation is not required, but nevertheless attempts to construe a relationship to safety using the argument that higher costs might be detrimental to the maintenance of aircraft seem very far-fetched.[64] If "concerned with" was intended to be understood in such broad terms, the three matters to which it refers could have been listed as alternatives instead of cumulatively. However, from the systematic point of view, doubts concerning the necessity of a cumulative relationship are justified. The wording of the general clause which speaks of "*such other* matters concerned with …," suggests the conclusion that the authors of the Chicago

[62] Also the opinion of Loibl/Reiterer, Rahmenbedingungen, p. 70, Fn. 129 a.E.

[63] Loibl/Reiterer, Rahmenbedingungen, p. 70 f. rightly point this out. By contrast, many authors seem to work on the assumption that it is a question here of alternatives, cf. for example Erler, Rechtsfragen, p. 115; also Rosenthal, Umweltschutz, p. 150 f. In English and French the three areas are also linked by "and" and "et" respectively, and not by "or" and "ou".

[64] Loibl/Reiterer, Rahmenbedingungen, p. 71 consider that kind of argumentation to be "difficult but perfectly acceptable."

Convention were convinced that the matters previously listed were also concerned with these areas[65] – an assumption that in the case of a link between immigration procedures and the safety of air navigation, for example, seems rather doubtful.

From the teleological point of view, too, it is possible to cite arguments for a broad understanding of the general clause, since, although one of the main areas the Chicago Convention focuses on is the technical area, it does also include economic objectives (cf. e.g. the recital in the preamble as well as Art. 44 (d) and (e) of the Convention itself).[66]

However, the ICAO's many years of practice outweigh these systematic and teleological objections with regard to questions of taxation. Annex 9 to the Chicago Convention, which was adopted as early as 1947 as a "standard" as defined in Art. 37 of the Chicago Convention ("Facilitation"), was concerned, amongst other things, with tax issues. This Annex has been revised many times without – as far as we are aware – the contracting States ever protesting that the ICAO was overstepping its authority.

In practical terms, we can therefore establish that there is a consensual recognition of ICAO's authority on tax matters, which in legal terms must be classified as subsequent practice in the application of the treaty and which leads to the conclusion that the interpretation is based on a consensus among the contracting parties (cf. Art. 31 of the VCLT). This consensus evidently centres on the fact that the general clause in Art. 37 of the Chicago Convention should be interpreted in such as way as to include tax questions. Whether this conclusion is reached via an understanding of the three areas safety, regularity, and efficiency as alternatives or via a broad definition of "concerned with" remains questionable. Ultimately, however, this dogmatic classification can be left open to debate: seen in the light of legal practice, it must be concluded that the ICAO does have authority to pass standards and recommended practices that deal with tax issues.[67]

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[65] This footnote is redundant in English

[66] For further details on this teleological approach cf. Loibl/Reiterer, Rahmenbedingungen, p. 71 f.

[67] This is also the conclusion of Loibl/Reiterer, Rahmenbedingungen, p. 75. Authors who, like Erler, Rechtsfragen, p. 115, see the general clause as the "unrestricted authority to issue regulations on aviation" would presumably also come to the same conclusion for the question of taxing kerosene. TÜV Rheinland et al., Maßnahmen, p. 112 f. takes the opposing view, negating an authority here on the grounds that kerosene taxation is not one of the matters listed in Art. 37 of the Chicago Convention – a perfectly acceptable and convincing approach that takes into account the fact that Art. 37 of the Chicago Convention justifies the authority of the ICAO to autonomously develop the obligations of the signatory states under international law. However, as we stated earlier, in the interest of being identifiable, definable and distinct as is constitutionally necessary, this authority needs to be precisely and clearly limited, which is the intention of Art. 37 of the Chicago Convention. Against this background, a great deal speaks in favour of excluding tax regulations from the scope of the ICAO's authority. However, the practice of the signatory states, which is not necessarily legally applicable but nevertheless uniform and accepted, is contrary to this interpretation.

(2.) Distinction between "standards" and "recommended practices"

In looking at the question of whether legislation of that kind is legally binding, it is necessary to distinguish between standards and recommended practices.[68] The ICAO defines standards as:

> *"Standards: Any specification, the uniform observance of which has been recognized as practicable and as necessary to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54 (l) of the Convention, and in respect of which non-compliance must be notified by States to the Council in accordance with Art. 38."* [69]

By contrast, the definition of recommended practices is as follows:

> *"Recommended practices: Any specification, the observance of which has been recognized as generally practicable and as highly desirable to facilitate and improve some aspect of international air navigation, which has been adopted by the Council pursuant to Article 54 (l) of the Convention, and to which Contracting states will endeavour to conform in accordance with the Convention."*

A comparison of these two definitions leads to the conclusion that standards have a greater binding force than recommended practices. Observance of a standard is considered necessary; by contrast, observance of a recommended practice is considered to be merely desirable. Member States must apply a standard wherever possible, whereas they are merely asked to endeavour to conform with a recommended practice. What seems to be important is that only in the definition of standards is reference made to the opting-out procedure established under Art. 38 of the Chicago Convention. It can thus be established that at most the standards have a binding effect under international law in the sense that Member States are obliged to adopt these regulations into their national law.

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[68] Cf. on this Erler, Rechtsfragen, p. 116 ff.; Rosenthal, Umweltschutz, p. 151 f.

[69] ICAO, Annex 9 to the Chicago Convention: Facilitation, 11th edition 2002, Foreword. This definition corresponds to the one that was developed when Annex 9 was first adopted in 1949. It should be noted that the other Annexes to the Chicago Convention use a different definition, dating from 1947, which defines "standards" as "any specification …, which is recognized as necessary for the safety or regularity of international air navigation…" Annex 9 does not, however, refer to the safety and regularity of aviation, so that the extended definition was adopted, which also includes measures aimed at "facilitation." Cf. on this Buergenthal, Law-making, p. 61; Loibl/Reiterer, Rahmenbedingungen, p. 62.
In the context of this report, the definition from Annex 9 seems relevant, since tax questions fit better into the category of "facilitation" than "safety" or "regularity" and since the ICAO has correspondingly to date treated the question of imposing charges on air transport in Annex 9 only.

(3.) Binding force of standards based on the wording of the Chicago Convention

There are essentially three different opinions on the question of how binding standards are: they range from the view that their binding effect is strict, relaxed or non-existent.[70]
Both the English and German text[71] can be cited as an argument against the strictly binding effect[72] of Art. 37 I of the Chicago Convention: the wording "undertakes to collaborate in securing the highest practicable degree" clearly indicates that this is a legal obligation, but that the obligation is not to implement exactly the standards passed by the ICAO but to aim for the best possible implementation, with the Member States being given latitude to assess the possibilities for implementing them. Art. 38 of the Chicago Convention also points in the same direction: it allows the contracting States to differ from standards if it finds compliance impracticable or deems it necessary to differ from them. Here, too, the contracting States have discretionary power in assessing implementation. In other words, the contracting States evaluate the possibilities for implementation.
However, the view that the ICAO's standards should be seen as having no binding force is just as unfounded as an assumption of unlimited binding force.[73] In particular this approach does not take into account the distinction between standards and recommended practices, which is anchored in the Chicago Convention itself by virtue of the fact that Art. 38 refers to standards and procedures, but not to recommended practices. Similarly, the notification obligations set out in Art. 38 are difficult to reconcile with these standards and procedures having no binding force. Finally, from the teleological point of view, it should be noted that the function of the standards - to promote the safety and regularity of international air navigation - can only be fulfilled if compliance with the standards is not entirely left to the discretion of the states.[74]

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[70] On this problem cf. Erler, Rechtsfragen, p. 131 ff.; Rosenthal, Umweltschutz, p. 153 ff.; Cheng, The law of international air transport, p. 64 ff.; Buergenthal, Law-making, p. 57 ff. ; Mankiewicz, L' adoption des annexes a la convention des Chicago par le Conseil de l' Organisation de l' Aviation Civile Internationale. There are also a number of works that examine and compare the legislative powers of the UN and its various sub-organisations and special organisations; cf., for example, Alexandrowicz, Law making functions, p. 40 ff.; Detter, Law making, p. 247 ff.; Yemin, Legislative powers, p. 114 ff.
[71] "Each contracting state undertakes to collaborate in securing the highest practicable degree of uniformity in regulations, standards, procedures..."
[72] Thus, for example, Detter, Law making, p. 248; probably also Seidl-Hohenveldern/Loibl, Recht der Internationalen Organisationen, Mn. 1554.
[73] The opinion of, for example, Cheng, The law of international air transport, p. 64 f; Hailbronner in Bernhardt, EPIL, "International Civil Aviation Organisation," p. 1072; Buergenthal, Law-making, p. 77 f.; presumably also Alexandrowicz, Law making functions, p. 45 f.
[74] Also rightly in agreement with this Rosenthal, Umweltschutz, p. 155.

Thus, as an interim conclusion it can be said that the Chicago Convention justifies a limited obligation on the part of the contracting States in the sense that standards must be transposed into national law as far as possible. Thus, there is a kind of obligation to endeavour to comply, where the contracting States have discretionary latitude in assessing what is possible for them to implement. In exercising that discretionary power they are bound by the principle of good faith.[75]

(4.) Extended binding force based on the ICAO's definitions?

To make the case that standards have a binding nature that goes beyond the subjective assessment[76] that has been left to the discretion of the contracting States we cite the fact that - following the principles of Art. 31 of the VCLT, under which subsequent agreements between contracting parties must be take into consideration in the interpretation - Art. 38 of the Chicago Convention must be interpreted in the light of the definitions of 1947, extracts of which have already been cited.[77] It is thus questionable whether the standards adopted by the ICAO itself contain a uniform definition of their binding nature that goes beyond that established under Art. 38 of the Chicago Convention, upon which the interpretation of Art. 38 would have to be based.

It must be conceded that the 1947 definition of "standards" does say that "in the event of impossibility of compliance, notification to the Council is compulsory under Art. 38" and that that does, in fact, replace the subjective discretionary power of the contracting States accorded under Art. 38 of the Chicago Convention by the more objective sounding "in the event of impossibility of compliance."[78] It is also relevant that, with the exception of Annex 9, this 1947 definition for the Annexes to the Chicago Convention has been in use in the same form for 60 years and is regularly adopted again whenever the Annexes are revised without – as far as we are aware – prompting protests or reservations on the part of the contracting States. Nevertheless, in conclusion, it is still not possible to assume a general consensus amongst the contracting States upon which the interpretation of Art. 38 of the Chicago Convention could be based. The reasons for that are as follows:

As we have already mentioned several times, two definitions that are regularly repeated have co-existed since 1949. They differ from one another not only on the question of what a

[75] Erler, Rechtsfragen, p. 134; Rosenthal, Umweltschutz, p. 154 f.; Loibl/Reiterer, Rahmenbedingungen, p. 69; and Yemin, Legislative powers, p. 149 f come to the same conclusion; cf. also Dahm, DÖV 1959, p. 361/364.
[76] Cf. Art. 38: "any state *which finds it impracticable*"
[77] Especially Loibl/Reiterer, Rahmenbedingungen, 67 ff.
[78] Loibl/Reiterer, Rahmenbedingungen, p. 67 f., base their view on this.

standard can regulate but also with regard to what they say about the binding nature of standards. The wording in question in the definition used in Annex 9 is merely "non-compliance must be notified." This wording does not permit the conclusion that the binding force is greater than that suggested by Art. 38 of the Chicago Convention; it contains no details at all on the possible grounds for "non-compliance." It must be noted here that in the extension of the objects of regulation achieved by the 1949 definition no change would to the phrase concerned with the binding force would have been necessary; on the contrary, it would have been possible to adopt the existing definition. We must therefore assume that this was a deliberate deviation from the 1947 definition.

It can thus be said that since 1949 two different definitions have regularly been used that differ from one another on the question of the binding nature that is of interest here.[79] From this it can be concluded either that there is no consensus amongst the contracting parties upon which the interpretation of Art. 38 of the Chicago Convention should be based or that there are more specific agreements that differ on what areas a standard regulates. If one takes the latter view, the definition in Annex 9, which does not differ in terms of degree of binding force from the definition in Art. 38 of the Chicago Convention, would be most relevant; the former view would in any case make reference solely to Art. 38.

In conclusion, it must therefore be said that at least the standards that are concerned with levying charges on air transport cannot be deemed to have any binding force beyond the wording of Art. 38 of the Chicago Convention by virtue of definitions contained in the Annexes.[80]

(5.) Extended binding force based on the implied-powers theory?

According to a ruling of the International Court of Justice (ICJ), powers that go beyond the explicit wording of the founding treaty of an international organisation can exist on the basis of what is known as the implied-powers theory,[81] which says that an international organisation must always be invested with the powers that are essential for it to fulfil its remit as set out in the relevant treaty. The agreement of the individual Member States with the purposes of the treaty agreed is considered to implicitly include their acceptance of the means necessary to achieve these aims, since otherwise the Member States would be acting inconsistently. Irrespective of whether this theory can be generally accepted, in the case of

[79] Loibl/Reiterer, Rahmenbedingungen, p. 68, overlook this when they speak of the consistent practice of the ICAO since 1947.
[80] Thus, the opinion of Loibl/Reiterer, Rahmenbedingungen, p. 68 f, is unfounded.
[81] Cf. on this Ipsen, Völkerrecht, Section 6 Mn. 8 f.

legislative powers in the question of taxing kerosene a recognition of that kind of implied powers for ICAO can be ruled out.
In order to fulfil its remit to foster international air transport as established under Art. 44 of the Chicago Convention, the ICAO does not depend on its ability to pass standards regarding the permissibility of taxing kerosene that must be unreservedly transposed into national law. There are no evident grounds to believe that a lack of uniformity in individual state practice on this matter could jeopardise international civil aviation in its development, efficiency or safety to such an extent that the ICAO would not be able to fulfil the remit assigned to it through its founding treaty unless it were granted powers to legislate in the area of kerosene taxation that go beyond the wording of the Chicago Convention.
Thus, with regard to kerosene taxation, a recognition of powers that go beyond the wording of the Chicago Convention on the basis of the implied-powers theory must therefore be refuted.

(6.) Subsequent departures from standards

It remains to be examined whether the contracting States may differ from the standards prescribed by the ICAO only when a new standard comes into force or an existing one is amended or whether this possibility exists even some time after an amendment or new standard has come into force.
Art. 38, 2nd sentence of the Chicago Convention stipulates only that a contracting State that does not bring its national law into line with the amendment to a standard must notify the Council within sixty days of the adoption of the amendment to the international standard. Art. 38 of the Chicago Convention does not explicitly regulate for what would be the opposite case – that a contracting State wishes to differ from ICAO practice by amending its national legislation without any reference to an amendment to an existing international standard or introduction of a new one.
However, Art. 38, 1st sentence of the Chicago Convention probably does cover this case when it says that "Any state … which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the international standard." The fact that the obligation to notify subsequent differences was explicitly stipulated points to the permissibility of that kind of change to national law.

Thus, it can be established that the contracting States are allowed to depart from the provisions of a "standard" but that they must notify the ICAO without delay.[82] The criteria for the permissibility of differences described above still apply in such cases, so that any departures from ICAO practice are to be avoided as far as possible.

(7.) The powers of ICAO organs to issue standards

The adoption of international standards and recommended practices is the responsibility of the ICAO Council, cf. Art. 54 (l) of the Chicago Convention along with the definitions quoted above. The ICAO Council consists of representatives from 36 contracting States, who are elected for a three-year term by the Assembly, in which all the contracting States are represented.[83] Standards are adopted or amended by the Council - contrary to the basic provision in Art. 52 of the Chicago Convention - by a two-thirds majority; cf. Art. 90.[84]

(8.) Formal requirements to be met by standards

Art. 54 (l) of the Chicago Convention stipulates that the functions of the Council include adopting standards and that it shall "for convenience designate them as Annexes to this Convention." Currently there are 19 such Annexes. The question can remain open to discussion here as to whether the original intention of the Convention was that this designation should have a statutory character. What is of decisive importance is that in the meantime a number of Annexes have been so designated, whereas conversely – as far as we are aware - the ICAO Council has not claimed binding force on the basis of Articles 37 ff. of the Chicago Convention for any document it has adopted that has not been designated an Annex to the Convention and thus laid claim to the character of a "standard."

There is thus a legal practice that all "standards" as defined in Art. 37 of the Chicago Convention are declared to be Annexes to the Convention. Seen against this legal practice, it can be assumed that the provision of Art. 54 (l) of the Chicago Convention has, for reasons of legal certainty and clarity, acquired a mandatory character, in other words that only those

[82] This is also the conclusion of Rosenthal, Umweltschutz, p. 154 f.; Erler, Rechtsfragen, p. 139 f.; Buergenthal, Law-making, p. 79. This applies equally to new standards and amendments to existing standards, cf. for example Buergenthal, op. cit., p. 92 f.

[83] On the composition of the Council see the provisions of Art. 50 of the Chicago Convention. For extensive treatment of this and the Council's fields of activity cf. Erler, Rechtsfragen, p. 20 ff.

[84] Admittedly, this is somewhat controversial in the case of amendments. On this problem see, for example, Erler, Rechtsfragen, p. 124 ff.; Buergenthal, Law-making, p. 64 f.

regulations that have been designated Annexes to the Chicago Convention acquire the legal validity of a standard.[85]

(9.) Interim conclusion

As an interim conclusion, it can thus be noted that, taking legal practice into consideration, the ICAO Council does seem to have the authority to regulate on tax matters by way of standards. Seen against the backdrop of the ICAO's long-established legal practice, the only type of regulation that can be considered as standards are those that have been declared to be Annexes to the Chicago Convention. The contracting States are obliged to transpose these standards as far as possible into national law. If they deem it to be necessary, the contracting States may also subsequently depart from existing standards.

bb) Existence of legally binding secondary legalisation in this particular case

Against this background, we must now examine whether a standard currently exists that prohibits Member States from taxing kerosene that is taken on board. As already mentioned, the only Annex that deals with tax issues is Annex 9.

No other ICAO document dealing with different aspects of levying charges on air transport has the status of a standard. This is particularly true of the numerous resolutions passed by the Council and the Assembly. The statements should be classified as "soft law,"[86] in other words as political agreements created by the participating actors without the will to make them binding, in contradiction to their designation as "law."[87] The legal meaning of "soft law" is confined to reducing the sphere of domestic affairs - the "domaine reserve" - in which third countries may not intervene due to the prohibition on intervention.[88] Furthermore, the existence of soft law can represent a transition phase in the development of international customary law that is binding, whereby, in view of the lack of will for them to be legally binding, resolutions adopted by the organs of international organisations can on no account be

[85] The endeavours of the ICAO to make a clear and transparent distinction between statements that are non-binding and binding to a limited extent is also evident within the individual Annexes, in which actual "standards" are distinguished from the supplementary "recommended practices" by sub-headings, wording and typefaces. This practice dates back over many years and indicates that ICAO legislation is characterised by a high degree of formal clarity and that against that background the assumption that Art. 54 (l) has a binding character is absolutely logically consistent.
Also convinced of its binding nature is Abeyratne, ZLW 1992, p. 387/388.

[86] In agreement with this is also Loibl/Reiterer, Rahmenbedingungen, p. 77.

[87] On the phenomenon of "soft law" cf. the detailed description by Thürer "soft law" in Bernhardt, EPIL; also an overview in Ipsen, Völkerrecht, Section 20 Mn. 20 ff; with particular reference to the resolutions of international organisations also Doehring, Völkerrecht, Mn. 745 ff.

[88] Herdegen, Völkerrecht, Section 20 Mn. 4.

understood as a blanket indication of the existence of international customary law.[89] Similarly, a contravention of soft law cannot be classified as a contravention of valid international law but at best as a contravention of a "political obligation," so that conversely the legality of a measure does not depend on its compatibility with resolutions of that kind.

Thus, within the only relevant document, Annex 9, a further distinction must be made between standards, on the one hand, which are binding to a limited extent, and fundamentally non-binding recommended practices, which are adopted to explain the standards and make them more specific and which are set apart from the standards by the use of sub-headings, wording, and typefaces.[90]

There is a provision relevant to taxation of kerosene in the currently valid version[91] of Annex 9 in Chapter 4, section E. It states:

> *4.36 "Stores and commissary supplies imported into the territory of a Contracting State for use on board aircraft in international service shall be relieved from import duties and taxes, subject to compliance with the customs regulations of the State."*

Three accompanying non-binding recommended practices follow under 4.37 to 4.39. A prohibition on taxing kerosene newly taken on board cannot be inferred from these recommended practices, nor from the standard cited.

Thus, legally binding secondary legalisation passed by the ICAO does not preclude the introduction of a tax on kerosene linked to purchase.

b) Voluntary commitment by the Federal Republic of Germany

However, it is possible that a tax on kerosene linked to the purchase of fuel could be legally impermissible due to the fact that the Federal Republic of Germany approved those statements by the ICAO that are classified as soft law and according to which the Member States should desist from levying taxes of that kind.

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[89] For extensive treatment of this problem see Doehring, Völkerrecht, Mn. 308. On the UN General Assembly see also Ipsen, Völkerrecht, Section 18 Mn. 2, Section 16 Mn. 20 and Verdross/Simma, Universelles Völkerrecht, Sections 634 ff.
Beyond fundamental objections to making a case on the grounds of international customary law, a prohibition in customary law against kerosene taxation is to be refuted merely on the grounds that even the ICAO acknowledges that on this issue there is definitely no consensus amongst the signatory states. Thus, the preamble to the new version of Resolution A-33/7 drafted by the ICAO Assembly in October 2004 explicitly notes that "the ICAO policy on exemption of aviation fuel from taxation has been called into question in some Contracting states." There are also examples of taxation of kerosene in the legal practice, which make it impossible to make a case for the assumption of customary law on the basis of practice within the signatory states. There is thus neither legal conviction nor uniform practice across the signatory states.

[90] On the clear distinction criteria and the structure of the Annexes, cf. Erler, Rechtsfragen, p. 118.

[91] 11th edition 2002.

A state that votes in favour of a Resolution and subsequently acts contrary to the provisions of that Resolution is in fact acting to a certain degree in contradiction of its own former behaviour. This inconsistent conduct could constitute a contravention of the generally valid principle in international law of *venire contra factum proprium,* which is also known as the "estoppel principle."[92]

Against an argument of that kind it must first of all fundamentally be said that to assume a legally binding voluntary commitment has been made by virtue of voting in favour of a non-binding Resolution is ultimately contrary to the non-binding nature of that Resolution. By construing voluntary compliance, purely factual conduct determined solely by political motives, from which no will to create a legally binding situation can be inferred, has been reinterpreted "through the back door" as it were to become a legally binding declaration. The application of the principle of estoppel to that kind of resolution must therefore be refuted.[93]

Beyond these general considerations, it must be taken into account in specific cases that Doc. 8632 "ICAO's policies on taxation in the field of International Air transport" is the only document that can be regarded as underpinning ICAO policy on tax exemptions for kerosene taken on board by aircraft. All other statements on this topic refer solely to this document. However, back in 1997, the Federal Republic of Germany submitted a declaration on the second edition of Doc. 8632, which had the following wording:

> "*General Comments*
> 1. *Although the resolutions do not comply with the policy of its Government, Germany follows these resolutions* ***at present****.*
> 2. *The Government of Germany has decided to introduce also in international commercial air transport* ***a taxation on the consumption of fuel and lubricants*** *as well as* ***a taxation on the sale and use of international passenger air transport****. Accordingly regulations are to be implemented within the European Union.*[94]
>
> *...*"

With that the Federal Republic of Germany has expressed the fact that it neither supports the principles set out in Doc. 8632 nor intends to observe them in the long term. In systematic terms, this declaration forms a constituent part of Doc. 8632, so that any reference to this document also includes the German declaration cited. It is thus not possible to infer any

[92] Cf. on this Doehring, Völkerrecht, Mn. 310; also Verdross/Simma, Universelles Völkerrecht, Section 583 a.E. With regard to terminology, a distinction is sometimes made between the estoppel principle and *venire contra factum proprium*, but that is immaterial in this context. Cf., for example, Müller/Cottier: "estoppel" in Bernhardt, EPIL. For a general commentary on the validity of this principle in international law see also Bleckmann, Völkerrecht, Mn. 217 ff.; Doehring, Völkerrecht, Mn. 410.

[93] Thus, rightly Doehring, Völkerrecht, Mn. 310.

[94] Doc. 8632, 3rd edition 2000, Supplement, Part B. Original emphasis.

voluntary commitment from the fact that the Federal Republic of Germany possibly voted in favour of subsequent Resolutions of the Assembly, because that assent includes the declared "reservation." Thus, also in the light of factual criteria, it is not possible to see the introduction of a tax on kerosene as "inconsistent conduct."
The permissibility of introducing kerosene taxation is thus not precluded by any voluntary commitment to the contrary by the Federal Republic of Germany.

c) Interim conclusion

The various statements of ICAO organs, considered in the light of any legal criterion, do not preclude the introduction of a kerosene tax linked to the purchase of fuel.

5.) Conclusion

Even if the Chicago Convention were applicable to domestic air transport in any way, neither the Convention itself nor the various documents adopted by ICAO organs preclude the introduction of a kerosene tax linked to the purchase of fuel.

III.) Compatibility with bilateral aviation agreements

In this section we shall consider whether the introduction of a tax on kerosene linked to the purchase of kerosene would be compatible with the bilateral aviation agreements the Federal Republic of Germany has concluded.

1.) General significance of bilateral aviation agreements

Bilateral agreements concluded between the individual aviation countries flesh out international aviation law within the framework set by the Chicago Convention,.[95] The Federal Republic of Germany has entered into agreements of that kind with 100 countries.[96] The bilateral aviation agreements are based on various model agreements, in particular the Bermuda I Agreement of 11 February 1946 concluded between the USA and Great Britain and the follow-up agreement concluded between the same two parties on 3 July 1977 and known as the Bermuda II Agreement. Individual countries have developed their own model agreements on the basis of these prototypes.

[95] Basic information on bilateral aviation agreements can be found, for example, in Ipsen, Völkerrecht, Section 55 Mn. 41 ff.; Weber in Bernhardt, EPIL, Air transport Agreements; Schwenk, Luftverkehrsrecht, p. 482 ff. Probably the most comprehensive description, although some of the details are out of date, can be found in Kloster-Harz, Luftverkehrsabkommen, passim.
[96] Ipsen, Völkerrecht, Section 55 Mn. 41, for 31.12.2002.

The central component of all aviation agreements is the reciprocal granting of traffic rights for air routes in and between the contracting States. Many individual regulations are agreed to facilitate the operation of air services between the contracting partners. They range from the naming of airlines authorised to exercise traffic rights to flight schedules, price setting and authorisation through to air safety issues.[97]

For this report the clauses contained in virtually all the agreements on exemption from customs duties and other charges are of particular interest. However, in assessing the permissibility of various options for taxation of kerosene, the problem arises that the details of the relevant clauses differ considerably. It is therefore not possible to make general statements about the legal permissibility (or impermissibility) of a taxation option based on the purchase of kerosene in the Federal Republic of Germany. Rather, what is decisive for the possibility of introducing taxation is the origin of the aircraft and the specific detail of the aviation agreement that has been concluded with the country of origin in question.

2.) Classification of aircraft to particular bilateral agreements

In considering the question of which bilateral agreement is applicable to which aircraft, it is not as a rule the nationality of the aircraft[98] that is important. Rather, the tax exemption clauses in the individual agreements apply as a rule to aircraft that are used by a company designated by one of the contracting parties. Thus, the tax exemption covers all aircraft that are deployed by a company that has been cited within the framework of the bilateral agreement or follow-up diplomatic notes as being authorised to exercise traffic rights. From that it follows that neither the nationality of the individual airlines nor the question of what criteria should be used to determine that nationality are decisive, but solely the naming of a particular airline within the framework of the agreement.

[97] A detailed overview of the content of important clauses is given in Schwenk, Luftverkehrsrecht, p. 489 ff., and Kloster-Harz, Luftverkehrsabkommen, p. 49 ff.

[98] With regard to nationality, Art. 17 of the Chicago Convention states that aircraft have the nationality of the state in which they are registered, the requirements for registration in accordance with Art. 19 of the Chicago Convention being based on the law of the individual states. Thus, according to the wording, the formal criteria alone are decisive. For extensive treatment of this and the question of whether, contrary to the wording, a registration may be carried out only if the country of registration has effective national jurisdiction over the aircraft to be registered cf. Schwenk, Luftverkehrsrecht, p. 261 ff.

3.) The irrelevance of bilateral agreements for taxation of German aircraft

The first thing to emphasise is that bilateral agreements do not contain any provisions concerning the taxation of aircraft used by German airlines. The aviation agreements must be taken into account solely regarding the question of taxing aircraft used by foreign airlines.

4.) The irrelevance of bilateral agreements with third countries

Whether bilateral agreements preclude the introduction of taxation on kerosene intended for use on domestic flights depends first of all on whether these agreements even grant foreign airlines the right to operate domestic flights.

For the definition of the term domestic flights we can refer to the relevant comments on the Chicago Convention.[99] As stated there, the term covers all flights that are operated between two airports in the same country, the purpose of which includes the transportation of passengers, luggage, cargo and mail between these domestic German airports only.[100] Thus, it is not a question of these transportation services being actually used, merely of the airline offering the services.

According to Art. 7 of the Chicago Convention, the right to operate domestic flights, which is also known as the eighth freedom of the air or the right of cabotage,[101] may be reserved for domestic airlines. Correspondingly, Section 23 of the German Air Transport Act (LuftVG) states that, subject to the aviation law of the European Community, the commercial transportation of passengers and goods by aircraft between places within [German] national territory may be reserved for German airlines.[102]

The Federal Republic of Germany has applied this rule and has not granted cabotage rights to foreign airlines in its bilateral aviation agreements.[103]

Thus, bilateral agreements do not preclude taxation of kerosene intended for use on domestic flights, since they do not grant foreign airlines the right to operate flights of that kind.

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[99] Many bilateral agreements make reference to the definition of the opposite term "international flights" in Art. 96 Chicago Convention; to some extent the agreements also contain their own definition of terms that does not always correspond to that given in Art. 96 of the Chicago Convention.

[100] Thus, for example, the aviation agreement concluded between the Federal Republic of Germany and France, Art. 6 para. V.

[101] An overview of the eight freedoms of the air can be found in Schwenk, Luftverkehrsrecht, p. 490 ff.

[102] For more details on this and on German practice see the commentary on Section 23 of the Aviation Act (LuftVG) in Giemulla/Schmid, Luftverkehrsgesetz; cf. also Schwenk, Luftverkehrsrecht, p. 492.

[103] According to unpublished information from the Federal Ministry for Transport, Construction and Housing.

5.) Significance of bilateral agreements with other EU Member States

The significance of the bilateral agreements that the Federal Republic of Germany has entered into with other EU Member States for evaluating the permissibility of taxing kerosene on domestic flights is also questionable.

a) Validity of bilateral agreements for traffic rights under Community law

It is problematic that, although airlines from other EU Member States are not as a rule granted traffic rights for domestic flights under the relevant bilateral agreements, according to Art. 3 of Regulation (EEC) 92/2408,[104] thus Community law, all Community air carriers[105] have had unlimited right of cabotage as of 1 April 1997.[106]

Thus, the question arises as to whether the tax clauses in the bilateral agreements, which in their regulatory context refer exclusively to international flights between the two contracting parties to the bilateral agreement, also extend to traffic rights that are based not on agreements or follow-up exchange of notes but on Community law .

Extending the scope of the tax clauses of bilateral agreements to domestic flights by way of interpretation represents an extension of contractually agreed commitments that is fundamentally difficult to reconcile with the sovereignty of the contracting parties. A treaty in international law may be modified by subsequent agreements between the contracting parties without it being necessary to amend the text of the original treaty, cf. for example Art. 39 of the VCLT. Thus, the general rule of *lex posterior derrogat legi priori* applies.[107] It is also basically possible for agreements between EU Member States to be modified by Community law, since the Member States are involved in the legislative process within the Community. However, in the case in question here, there are no grounds whatsoever for believing that in reciprocally granting cabotage rights the Member States also wanted to incorporate an extension of the tax privileges agreed for international flights. There is no reason for that kind

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[104] Regulation (EEC) No. 2408/92 of 23rd July 1992 on Access for Community Air Carriers to Intra-Community Routes, OJ L 240 of 24.08.1992 p. 008 ff.

[105] A Community air carrier is any airline that has been granted an operating licence by a Member State. Cf. the legal definition in Art. 2 b) of Regulation 2408/92; näher dazu Niejahr in: Frohnmeyer/Mückenhausen, EG-Verkehrsrecht, Section 51 Mn. 146 ff. The requirements issuing an operating licence are harmonised under Community law and are based on Regulation 2407/92/EC on the licensing of air carriers; for a conprehensive treatment of this see Niejahr, op. cit., Mn. 27 ff.

[106] An overview of the liberalisation of intra-Community aviation and the content of the individual regulations can be found in Niejahr in: Frohnmeyer/Mückenhausen, EG-Verkehrsrecht, section 51, especially Mn. 165 f.; cf. also Schwenk, Luftverkehrsrecht, p. 507 ff., especially p. 521.

[107] In accordance with the legal principle of *lex posterior derrogat legi priori,* more recent legislation takes precedence over prior legislation. For a general treatment of this cf., for example, Kramer, Methodenlehre, p. 86 f.

of extension of tax privileges, particularly since the bilateral agreements do not grant cabotage rights and therefore no problems arise with regard to unequal treatment of cabotage flights in exercise of Community law traffic rights and in exercise of traffic rights based on bilateral agreements.

But, with regard to intra-Community flights, precisely this distinction could arise, which is problematic in actual and legal terms, in so far as traffic rights granted in bilateral agreements coexist alongside those granted under Community law. Since the bilateral agreements retain validity provided they are not in violation of Community law[108] and in order that the companies named within the framework of these agreements can continue to claim the privileges granted to them, it seems perfectly conceivable with regard to intra-Community flights to achieve equal treatment by extending the scope of the tax clauses in the bilateral agreements by way of interpretation to apply also to flights operated in exercise of Community traffic rights.

If, against this background, we take into account the will of the Community legislature to grant international and domestic flights equal status within the Community and to overcome the system of reciprocal privileges being granted through bilateral international agreements - a will which was reflected in the act of opening up comprehensive market access - an extension of the scope of tax clauses to domestic flights might not seem necessarily obvious in legal terms but it cannot be completely ruled out.

Even if the arguments weigh against applying the tax clauses to domestic flights, we shall nevertheless explore below whether tax clauses in the bilateral agreements would preclude kerosene taxation if they were applicable on domestic flights operated in exercise of Community traffic rights. This review, which has the distinct character of a supplementary opinion, will show that even if they did extend to traffic rights anchored in Community law, the tax clauses in the bilateral treaties would not preclude kerosene taxation.

b) Bilateral agreements overridden by Art. 14 II of Directive 2003/96

The tax clauses could prove to be inapplicable due to the fact that the provisions of intra-Community bilateral agreements are for their part overridden by Community law.

[108] Which is not the case, due to the fact that the Member States are not obliged to introduce a tax on aviation gasoline under the relevant tax clauses. Cf. comments below under b).

For taxation of aviation gasoline, the blanket prohibition of Directive 92/81 EC has been in force since 1992[109]:

> *"Article 8*
> *(1) In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonized excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:*
>
> *a)…;*
> *b) Mineral oils supplied for use as fuels for the purpose of air navigations other than private pleasure flying.*
> *For the purposes of this Directive, 'private pleasure flying' shall mean the use of 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 remunerated services or for the purposes of public authorities Member States may limit the scope of this exemption to supplies of jet fuel (CN code 2710 00 51);*

This blanket prohibition has a clearly greater scope than most intra-Community bilateral agreements, which, for example, with regard to kerosene taken on board are confined as a rule to a tax exemption for aviation gasoline intended for use in international aviation.
The relationship between bilateral agreements between EU Member States and secondary Community law is thus questionable. Seen from the point of view of the hierarchy of norms, regulations made under secondary Community law fundamentally supplant bilateral agreements between the EU Member States with the result that the provisions of an agreement become inapplicable whenever they contradict secondary law. This precedence of Community law does not result from Art. 307 of the EC Treaty, which does not apply to inter-se agreements between Member States,[110] but from the general *lex posterior* principle, under which more recent legislation has precedence over prior legislation, and from the primacy of Community law.[111]

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[109]Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils, Official Journal L 316 of 31.10.1992, p. 0012 – 0015.
[110]This is also the view of Kokott in Streinz, EUV/EGV, Art. 307 EGV Mn. 2; Petersmann/Spennemann, in: von der Groeben/Schwarze, EUV/EGV, Art. 307 EGV Mn. 7
[111] This is also the view of Schwenk, Luftverkehrsrecht, p. 516; cf. also ECJ, Ruling 235/87-Matteuci, Slg. 1988, 5606 ff., Mn. 20 ff; also Schmalenbach in Callies/Ruffert, EUV/EGV, Art. 307 EGV Mn. 5. Niejahr, in Frohnmeyer/Mückenhausen, EG-Verkehrsrecht, section 51 Mn. 2 and 8 also of "replacement" or "supplanting" albeit without justifying his use of the terms. For international treaty law, the *lex posterior* principle is explicitly established in Art. 30 III WV; on the scope and meaning of this principle in international law generally see also Dahm/Delbrück/Wolfrum, Völkerrecht, p. 686, 692 f.

Consequently, the total prohibition in Community law takes precedence over detailed provisions of the bilateral agreements, which thus become inapplicable if they permit the imposition of mineral oil taxes on aviation gasoline contrary to the bilateral agreements.[112] However, it must be noted that ultimately there is no irreconcilable contradiction between the two regulations, since the Member States can fulfil the requirements of both regulations by non-taxation.

This total prohibition under Community law is eased by the provisions of Directive 2003/96, which allows kerosene to be taxed on domestic flights and under certain conditions also on intra-Community flights. Art. 14 of Directive 2003/96 states:

> *"(1) In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of taxable products, and without prejudice to other Community provisions, Member States shall exempt the following from taxation ...:*
> *a) ...*
> *b) Energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure flying.*
> *For the purposes of this Directive "private pleasure flying" shall mean 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 remunerated services or for the purposes of public authorities.*
> *Member States may limit the scope of this exemption to supplies of jet fuel (CN code 2710 19 21 ;*
> *c) ...*
> *(2) 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."*

Thus, pursuant to Art. 14 II 1 of Directive 2003/96, Member States are entitled but not obliged under Community law to introduce a tax on kerosene for domestic flights. That gives rise to the question of whether the Member States can make use of this entitlement only on the condition that bilateral agreements do not preclude taxation. The wording does allow an unequivocal conclusion: the word "may" can be understood as an entitlement subject to or irrespective of the bilateral agreements.

[112] Also the provisions of the bilateral agreements relating to tax are largely overridden by Community law; thus, for instance, customs duties and other charges levied on the import and export of goods within the Community are prohibited per se.

The fact that there is no contradiction between bilateral agreements and Community law speaks in favour of the option "subject to" international agreements, since the Member States can fulfil both regulations by not introducing a tax.
However, in that regard it must be noted that pursuant to Art. 2 of the EC Treaty protection and improvement of the quality of the environment are amongst the Community's objectives listed in the Treaty.[113] The objectives set out in Art. 2 of the EC Treaty are not just broad political statements; on the contrary they have a legally binding, steering function, since they must be taken into account as an aid to interpretation for the teleological interpretation of secondary legalisation.[114] In the case of environmental protection this principle also ensues from the horizontal clause of Art. 6 of the EC Treaty, which, through its wording and its position in the treaty, underlines the high status accorded by the Community to environmental policy.[115] If we interpret Art. 14 II of Directive 2003/96 in the light of environmental policy concerns, this regulation can be understood only in the sense that it permits the introduction of a kerosene tax on domestic flights irrespective of any existing bilateral agreements, since only this interpretation allows for across-the-board taxation of domestic flights. Only across-the-board taxation of flights within a country can guarantee that the introduction of a tax on kerosene will also make it possible to create ecological incentive effects.
However, ultimately environmental aspects alone cannot do anything about the continued existence of the bilateral agreements. The tax clauses in the bilateral agreements have never been revoked nor were they at any time incompatible with Community law, so that there is nothing to suggest an implied repeal.
Most arguments thus speak in favour of the view that Art. 14 II of Directive 2003/96 allows Member States to introduce a tax on kerosene on domestic flights only on the condition that bilateral agreements do not preclude it.

[113] Environmental protection as a Community objective and the interaction on this matter between Articles 2, 6 and 174 EGV is extensively discussed by Schröder in Rengeling, HdBUR, Section 9.
[114] This is also rightly the view of v. Bogdandy in Grabitz/Hilf, EUV/EGV, Art. 2 EGV, Mn. 8 and 13 ff.; Streinz idem, EUV/EGV, Art. 2 EGV Mn. 8 and 18.
[115] Callies in Callies/Ruffert, EUV/EGV, Art. 6 EGV Mn. 1. For an extensive treatment of the substantive statements of Art. 6, its legal force and its function as a yardstick for interpretation see also Kahl in Streinz, EUV/EGV, Art. 6 EGV, especially Mn. 9, 13 ff. and 24 f; also Schröder in Rengeling, HdBUR, Section 9 Mn. 23 ff.

6.) Content of the bilateral agreements

Thus, it is questionable whether the bilateral agreements concluded between the Federal Republic of Germany and other EU Member States preclude a tax based on the purchase of kerosene for use on domestic flights.

a) Normal case: linking the fuelling clause to international air transport

As an example, we shall cite here the corresponding clause in the agreement concluded between the Federal Republic of Germany and Austria:

> *"(1) Aircraft used by any company designated by one contracting party, and entering, departing from or flying across the territory of the other including fuel, lubricants, spare parts, regular equipment and stores on board shall be exempt from customs duties and other charges imposed on the import, export or transit of goods. This shall also apply to goods on board said aircraft that are consumed during the flight across the territory of the latter contracting party.*
>
> *(2) Fuel, lubricants, stores on board, spare parts, and regular equipment temporarily imported into the territory of one contracting party in order to be immediately or after storage installed in or otherwise taken on board the aircraft of a designated airline of the other Contracting Party, or to be otherwise exported again from the territory of the former Contracting Party, shall be exempt from the customs duties and other charges mentioned in paragraph 1 above,*
>
> *(3) Fuel, lubricants and other consumable technical supplies taken on board the aircraft of any designated airline of either Contracting Party in the territory of the other Contracting Party and used in international air services shall be exempt from the customs duties and other charges mentioned in paragraph 1 above, as well as from any other special consumption charges.*
>
> *(4) Each Contracting Party may keep the goods mentioned in paragraphs 1 to 3 above under customs supervision.*
>
> *(5) Where no customs duties or other charges are levied on goods mentioned in paragraphs 1 to 3 above, such goods shall not be subject to any economic prohibitions or restrictions on importation, exportation or transit that may otherwise be applicable."*

According to these provisions, a tax exemption for fuels taken on board applies only when it is taken on board for use in international air services, so that taxation of kerosene taken on board for use on domestic flights is permissible. With regard to the terms “scheduled air

service" and " international air services," Art. 1 of the agreement makes reference to the definitions in the Chicago Convention described above.
The fuelling clauses in the agreements concluded by the Federal Republic of Germany with Finland, Ireland, Luxemburg, the Netherlands, Spain, Portugal, Estonia, Latvia, Lithuania, Poland, the Czech Republic, Hungary, and Malta explicitly assume the use of kerosene on international flights and thus do not preclude taxation on domestic flights.
The agreements concluded by the Federal Republic of Germany with France, Denmark and Sweden limit the scope of the tax exemptions generally to "aircraft used exclusively for international air services by a company designated by the other contracting state;" thus, these agreements similarly do not preclude taxation of fuels intended for use on cabotage flights.

b) Agreement with Belgium

The agreement concluded between the Federal Republic of Germany and Belgium provides for a tax exemption for all fuels taken on board, irrespective of their intended use. However, this exemption applies only to customs duties and other charges levied on import, export and transit. A consumption tax is neither a customs duty nor a charge imposed on import, export and transit since it is no way related to crossing a border but exclusively to the consumption of particular goods. This distinction also applies to bilateral aviation agreements, as can be inferred from the very fact that many agreements mention both taxes on import, export and transit and special consumption taxes. Thus, the agreement with Belgium does not preclude taxation of kerosene taken on board for use on domestic flights.

c) Agreements with Italy, Greece and Cyprus

The relevant clause in the agreement concluded between the Federal Republic of Germany and Italy states the following:

> "*Fuels and lubricants taken on board the aircraft of a company designated by one contracting party are exempt from the customs duties and other charges listed in paragraph 1* [charges levied on import, export and transit; comment of the author.] *and from any other special consumption taxes (for the Republic of Italy: imposte di fabbricazione e di consumo). This also applies to the part intended for consumption while flying over the territory of the other contracting party. …"*

Thus, the imposition of charges including consumption taxes is explicitly ruled out and this provision does not explicitly apply to international flights only. However, it can be directly inferred from sentence 2 that this fuelling clause is only meant to cover international flights:

the explicit emphasis that the exemption also applies to the *part* of the flights that takes place over German territory makes it clear that flights that take place within the Federal Republic of Germany only are not covered. For purely domestic flights it is not possible to speak of that kind of part; rather the word "part" implies that it must be referring to flights beyond Germany.

The fact that domestic flights are not already covered under sentence 1 can be inferred from the fact that if they were covered sentence 2 would be superfluous. It is not possible to make an *a fortiori* inference from sentence 2 to domestic flights since, seen against the regulatory practice of the other bilateral agreements, the exemption of domestic flights would be the exception, whereas the exemption of international flights regularly includes the part of the flight that takes place over German territory; from a broader interpretation of exemption it is not possible to make an *a fortiori* inference to a case of exemption which would be exceptional.

This argumentation can be applied to the comparable clauses in the aviation agreements concluded by the Federal Republic of Germany with Cyprus and Greece.

d) Agreement with the United Kingdom

Finally, the agreement between the Federal Republic of Germany and the United Kingdom must be looked at separately.

This agreement includes a distinction between "in the case of fuel and lubricating oils taken on board aircraft in the said territory [i.e. the territory of the contracting party - author's comment] and remaining on board at the airport or airports of clearance from that territory" and other fuels. While in the former case the fuels are exempt from charges, the latter are to be treated in a way that is not more unfavourable than if they were being used by the national airline of the other contracting state or a most-favoured foreign company in an international scheduled air service. Whereas with regard to the first alternative, the German text uses only the vague term "Abfertigung," or "clearance, "the English version, which has equal authority, is more precise in speaking of fuels "remaining on board at the airport or airports from that territory." Since some kind of clearance takes place at every airport, it is only the English version of the text that provides the necessary clarification that it must be a question of clearance on leaving the territory in question, consequently the takeoff of an international flight. //Ich kann ohne den vollen Text in beiden Sprachen, der noch nicht aufgetrieben werden konnte, keinen richtigen Sinn darin sehen. Koennen Sie da vielleicht nachpruefen?//

Correspondingly, fuels taken on board for use on domestic flights come under the second category so that they may be taxed in the same way as aircraft used by domestic companies.

e) Agreements with Slovenia and Slovakia

The agreements concluded by the Federal Republic of Germany with Slovakia and Slovenia agreements have, as far as we are aware, not yet been ratified and correspondingly not yet published. These agreements can therefore not be included in this study.

7.) Standard EU clauses for future bilateral agreements

Finally, we shall look briefly at the standard clauses, from which, according to the provisions of Regulation (EC) 847/2004,[116] which was adopted to implement the ECJ's "Open skies" ruling,[117] EU Member States may not deviate in future negotiations on bilateral aviation agreements with third countries.

According to this, a concluding paragraph must be added to those clauses that apply to tax privileges, explicitly allowing the EU Member States to tax kerosene taken on board within its territory and intended for use on domestic or intra-Community flights.

However, at this point we must once more point out that these regulations on domestic flights are only relevant if the contracting parties in questions have been granted cabotage rights.

8.) Conclusion

Bilateral agreements do not preclude taxation of kerosene taken on board in the Federal Republic of Germany intended for use on domestic flights.

The possibilities for consensually amending or rescinding bilateral agreements do not need to be examined more closely here; the same applies to the question of whether it would be legally permissible to treat aircraft from different countries differently.

IV.) Compatibility with primary Community law

When considering the possibility of taxing kerosene against the criterion of primary Community law, i.e. the EU Treaty and EC Treaty, the main aspects to be taken into account are tax regulations and the fundamental freedoms.

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[116] Regulation (EC) No. 847/2004 on the negotiation and implementation of air service agreements between Member States and third countries, OJ L 157 of 30.04.2004, p. 007 ff.

[117] ECJ, Ruling C-466/98 and verbal Ruling, Slg. I-2002, p. 9427 ff.; an instructive discussion can be found in Bentzien, ZLW 2003, p. 153 ff.

1.) Art. 90 of the EC Treaty

Art. 90 of the EC Treaty prohibits Member States from imposing, directly or indirectly, on the products of other Member States any taxation in excess of that imposed, directly or indirectly, on similar domestic products.

Thus, Art. 90 of the EC Treaty regulates how Community law's general prohibition of discrimination, which is described in Art. 12 of the EC Treaty, applies specifically to tax; the purpose of this norm is to ensure that domestic taxation systems have a completely neutral effect on competition.[118]

a) Scope of application

In terms of content, Art. 90 of the EC Treaty applies to levies on goods, the definition of goods under Art. 90 of the EC Treaty corresponding to that of Art. 23 of the EC Treaty.[119] Thus, the term goods applies to all physical objects that can be conveyed across a border with a view to trading.[120] The geographical scope of application of Art. 90 of the EC Treaty covers all goods that originate from other Member States or from third countries, the latter only in cases where they are already in free circulation as defined in Art. 24 of the EC Treaty, but not when they are directly imported from third countries.[121]

Art. 90 of the EC Treaty is binding primarily on the Member States, but also on the Community organs when passing secondary legislation.[122]

Art. 90 of the EC Treaty must therefore be taken into account for the taxation by Member States of all mineral oils that originate from other Member States or from third countries if they are already in free circulation.

b) Definition of charges

Charges are not defined on the basis of national law. On the contrary, this is a term specific to the Community, which in the context of Art. 90 of the EC Treaty must be interpreted broadly

[118] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 2; Eilers/Bahns/Sedlaczek in von der Groeben/Schwarze, EUV/EGV, Art. 90 EGV Mn. 1. For an extensive treatment of this and the following section see also Wasmeier, Umweltabgaben, p. 126 ff., with numerous further references.

[119] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 4; Voß in Grabitz/Hilf, EUV/EGV, Art. 90 EGV Mn. 7.

[120] Kamann in Streinz, EUV/EGV, Art. 28 EGV Mn. 19; for an extensive discussion of that see Epiney in Ehlers, Grundrechte und Grundfreiheiten, Section 8 Mn. 8 f.

[121] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 6 f.; Voß in Grabitz/Hilf, EUV/EGV, Art. 90 EGV Mn. 9

[122] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 9 f; Eilers/Bahns/Sedlaczek in von der Groeben/Schwarze, EUV/EGV, Art. 90 EGV Mn. 64.

for teleological reasons.[123] Art. 90 of the EC Treaty thus applies to all types of charge as defined under German financial system that are related in some way to goods. A relationship to goods is particularly relevant for levying excise duty,[124] so that taxing kerosene within the framework of the mineral oil tax must considered in the light of Art. 90 of the EC Treaty.

c) Discrimination prohibition

Art. 90 of the EC Treaty does not constitute a general prohibition on levying taxes, but merely prohibits unequal treatment of domestic and other goods when levying taxes. Art. 90 of the EC Treaty is thus only applicable if the goods in question are produced domestically, a question which in the case of mineral oils and in particular kerosene can unproblematically be answered in the affirmative.

The type of unequal treatment prohibited by Art. 90 of the EC Treaty is always given in cases when the level of taxation of domestic goods is less than that of similar foreign goods.[125] In judging the level of taxation, not only the tax rate but also the basis for calculating that tax and any taxes already levied in the country of origin[126] must be taken into consideration.[127]

d) Conclusions for taxation of kerosene

Thus, provided that the same tax rate is applied to both domestic kerosene and kerosene that is imported into the Federal Republic of Germany and that the quantity of kerosene to be taxed is established in the same way, the introduction of a tax on kerosene is compatible with Art. 90 of the EC Treaty. In the case of taxation linked to the purchase of the kerosene in the Federal Republic of Germany no grounds for double taxation can be identified, because the mineral oil imported from other Member States within the framework of intra-Community trade in mineral oil is not subject to tax before it is exported to Germany due to the harmonisation under Community law of excise duty in general and mineral oil tax in particular.[128]

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[123] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 11.
[124] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 15; Voß in Grabitz/Hilf, EUV/EGV, Art. 90 EGV Mn. 17.
[125] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 22.
[126] This also applies to taxes levied on prior stages of production or marketing, cf. Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 22.
[127] Cf. examples of different treatment that are not permissible in Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 22; also in Eilers/Bahns/Sedlaczek in von der Groeben/Schwarze, EUV/EGV, Art. 90 EGV Mn. 33 ff. On the question of to what extent Art. 90 constitutes a general prohibition on double taxation cf. Eilers/Bahns/Sedlaczek in von der Groeben/Schwarze, EUV/EGV, Art. 90 EGV Mn. 40.
[128] Due to the so-called principle country of destination principle, mineral oil tax harmonized under Community law is not as a rule liable in the Member State in which the mineral oil is produced but in the Member State in which it is released for consumption. For more details on this cf. D.) I.) 2.) b) aa) and Soyk, Mineralölsteuerrecht, p. 149 ff.

Thus, what would not be permissible would be the introduction of different systems for taxing kerosene produced domestically and imported kerosene. Furthermore, it would not be permissible to tax kerosene differently on the basis of whether it was purchased by a domestic or foreign company.

2.) Free circulation of goods

In structural terms, taxing kerosene represents a non-discriminatory restriction on intra-Community trade in mineral oil, which would have to be examined against the criterion of free circulation of goods, and to be more precise against the prohibition of any measures that would have an effect equivalent to quantitative restrictions laid down in Art. 28 of the EC Treaty.

However, according to a ruling of the ECJ, Art. 90 of the EC Treaty takes precedence over Art. 28 of the EC Treaty based on the *lex-specialis* principle, so that fiscal restrictions on intra-Community trade in goods covered by Art. 90 of the EC Treaty are not subject to the prohibition under Art. 28 of the EC Treaty.[129] Thus, fiscal restrictions on free trade in goods are subject only to the discrimination prohibition contained in Art. 90 of the EC but not to the additional prohibition applicable to the free circulation of goods on non-discriminatory measures, i.e. measures that are indistinctly applicable.[130]

The introduction of kerosene taxation thus does not contravene the free movement of goods as defined in Community law.

3.) Freedom to provide services and freedom of establishment

It is furthermore questionable whether the introduction of a tax on kerosene should also be considered against the criterion of the freedom of establishment and freedom to provide services guaranteed under Art. 43 ff. and 49 ff. of the EC Treaty. The point of reference in this case would not be an additional burden on trade in mineral oil, but the burden that would result indirectly on mineral oil traders operating in Germany, airlines from other Member States and air passengers.

Here, the applicability of the freedom to provide services is problematic on several grounds.

Firstly, in terms of content it is questionable whether the introduction of kerosene taxation should be assigned to transport or taxation law, since the applicability of the freedom to

[129] Kamann in Streinz, EUV/EGV, Art. 90 EGV Mn. 33; Voß in Grabitz/Hilf, EUV/EGV, Art. 90 EGV Mn. 61.
[130] Cf. Waldhoff in Callies/Ruffert, EUV/EGV, Art. 90 EGV Mn. 16 f. with further references.

provide services seems to be questionable for both sectors. The substantive emphasis of whatever option might be chosen is thus decisive.

If the Energy Products Directive as a whole is taken as the point of reference, it is clearly a question here of a legislative measure in the tax sector. Considering in isolation the regulations that apply to aviation gasoline leads to the same conclusion: firstly, it is a case of laying down a rule about a tax exemption or rather the exception to a tax exemption, and secondly, particularly due to the optional character of the exemption regulation under Art. 14 II 1 of the Directive, it is not possible to assume with certainty that the legislative measures passed will have any consequences for aviation, whereas the Community law on excise duty is directly affected. The Directive and its relevant provisions must therefore be categorised under tax law.

Furthermore, this conclusion is also backed by the legislative procedure that came into operation with the passing of the Energy Products Directive, in which the European Parliament was merely consulted: while in Art. 80 II in conjunction with Art. 71 I of the EC Treaty, also for provisions in the transport sector, a co-decision procedure is provided for under Art. 251 of the EC Treaty, in the case of provisions to harmonise indirect taxes in accordance with Art. 93 of the EC Treaty mere consultation of the European Parliament is sufficient. In line with the categorisation of the underlying Directive, we can assume that, for the classification that is relevant in this case under Community law, the introduction of kerosene taxation in national law should be classified primarily as tax law.

Thus, it remains to be examined whether the freedom to provide services is applicable to tax measures.[131] We must take into account that – as mentioned above – the free circulation of goods is supplanted according to the *lex-specialis* principle of Art. 90 of the EC Treaty. The consequence of this is that, with regard to the restrictions on trade in goods brought about by fiscal measures, no blanket prohibition on restrictions must be observed but merely a prohibition on discrimination, so that the Member States still have relatively broad latitude in their tax legislation.[132]

Correspondingly, it can be assumed that the freedom to provide services will similarly not be applicable if it is a case of restrictions on the free movement of services, which are indirectly caused by the fact that the non-discriminatory taxation of certain goods has led to an increase in the cost of certain services. That kind of fiscal measure would be subject to a comprehensive restriction prohibition if the goods that had become more expensive were

[131] The following considerations also apply in principle to freedom of establishment.
[132] Cf. Waldhoff in Callies/Ruffert, EUV/EGV, Art. 90 EGV Mn. 16f. with further references.

"preliminary products" related to services but not if they were goods for private consumption. A distinction of that kind may not seem very convincing, so that we can assume that the freedom to provide services in accordance with the scope of application of Art. 90 of the EC Treaty is supplanted if it is a question of detriments caused by fiscal measures that result from the taxation of the taxable event per se.
It is a different matter in the case of detriments that result from the choice of the person liable to tax. Here Art. 90 of the EC Treaty does not come into effect, because there is no discriminatory taxation of goods. If, for example, a kerosene tax was levied from foreign airlines only, regardless of whether the kerosene taken on board originated in Germany or another Member State, Art. 90 of the EC Treaty would not be affected. However, in order to ensure appropriate protection for the Single Market the fundamental freedoms must be applied.
In conclusion, it can be established that if there is no question of detriments caused by taxation of the taxable event, the introduction of kerosene taxation must be considered against the criterion of the freedom to provide services.

Taxation of kerosene linked to purchase in the Federal Republic of Germany is a burden primarily on mineral oil traders operating in Germany, whose goods become more expensive. However, due to the nature of mineral oil tax as an indirect tax it follows that, although from a legal point of view the mineral oil traders are the taxable persons, as a rule they can pass the tax burden on to their customers, in this case the airlines. Thus, as purchasers of aviation gasoline, the airlines will also bear an economic burden. However, it can be assumed that the airlines will in turn pass this extra burden onto their customers, so that ultimately the passengers are the economic taxpayers. The detriments identified must therefore also be considered against the criterion of the fundamental freedoms.

With regard to the mineral oil traders it can be assumed that they as a rule will have fixed installations in Germany, so that the scope of freedom of establishment[133] is affected; if mineral oil traders based in other countries, but close to the border, supply airlines based in Germany, the freedom to provide services[134] would also be affect. Cross-border purchase[135]

[133]On the scope of the freedom of establishment precept cf. Tietje in Ehlers, Grundrechte und Grundfreiheiten, Section 10 Mn. 13 ff.
[134] Cf. Pache in Ehlers, Grundrechte und Grundfreiheiten, Section 11 Mn. 14 ff.
[135] Cf. only Müller-Graff in Streinz, EUV/EGV, Art. 43 EGV Mn. 20, Art. 49 EGV Mn. 31 ff.

would also have to exist, in other words it would have to be a matter of mineral oil traders from other EU Member States.

Taxing mineral oil brings about an indirect detriment to mineral oil traders in their freedom of establishment and freedom to provide services. This detriment would not, however, be discriminatory since foreign mineral oil traders are not affected more than German ones, neither legally nor de facto; it is an indistinctly applicable measure. In accordance with the ECJ's Keck ruling[136] that originally referred to free movement of goods but is also applicable to all fundamental freedoms,[137] indistinctly applicable measures only have to be justified if they represent a restriction on market access;[138] by contrast, indistinctly applicable restrictions that only have an effect after market access has been established do not require justification. There are no apparent reasons to believe that extending mineral oil tax to aviation gasoline would make market access more difficult for foreign mineral oil traders in any way; it can therefore be assumed that in accordance with the Keck ruling it is a measure that does not require justification.

Thus, it can be established that the introduction of kerosene taxation would not infringe the fundamental freedoms of mineral oil traders.

With regard to airlines, foreign companies offering domestic flights within the Federal Republic of Germany would be curtailed in their active freedom to provide services.[139] However, here too German airlines would be equally affected so that this would not be a case of discrimination but of an indistinctly applicable measure, in other words a mere restriction. There are no apparent reasons to believe that this restriction would make market access more difficult for foreign airlines, so that in line with the principles described above there is no justification requirement for this measure under Community law.

[136] ECJ, verbal Rulings C-267/91 and C-268/91-*Keck*, Coll.. 1993, I-6097.

[137] Rightly Randelzhofer / Forsthoff in Grabitz / Hilf, EUV/EGV Art. 49 / 50 EGV, Mn. 92 ff.; Ehlers idem, Grundrechte und Grundfreiheiten, Section 7 Mn. 66.

[138] Leible in Grabitz / Hilf, EUV/EGV Art. 28 EGV Mn. 28 and Koenig/Haratsch, Europarecht, Mn. 560 f also base their opinion on restriction of market access, which is probably the best criterion for defining whether it falls under the Keck ruling.

[139] Randelzhofer / Forsthoff in Grabitz / Hilf, EUV/EGV, Art. 49 / 50 EGV Mn. 42. On the different possible manifestations of freedom to provide services see also Pache in Ehlers, Grundrechte und Grundfreiheiten, Section 11 Mn. 27 ff.

This is also true by analogy for a restriction of the passive freedom to provide services[140] of German passengers who wish to travel on foreign airlines and foreign passengers who wish to book a domestic flight in Germany with a German airline.

Thus, in conclusion it can be established that the introduction of a tax on kerosene linked to the purchase of kerosene in the Federal Republic of Germany is compatible with the fundamental freedoms of the EC Treaty.

4.) Conclusion

Primary Community law does not preclude the introduction of kerosene taxation based on the purchase of kerosene in Germany, if, when imposing the tax, preferential treatment is given neither to mineral oil originating in Germany nor to German airlines.

V.) Compatibility with secondary Community law

In examining the possibility of kerosene taxation against the criterion of secondary Community law, that is Regulations, Directives and Decisions adopted by the Community organs under the EU Treaty and EC Treaty, which due to the primacy of Community law are above national law in the hierarchy of norms, particular attention must be given to the Energy Products Directive 2003/96 and the Excise Duty Directive 92/12.

1.) Excise Duty Directive 92/12

Within the framework established by Art. 90 ff. of the EC Treaty, the Excise Duty Directive develops Community law on excise duties in some considerable detail. This Directive forms as it were the "General Part" of EU consumption tax law, containing the stipulations to be complied with in levying all excise duties regardless of the specific characteristics of the goods in question; cf. Art. 3 I of Directive 92/12.[141]

Art. 6 I of Directive 92/12 stipulates that excise duty is chargeable at the time of release for consumption of the goods subject to excise duty, i.e. in particular when it is removed from the tax warehouse. Taxation of kerosene linked to purchase in the Federal Republic of Germany in the option described under C) I.) would be compatible with this stipulation.

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[140] Randelzhofer /Forsthoff in Grabitz / Hilf, EUV/EGV, Art. 49 / 50 EGV Mn. 43.

[141] For an instructive discussion of EC law on excise duty and on the meaning of the Excise Duty Directive see Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, section B, especially Mn. 9 ff.

Furthermore, there are no foreseeable problems with regard to the compatibility of this option with the Excise Duty Directive.

2.) Energy Products Directive 2003/96

Within the framework set out by the Excise Duty Directive the Energy Products Directive – which is of equal status in the hierarchy of norms – contains detailed instructions on the taxation of different energy sources.

Art. 14 of Directive 2003/96, the exacting wording of which has already been quoted under C) III.) 6.), is particularly relevant for the taxation of aviation gasoline. Art. 14 II 1 of Directive 2003/96 explicitly allows Member States to tax kerosene that is supplied for use as aviation fuel on domestic flights. The question of whether this taxation can or must apply to all airlines operating those flights is not treated in any way; however, it does establish that taxation of airlines from other EU Member States is permissible under Community law.

It is questionable whether the minimum levels of taxation for motor fuels[142] set out in Annex I, Table A of Directive 2003/96 are to be interpreted as mandatory. Art. 7 I of Directive 2003/96 stipulates that these minimum levels of taxation are applicable. However, the question of whether Art. 14 II 3 of Directive 2003/96 permits a deviation, in other words the establishment by norm of lower levels of tax, must be examined. In this regard, it should primarily be clarified whether the deviation possibility provided for there applies to Art. 14 II 2 of Directive 2003/96 alone, in other words to the taxation of aviation gasoline for use on intra-Community flights based on bilateral agreements, or also to the possibility of Member States unilaterally introducing a tax on kerosene intended for use on domestic flights provided for in Art. 14 II 1 of Directive 2003/96.

As far as the wording of the German, English and French version of the 3rd sentence of Art. 14 II 3 of Directive 2003/96 is concerned, it seems more likely that, since it is not specified further, “diesen”/”such”/”ces” is a reference to the immediately preceding 2nd sentence, in other words solely to intra-Community flights. Furthermore, in systematic terms, it should be noted that the minimum levels of taxation for kerosene set out in the Annex to Directive 2003/96 would largely be redundant if the possibility of deviation also referred to domestic flights.

[142] From 1.1. 2004 the minimum levels of taxation for kerosene are € 302 per 1000 l, from 1.1.2010 rising to € 330.

Nevertheless, the predominant arguments suggest that the minimum levels of taxation are not binding on the Member States even in the case of introduction of taxation on kerosene used on domestic flights:

In particular in a systematic interpretation it must be taken into consideration that Member States even have the possibility of waiving the possibility of introducing kerosene taxation entirely; all the more reason therefore to allow them to introduce the tax at a lower rate. In other words, if the decision to levy a tax at all has been explicitly "de-harmonised" and left to the discretion of the Member States, this must all the more apply to the question of the level of tax. Arguments for this conclusion can also be found in the wording: for example the use of the plural ("in diesen Fällen" / "in such cases" / "dans ces cas") would not have been necessary if referring to the 2nd sentence of paragraph II S only, especially since there is then further reference to the Member States in the plural. The wording "in this case [that is in the case of entering a bilateral agreement] … the Member States [that is the signatories to the agreement]… may apply" would have sufficed. The use of the plural "in these cases" would only be appropriate and necessary if the intention was to cover both the conclusion of a bilateral agreement and the unilateral introduction of taxation on kerosene used on domestic flights.

It can therefore be assumed that Art. 14, para. II, sentence 3 has precedence over the general provisions of Articles 4 and 7 of Directive 2003/96/EC with regard to the level of taxation to be applied to domestic flights also. Thus, Member States are not obliged to apply the minimum levels of taxation for kerosene prescribed under Community law in cases of kerosene used on domestic flights.

3.) Conclusion

Thus, to summarise: it can be established that secondary Community law does not preclude the introduction of kerosene taxation in the specific form examined here; legal practice also suggests that no stipulations on setting levels of taxation can be inferred from Community law.

VI.) Compatibility with constitutional law

With regard to the compatibility of a taxation system linked to the purchase of aviation gasoline in the Federal Republic of Germany with the provisions of the Basic Law, it is

necessary to examine not only the extent of Germany's regulatory sovereignty, but also whether the option being explored here is a tax as defined in the German financial system. The issue to then be considered, depending on the conclusion drawn, is the legislative authority of the central government legislative power and the rights of involvement of the *Bundesrat* (Upper House).

1.) Regulatory sovereignty of the Federal Republic of Germany

Taxation of the aviation gasoline taken on board by aircraft belonging to foreign airlines represents a situation that includes a foreign factor, so that the recourse to regulatory sovereignty made in levying the taxes by the Federal Republic of Germany requires justification.[143] Adequate justification may be provided here by the territoriality principle,[144] under which a country has fundamentally unlimited regulatory power within its national territory to which legal or natural persons, including non-nationals, are subject.

2.) Tax character

To examine the implications in constitutional law of kerosene taxation, it is necessary to classify it in one of the categories of tax contained in the German financial system.
The obvious solution would seem to be to regulate kerosene taxation under the Mineral Oil Tax Act, since under the option considered here it would be a case of a duty on kerosene, which would be a tax in the legal sense. The term "taxes" under constitutional law, which is based on the definition in Section 3 I of the Tax Code, is to be interpreted in such a way that monetary payments that are not made in remuneration of a particular service and are levied by a public body to generate revenue and to which everyone to whom the liability specified by the law relates is subject; the generation of revenue can be a secondary aim.[145]
The question of remuneration for a service does not enter into the option examined here for taxing kerosene. The fact that in introducing a tax on kerosene, the aim of creating an environmental incentive outweighs fiscal interests does not affect its character as a tax; "incentive charges" can also be taxes in the legal sense.[146] Similarly, although ring-fencing

[143] Herdegen, Völkerrecht, Section 26 Mn. 1
[144] For comprehensive comments on the territoriality principle see Doehring, Völkerrecht, p. 42 ff, 352 ff.
[145] Jarass/Pieroth, GG, Art. 105 Mn. 3; Heun in Dreier, GG, Art. 105 Mn. 13, also containing further references. to the ruling of the German Constitutional Court.
[146] For example, with convincing arguments, Brockmeyer in Schmidt-Bleibtreu/Klein, GG, Art. 105 Mn. 6a. Jatzke, System, p. 56 ff. with further references is of the belief that fiscal purposes alone cannot justify the imposition of a consumption tax over and above the general value added tax; he believes it to be necessary that

the revenue presents problems in terms of budgetary principles, it does not affect the tax character of a charge.[147]

The option examined here for introducing a charge on kerosene thus comes under the definition of a tax in constitutional law.

3.) Legislative power

Based on the above conclusion that the option examined for a duty on kerosene represents a tax in the legal sense, legislative power must be judged primarily on the basis of Art. 105 of the Basic Law. In accordance with Art. 105 II of the Basic Law the federal government has concurrent legislative power for those taxes, the revenue from which they are fully or partially entitled to. According to Art. 106 I No. 2 of the Basic Law, the federal government has sole entitlement to the revenue from mineral oil tax, which means that it has concurrent legislative power.[148]

According to the explicit wording of Art. 105 II of the Basic Law, the permissibility of making use of this power, unlike in the case of the other concurrent powers, does not depend on the conditions detailed in Art. 72 II Basic Law applying.[149]

Thus, seen from the point of view of the law relating to the finance system, the power here is with the federal government. It is, however, questionable whether the incentive effect that accompanies the imposition of the tax also gives rise to the additional factor of where the substantial competence lies. Here it must first be noted that, in terms of the regulatory system, the introduction of kerosene taxation does not represent a question of justifying a new tax but of removing a tax exemption, which would suggest that this is a matter primarily related to tax law. Furthermore, according to the Federal Constitutional Court ruling, which is however a moot point in the literature, the power to legislate on tax matters should in view of the inclusion of non-fiscal purposes in the definition of tax also include responsibility for the

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the tax covers a commodity, the acquisition of which points to a greater ability of the consumer to pay tax or that the consumption tax is being used to pursue particular health or ecological incentive purposes.

[147] Similarly Heun in Dreier, GG, Art. 105 Mn. 15; Maunz in Maunz/Dürig, GG, Art. 105 Mn. 10. The Federal Constitutional Court recently reaffirmed that a contravention of the principle of universality, which is anchored in budgetary law, is not contrary to the constitution if the hypothecation is not enforced to an unreasonable degree, cf. 1 BvR 1748/99, 1 BvR 905/00 of 20.4.2004, Mn. 62.

[148] Heun in Dreier, GG, Art. 106 Mn. 15.

[149] Explicitly on this also Maunz in Maunz/Dürig, GG, Art. 105 Mn. 40; similarly Heun in Dreier, GG, Art. 105 Mn. 34.

corresponding incentive and design goals.[150] The only thing deemed to be impermissible is misusing tax regulations to circumvent general norms regarding particular powers.[151]
By contrast, if one were to agree with certain sections of the literature, and, in cases where incentive purposes exist, require the federal government to have both tax and substantive competence, Art. 73 No. 6 Basic Law, which accords the federal government exclusive authority over aviation, would have to be applied here.[152]

4.) Involvement of the *Bundesrat*

Irrespective of whether the authority of the federal government is considered to be based exclusively on Art. 105 II of the Basic Law or also on Art. 73 No. 6 Basic Law, the consent of *Bundesrat* (Upper House) is not necessary, since the federal government has sole entitlement to the revenue from mineral oil tax, cf. Art. 105 III Basic Law.[153] The fact that the revenue is partially hypothecated for purposes including an improvement in the transport facilities provided by local authorities changes nothing with regard to the apportionment of revenue;[154] the revenue itself and its hypothecation must be seen as separate legal categories.

5.) Conclusion

German constitutional law does not preclude the introduction of kerosene taxation based on the purchase of kerosene in the Federal Republic of Germany.

VII.) Compatibility with national law

In terms of the hierarchy of norms, national law cannot preclude the introduction of kerosene taxation by an amendment to the Mineral Oil Tax Act, since within the framework of international law, Community law and constitutional law, the legislature has freedom of discretion.

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[150] Jachmann in vMKS, GG, Art. 105 Mn. 22 is in agreement; cf. also Heun in Dreier, GG, Art. 105 Mn. 16 with further references. from the ruling and also on the contrary view.
[151] Heun in Dreier, GG, Art. 105 Mn. 16; Jachmann in vMKS, GG, Art. 105 Mn. 22 criticises this restriction as being ineffective due to its vagueness.
[152] For more details on the scope of this power cf. Heintzen in vMKS, GG, Art. 73 Mn. 53.
[153] For example, for the powers based on Art. 105 II see also Teichner in Teichner et al., Energiesteuerrecht, Foreword. MinöStG, Mn. 18.
[154] Teichner in Teichner et al., Energiesteuerrecht, Foreword. MinöStG Mn. 16; Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, Mn. C 40.

The only thing necessary for the introduction of the option considered here would be an amendment to Section 4 I No. 3 (a) of the Mineral Oil Tax Act; for more details on this cf. C) I.) 2.) above.

VIII.) Summary

The provisions of the Chicago Convention do not preclude a kerosene tax linked to the purchase of kerosene in the Federal Republic of Germany, since the Chicago Convention makes reference neither to fuels taken on board nor to consumption taxes. Resolutions adopted by the ICAO Council or the ICAO Assembly, which sometimes engender far-reaching standards, similarly do not legally preclude taxation of that kind, because they are classified as being not legally binding.

The aviation agreements that the Federal Republic of Germany has entered into with the other EU Member States prohibit only the imposition of consumption taxes on kerosene taken on board for use on international flights. Aviation agreements with third countries are not relevant for the taxation of domestic flights, since third countries have no traffic rights for domestic flights.

Community law does not preclude the introduction of kerosene taxation, provided it does not lead to foreign goods or services being placed at a disadvantage and provided it fits in with the Community's excise duty system. The option examined here fulfils these requirements.

No level of national law precludes the introduction of kerosene taxation based on purchase.

The introduction of a kerosene tax linked to the purchase of kerosene in the Federal Republic of Germany would thus from the legal point of view be unconditionally possible.

D) Permissibility of an estimate-based kerosene tax

In this section we shall consider whether in order to avoid the possibility of airlines engaging in tankering strategies, taxation of kerosene could be designed in such a way that the kerosene used on domestic flights is taxed irrespectively of the place of fuelling, with the amount of kerosene used being estimated on the basis of the route in question and other factors.

I.) Description of the specifics of this option and the legal framework

In this section we shall give more specific details of the estimate-based model for taxing kerosene and explain the legal framework.

1.) Description of the option under review

If a tax on kerosene linked to fuelling in the Federal Republic of Germany were introduced there is a high probability that airlines would pursue strategies to avoid fuelling there. It would thus not be possible to achieve the desired environmental and fiscal objectives of taxing kerosene in this way.

The problem could be solved if the tax were linked not to the purchase of kerosene but to its consumption. Most consumption taxes are not in fact linked directly to consumption itself but are levied at an earlier stage in the market chain and then passed on by the statutory taxpayer to the consumer who is the economic taxpayer. This is solely for reasons of administrative economy.[155] By comparison with this, direct taxation of consumption would be a "rapprochement" to the actual basic philosophy of consumption tax.[156] In order to keep the administrative expenditure involved in direct taxation of consumption as low as possible, an estimate-based collection would on first glance seem particularly appropriate.[157]

The term "estimate-based" in this context means that the kerosene tax would not be based on the actual amount of kerosene used on each individual flight but rather on a form of average consumption. For this it would be necessary to ascertain how much kerosene is consumed on average on each domestic route, taking into account detour factors such as type of aircraft, engines and possibly load. These average values would then be laid down in an equally

[155] Cf. Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, Mn. C 11.

[156] Although in practice direct levying is the exception, from the point of view of the German law it cannot be classified as contrary to the tax system or the constitution. Cf. Peters/Bongartz/Schröer-Schallenberg, op. cit. For a critical view of imposing extra direct taxes on the consumer see Jatzke, System, p. 75 ff.

[157] On the administrative costs of a specifically consumption-linked taxation based on airlines reporting obligations, which would not in fact be higher, cf. E.) I below).

detailed tax scale as notional consumption. A standard value would be established, according to which a certain amount of kerosene would be considered to have been used, for example, on the Hamburg-Dusseldorf route, by a particular model of aircraft with particular engines and at full load, taking into account a detour factor of 1.25. Using this tax scale in combination with a tax rate per unit of quantity of kerosene, a tax could thus be levied without having to ascertain exact data for individual flights. The only information necessary would be the number of flights operated.
It would be expedient if the airline as the direct consumer were the person liable for this kind of kerosene tax; it could then use its pricing policy to pass the tax on to customer.
Finally, we must emphasise what quantities of fuel and what kind of flight we envisage would be covered by a kerosene tax of this type. Below we consider only the possibility of taxing the kerosene used between two domestic airports and not whether, in addition to that, it would be possible to tax the aviation gasoline used between a German airport and the border of German air space.

2.) Legal framework

From the legal point of view, this option differs specifically from the option considered under C.) in the following aspects: firstly, both the Chicago Convention and the bilateral agreements distinguish between kerosene that is already on board and kerosene that is taken on board. Secondly, direct taxation of consumption constitutes a departure from the currently prevailing system for levying taxes in German and European consumption tax law. Finally, it must be taken into account that estimate-based taxation of this kind could lead to kerosene imported into the Federal Republic of Germany on board aircraft being taxed.
In the following section, we shall therefore give a brief overview of the current norms in national law on which tax exemption for fuels imported into the Federal Republic of Germany on board aircraft is based, in order to show what changes to German law would be necessary.

a) Tax exemption based on Section 4 of the Mineral Oil Tax Act

First of all, it must be stressed that Section 4 I No. 3 a) of the Mineral Oil Tax Act, that is tax exemption for mineral oils that are used as aviation fuel, would also preclude estimate-based taxation. This provision is not directly connected to the act of purchase but stipulates without specifying further that mineral oils that are used as aviation fuel are exempt from tax. It would therefore be necessary to incorporate into Section 4 I No. 3 a) of the Mineral Oil Tax Act a

corresponding proviso giving precedence to the regulation that covers the estimate-based taxation of kerosene on domestic flights.
On this basis of this amendment, it would be possible to introduce estimate-based taxation of kerosene on domestic flights in cases where the kerosene had been taken on board in Germany.

b) Tax exemption for imported kerosene

With regard to tax exemption for kerosene imported into the Federal Republic of Germany on board aircraft, a distinction must be made between aircraft arriving from other EU Member States and aircraft arriving from third countries. What is decisive here is not the owner of the aircraft but the place where the aircraft took off.

aa) Import from other EU states[158]

For the import of kerosene from other EU Member States on board aircraft, the tax exemption is based on Section 19 of the Mineral Oil Tax Act, which states:

> *"(1) If, pursuant to Section 1 sub-section 3, mineral oil, with the exception of natural gas, that has already been released for consumption in a Member State is purchased for commercial purposes, the tax becomes chargeable when the purchaser:*
>
> *1. Receives the mineral oil in the fiscal territory, or*
> *2. Imports or has imported into the fiscal territory the mineral oil that was received outside the fiscal territory.*
>
> *The taxable person is the purchaser. Purchase by a public body is identical to purchase for commercial purposes.*
>
> *(2) If mineral oil that has already been released for consumption in a Member State is imported into the fiscal territory in cases other than those cited in paragraph 1 nos. 1 and 2 tax becomes chargeable when it is first held or used in the fiscal territory for commercial purposes. The taxable person is the person holding or using it. Sentence 1 does not apply to fuels in the standard tanks of means of transport other than watercraft, in special containers, operating machinery and equipment unless they are on watercraft and other floating installations, in agricultural and forestry vehicles, or refrigeration and air conditioning systems.*
>
> *(3) ..."*

Section 19, sub-section 1 of the Mineral Oil Tax Act enshrines in German law the country of destination principle[159] underlying Community law on excise duties. The country of

[158] For an extensive treatment of this see Soyk, Mineralölsteuerrecht, p. 177 ff.

destination principle essentially says that the tax on goods subject to excise duty that are imported for commercial purposes into another Member State within the Community is chargeable in the importing country. This applies both when mineral oils are transported under a tax suspension arrangement, in other words when tax has not yet been chargeable in the dispatching country, and when mineral oils are purchased in other Member States in which they had already been released for consumption, i.e. when tax has already been chargeable in the dispatching country.[160] In the latter case, the tax paid in the dispatching country is refunded. Section 19 of the Mineral Oil Tax Act applies only to this latter alternative, where mineral oils are purchased in other Member States in which they had already been released for consumption.

Here it must be noted that the term "released for consumption" does not assume that tax had actually been chargeable in the dispatching country; rather it covers those cases in which tax was not chargeable in the dispatching country due to tax relief arrangements.[161] Also in those cases in which the kerosene on board an aircraft was purchased tax-free in the country of departure, it is a case of kerosene that had already been released for consumption in that Member State.

Against the backdrop of this basic rule, Section 19 I Nos. 1 and 2 of the Mineral Oil Tax Act regulate two circumstances under which tax becomes chargeable, neither of which applies to kerosene imported on board aircraft. It is Section 19 II 1 of the Mineral Oil Tax Act that would be of relevance here;[162] here the exemption provision of Section 19 II 3 of the Mineral Oil Tax Act becomes applicable, under which fuels in the standard tanks of means of transport are exempt from tax liability.

Thus, in summary it can be concluded that the tax exemption for kerosene imported from other EU Member States in the tanks of aircraft are exempt on the basis of Section 19 II 3 of the Mineral Oil Tax Act. Consequently, a corresponding proviso for aircraft would have to be incorporated into Section 19 II of the Mineral Oil Tax Act, assigning precedence to the provision regulating estimate-based taxation of kerosene used on domestic flights.

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[159] On the country of destination principle see Eilers/Bahns/Sedlaczek in: von der Groeben/Schwarze, EUV/EGV, Art. 93 EGV Mn. 21 ff.

[160] Cf. Soyk, Mineralölsteuerrecht, p. 177.

[161] Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, Mn. D 6; also Reiche in Teichner et al., Energiesteuerrecht, Section 19 MinöStG Mn. 7.

[162] Cf. the example given in Soyk, Mineralölsteuerrecht, p. 179.

bb) Import from third countries

For kerosene imported into the Federal Republic of Germany from third countries in the standard tanks of aircraft, Section 23 of the Mineral Oil Tax Act stipulates that customs regulations apply amongst other things to the question of tax chargeability and the taxable person.[163] Section 31 III No. 3 of the Mineral Oil Tax Act authorizes the Federal Minister of Finance to establish by secondary legislation tax exemptions for mineral oils directly imported from third countries. Correspondingly, Section 1 of the Import Duty Regulation (EverbStV) stipulates that - under the provisions of the Customs Duty Relief Regulation (EC), of Art. 184 f. of the Customs Code, and the German Customs Regulation - products are basically exempt from special consumption taxes; fuel in the standard tanks of aircraft is exempt from import duties under Section 21 I of the German Customs Regulation.[164]

In conclusion, the tax exemption in this particular constellation is based on Section 21 I of the German Customs Regulation. In terms of regulatory procedure, taxation could thus be achieved by restricting the reference to tax exemption circumstances resulting from the law on customs duties made under Section 1 of the Import Duty Regulation (EverbStV) to make them apply solely to kerosene used on intra-Community and international flights. Thus, it would not be necessary to amend the customs regulations.

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[163] For more details on this see Soyk, Mineralölsteuerrecht, p. 184 ff.; for a detailed treatment of the customs procedure see also Reiche in Teichner et al., Energiesteuerrecht,, Section 23 MinöStG, Mn. 18 ff.

[164] Reiche in Teichner et al., Energiesteuerrecht,, Section 23 MinöStG Mn. 28 f.; Soyk, Mineralölsteuerrecht, p. 189 ff.

To facilitate understanding, we shall give a brief overview of Community customs law.

The point of departure for any consideration of this subject must be the fact that the EC is a customs union, characterised by the abolition of all customs duties between its Members and by the creation of a common customs tariff regulating trade with third countries.

The authority to set the common customs tariff and all regulations in connection with that lies with the EC. What is known as the Customs Code, which is a Regulation as defined in Art. 249 of the EC Treaty, contains a comprehensive codification of Community Customs law. Based on an authorisation in Art. 249 of the Customs Code, the EC Commission adopted the regulation implementing the Community Customs Code. The Customs Duty Relief Regulation also has the status of a Regulation as defined under Art. 249 of the EC Treaty (cf. also Art. 184 of the Customs Code); it lists numerous tariff and non-tariff circumstances under which relief from customs duty is granted.

The most important legal sources for German law, which are intended only to fill any existing gaps and give supplementary guidance, are the Customs Administration Act (ZollVG) and the Customs Regulation (ZollV), which was passed on the basis of the authority contained in Sections 29, 30 of the Customs Administration Act. The Customs Regulation contains numerous non-tariff exemption circumstances implementing authorisations under Community law. The exemption from customs duty for aviation gasoline contained in Section 21 I of the Customs Regulation is based on the authorisation in Art. 133, 139 of the Customs Duty Relief Regulation.

3.) Summary

To avoid tankering strategies, kerosene tax could be levied independently of the place of fuelling in an estimate-based form, i.e. on the basis of average consumption calculated using diverse parameters. For that to be possible, not only would the general tax exemption in Section 4 sub-section I, No. 3 a) of the Mineral Oil Tax Act have to be restricted to international and intra-Community flights, but also the specific exemptions for aviation gasoline imported into the Federal Republic of Germany on board aircraft would have to be amended accordingly. Thus, it would also be necessary to amend Section 19 II 3 of the Mineral Oil Tax Act (to make it possible to tax kerosene imported into the Federal Republic of Germany from other EU Member States on board aircraft) and Section 1 of the Import Duty Regulation (EverbStV) (to make it possible to tax kerosene imported into the Federal Republic of Germany from third countries on board aircraft).

II.) Compatibility with the Chicago Convention

The following section will look at whether estimate-based tax on kerosene is compatible with the provisions of the Chicago Convention.

1.) Art. 15

With regard to the compatibility of estimate-based taxation of kerosene with Art. 15 of the Chicago Convention there are no significant differences from the option considered above under C.).

Even if the Chicago Convention were applicable to domestic flights, which it is not, the wording of Art. 15 does not cover taxes but only charges connected with a service. An estimate-based kerosene tax would be levied to cover a public funding requirement and would not have any connection with a particular service.

Furthermore, it must also be taken into consideration that Art. 15 of the Chicago Convention applies only to charges levied for the right of transit over, entry into or exit from [a territory]. An estimate-based kerosene tax would be linked to consumption and have no connection whatsoever with the right of transit over, entry into or exit from a territory.

Correspondingly, it can be concluded that Art. 15 of the Chicago Convention does not preclude the introduction of estimate-based kerosene tax.

2.) Art. 24

Whereas the wording of Art. 24 of the Chicago Convention is obviously not contrary to the taxation option explored under C.) above, prima facie the legal position with regard to estimate-based taxation seems less clear.

We shall therefore quote Art. 24 I, sentences 1 and 2 of the Chicago Convention once more:

> *"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 regulation of the State. Fuel, lubricating oil, 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."*[165]

Whether an estimate-based kerosene tax is compatible with these provisions thus depends firstly on whether Art. 24 I 2 of the Chicago Convention is applicable to domestic flights, and secondly on whether an estimate-based kerosene tax falls under the types of charge prohibited.

a) Applicability to domestic flights

The applicability of Art. 24 I 2 of the Chicago Convention to domestic flights depends firstly on the meaning of the wording "arrival in the territory" and "leaving the territory."[166] The question to be examined here is whether the concept of national territory covers air space or whether it is confined to the land and coastal area.

In general usage in international law the term "sovereign territory," which in this context can be used synonymously with national territory,[167] applies not only to a particular part of the earth's surface that has been assigned to a particular country by drawing borders around it, but also to coastal waters, the soil beneath the surface of the earth and the air space above the national territory.[168] Consequently, national territory is not a two-dimensional area but a three-dimensional space.[169] Air space in turn at a certain altitude that is disputed becomes outer space, which, as *res communis omnium*, belongs to no particular country. Even if none of the different proposals for determining the boundary between air space and outer space has met with general acceptance, it can nevertheless be concluded that many opinions agree that

[165] For the German and French wording see above under C.) II.) 2.) a).
[166] On this problem see also Loibl/Reiterer, Rahmenbedingungen, p. 54 ff.
[167] An essential feature of national territory is that it is an area in which the state has the exclusive right to exercise its sovereign power; cf. Doehring, Völkerrecht, Mn. 88.
[168] Cf. for example Ipsen, Völkerrecht, Section 23 Mn. 2 with further references.
[169] Ipsen's pithy turn of phrase, Ipsen op. cit..

air space can be considered part of national territory up to an altitude of 80 kilometres.[170] Consequently, the air space in which civilian aviation operations take place must undisputedly be classified as part of a country's sovereign territory.

If we interpret Art. 24 I 2 of the Chicago Convention in the light of this general usage in international law, we come to the conclusion that taxation of domestic flights is not covered by this regulation, since these flights do not leave the sovereign territory of the Federal Republic of Germany.

However, it must be noted that the Chicago Convention departs from general usage in international law on this point: a synoptic consideration of Art. 1 and 2 of the Chicago Convention reveals that a distinction is made between territory - which is intended to cover land areas and territorial waters - and air sovereignty, which is intended to refer to the air space above the territory of a country.[171] Thus, air space is not seen here as part of the territory of a country but as a separate realm.

However, this usage is not consequently adhered to within the Chicago Convention. Although there are numerous examples of the use of the term in this sense,[172] there are also many regulations in which the term "territory" is obviously meant to include air space.[173] Thus, for example, Art. 27 of the Chicago Convention speaks not only of entry into territory but also of transit across (!) the territory with or without landings. Art. 26 regulates the investigation of accidents occurring in the territory of another contracting state; it is hardly likely that this provision is not intended to apply to accidents that occur in the air space of another contracting state. Art. 11 of the Chicago Convention determines that the air regulations of a contracting state are also applicable to the operation and navigation of aircraft while within (!) its territory. Art. 12 also speaks of aircraft operating within the territory of a contracting state and of the air regulations valid in that territory. Finally, Article 5 and 10 of the Chicago Convention should also be mentioned here, in which a distinction is made between entry into the territory and making a landing, although according to Art. 1 and 2 of the Chicago Convention the territory would not be reached until a landing was made.

Thus, it can be noted that the term territory is used in different ways in the Chicago Convention:[174] in some cases it includes air space as is common usage in international law, in

[170] Ipsen, Völkerrecht, Section 23 Mn. 2.
[171] Also Loibl/Reiterer, Rahmenbedingungen, p. 56
[172] See, for example, Articles 6, 8 and 9 of the Chicago Convention, which speak of flying over, not flying through territory.
[173] This footnote is redundant in English.
[174] This is overlooked by Loibl/Reiterer, Rahmenbedingungen, p. 56 ff.

some cases it refers only to land, corresponding to the system set out in Articles 1 and 2 of the Chicago Convention. Against the backdrop of this inconsistent use of terminology, we shall attempt below to ascertain the scope of the term "territory" in Art. 24 of the Chicago Convention on the basis of context and the purpose of this regulation.

Art. 24 I 1 of the Chicago Convention speaks of flight across territory and thus obviously assumes that the air space is not part of the territory. Art. 24 I 2, which is the only Article of the Chicago Convention relevant to the permissibility of an estimate-based kerosene tax, thus produces no clear conclusion. In brief, Art. 24 I 2 of the Chicago Convention states that certain charges may not be levied on fuels that were on board an aircraft on arrival in the territory of another contracting State and on leaving that territory. If the term territory were understood in the sense used in Art. 1 and 2 of the Chicago Convention, the outcome would be that all fuels that were not used either between entry into German air space and landing[175] or during the aircraft's ground movements would be exempt from these charges. If territory is interpreted on the basis of this understanding, the requirement of being retained on board on leaving the territory would not have been necessary; it would have sufficed to exempt all fuels on board on arrival in the territory. The stipulation of being retained on board would at any rate not have been required to exclude unloaded fuel from the charge exemption, since this constellation is separately regulated in Art. 24 I 3. Thus, it can be concluded that the criterion of being retained on board only makes since if the term territory is understood as it is commonly used in international law.[176] It then follows that kerosene imported into the Federal Republic of Germany on board aircraft enjoys the exemption from charges if it is not used within German air space. In the context of Art. 24, it therefore seems appropriate to interpret the idea of territory in such a way as to include air space, thus permitting charges of whatever kind to be imposed on fuels used on domestic flights.

This interpretation is backed by two further considerations:

Firstly, it must be noted that the regulations on charges contained in many bilateral agreements are similar to that in Art. 24 I 2 of the Chicago Convention, which is followed by the sentence that this exemption also applies, "provided that the goods already on board …

[175] Loibl/Reiterer, Rahmenbedingungen, p. 55 with Fn. 55 are sceptical with regard to the permissibility of taxation in this constellation.

[176] This conclusion is backed by the principles on the taxation of aviation gasoline summarised in Doc. 8632 "ICAO's policies on taxation in the field of International Air Transport." These state that exemption from charges should be granted to fuels that are in the tanks of an aircraft when it arrives in another signatory state and are not unloaded. There is no mention of the criterion of being retained on board, which, in the context of Art. 24, suggests that domestic flights are not covered by the exemption; however, it does say that relief from duty should be granted only to aircraft "engaged in international air transport." This regulation points clearly to the link between the criterion of being retained on board and the inclusion of domestic flights.

are used on the flight across the territory of the latter contracting State."//Das habe ich woertlich aus dem Deutschen uebersetzt. Ich habe keinen Satz in Art. 24 gefunden, von dem ich meinte, dieses Zitat koennte eine Uebersetzung sein. Hat der Autor vielleicht eine andere Fassung des Abkommens als die, die ich im Internet gefunden habe?// This practice makes it clear that charges levied on consumption over the alien territory requires a separate regulation, whereas exemptions such as those set out in Art. 24 I 2 of the Chicago Convention are only intended to apply to kerosene on board in transit.

Secondly, it must be taken into account that the intention of the Chicago Convention is clearly to promote and facilitate international civil aviation, not domestic air transport. This is made clear both in the official title of the agreement ("Convention on International Civil Aviation") and in the wording of the preamble, which consistently makes reference to developing international aviation. Seen against the backdrop of this general intention of the treaty, it would seem appropriate in case of doubt to interpret its provisions in such as way that regulating domestic aviation is left as far as possible to the contracting States themselves. Thus, as an interim conclusion it can be said that the term territory in Art. 24 I 2 of the Chicago Convention should be interpreted so as to include the air space of the contracting States, so that this regulation does not preclude imposing charges of whatever kind on kerosene used on domestic flights.[177]

b) Types of charge covered

It is also helpful to consider whether Art. 24 I 2 of the Chicago Convention even applies to consumption taxes. According to its wording, there is an exemption from "customs duty, inspection fees or similar national or local duties and charges."[178]

The term "national or local duties and charges" is basically very broad and, in case of doubt, would also cover taxes of any kind. [179] However, it becomes more clearly outlined and restricted by the addition of the attribute "similar." Thus, there has to be a structural connection in legal terms to "customs duties" or "inspection fees."[180]

The main feature that characterises customs duties is that they are linked to goods crossing a border.[181] By contrast, an estimate-based kerosene tax would be linked not to kerosene crossing a border but to its consumption. This is made particularly clear by the fact that a tax

[177] Also the opinion of Jatzke, System, p. 129.
[178] Footnote redundant in English
[179] On the term "duties" see also Loibl/Reiterer, Rahmenbedingungen, p. 52 f.
[180] This is completely overlooked by Loibl/Reiterer, Rahmenbedingungen, p. 51 ff.
[181] Witte/Wolffgang, Zollrecht, p. 29.

of this kind would not cover kerosene consumed in the air space, i.e. the national territory, of the Federal Republic of Germany, unless it was for a flight between German airports. The tax would be therefore on something that is the very opposite of goods crossing a border, namely the kerosene used between the border of German air space and the first or last airport in Germany would be exempt from tax. The fact that an estimate-based tax on kerosene would not be a charge similar to customs duty also becomes clear from the fact that any kerosene taken on board in the Federal Republic of Germany would be taxed in the same way.[182]
Seen in the light of the legal system, inspection fees, like all other kinds of fees, are characterised by the fact that they are connected to some kind of service provided in return. An estimate-based tax on kerosene would not be levied as remuneration for any kind of service provided by the state, but to raise general revenue for the state. The level of tax would also be ascertained irrespective of the expenditure needed to remedy the environmental damage caused by aviation. There is thus no connection of any kind with a service provided in return.
In summary, it can thus be noted that an estimate-based tax on kerosene bears no similarity whatsoever to customs duties or inspection fees, so that it does not fall under the charges covered by Art. 24 I 2 of the Chicago Convention.

c) Interim conclusion

Art. 24 of the Chicago Convention does not preclude the imposition of an estimate-based kerosene tax on domestic flights, since this regulation applies neither to domestic flights nor to taxes.

3.) ICAO secondary legislation

As explained in detail under C.) II.) 4.), the ICAO Council has the authority to regulate on tax issues through Directives. Seen against the background of the ICAO's long-standing legal practice, the only regulations that can be interpreted as standards are those that have been declared to be Annexes to the Chicago Convention. The contracting States are obliged to implement these standards as far as possible in their national law. If the contracting States deem it necessary, they may also subsequently differ from existing standards.

[182] Witte/Wolffgang op. cit. also base their distinction between customs duties and consumption taxes on this criterion.

Annex 9 is the only currently existing Annex to the Chicago Convention that deals with imposition of charges on aviation. The relevant provision is in Chapter 4, Section E of Annex 9; we shall quote the legally binding part once more:

> *4.36 "Stores and commissary supplies imported into the territory of a Contracting State for use on board aircraft in international service shall be relieved from import duties and taxes, subject to compliance with the customs regulations of the State."*

As defined in the first chapter to Annex 9, the term "stores and supplies" also applies to fuel intended for the operation of an aircraft.
Thus, this provision does apply to fuels; however, it prohibits only the imposition of import charges of any kind and furthermore refers to the constellation in which fuels are imported into the territory of another state for use by aircraft on international flights.
Similarly, it is not possible to infer any prohibition on an estimate-based tax on kerosene for domestic flights from the non-binding "recommended practices" established under 4.37 to 4.39, which flesh out the actual standard referred to here. The recommended practice under 4.38 does refer to exemption from charges for fuels consumed on board, but explicitly excludes cabotage flights and thus the domestic flights under consideration here.

4.) ICAO documents

As we have already described under C.) II.) 4.), all the documents adopted by ICAO organs that have not been declared Annexes to the Chicago Convention are to be classified as non-legally binding soft law that cannot preclude the legal permissibility of measures implemented by contracting States.[183]

5.) Conclusion

Neither the Chicago Convention itself nor the various documents adopted by ICAO organs preclude the introduction of estimate-based kerosene taxation.

[183] With regard to the principles on taxation of aviation gasoline summarised in Doc. 8632 "ICAO's policies on taxation in the field of International Air Transport" it should be noted that they explicitly refer only to aircraft "engaged in international air transport."

III.) Compatibility with bilateral treaties

We must also examine to what extent bilateral aviation agreements, the fundamental significance and substantive content of which has already been described under C.) III.), might preclude estimate-based taxation.

The only bilateral agreements relevant for the taxation of domestic flights are those that the Federal Republic of Germany has concluded with other EU Member States, since agreements with third countries do not grant traffic rights for domestic flights. Cf. C.) III.) 4.).

Bilateral agreements are completely irrelevant to the permissibility of taxing German aircraft.

We shall assume the applicability of the clauses on charges on domestic flights contained in agreements concluded with other EU Member States, although the corresponding traffic rights result not from these agreements, but from Community law. Cf. C.) III.) 5.) a). The relevant clauses in the bilateral agreements are not supplanted by Art. 14 II of Directive 2003/96 Cf. C.) III.) 5.) b).

In this section, we shall therefore examine whether an estimate-based taxation option is compatible with the individual agreements concluded by the Federal Republic of Germany with other EU Member States.

1.) Type I: No exemption from consumption taxes for kerosene on board

As an example, we shall consider once more the corresponding clause in the agreement with Austria, which we shall therefore cite again here:

> *"(1) Aircraft used by any company designated by one contracting party, and entering, departing from or flying across the territory of the other including fuel, lubricants, spare parts, regular equipment and stores on board shall be exempt from customs duties and other charges imposed on the import, export or transit of goods. This shall also apply to goods on board said aircraft that are consumed during the flight across the territory of the latter contracting party.*
>
> *(2) Fuel, lubricants, stores on board, spare parts, and regular equipment temporarily imported into the territory of one contracting party in order to be immediately or after storage installed in or otherwise taken on board the aircraft of a designated airline of the other Contracting Party, or to be otherwise exported again from the territory of the former Contracting Party, shall be exempt from the customs duties and other charges mentioned in paragraph 1 above,*
>
> *(3) Fuel and lubricants taken on board the aircraft of any designated airline of either Contracting Party in the territory of the other Contracting Party and used in international air services shall be*

exempt from the customs duties and other charges mentioned in paragraph 1 above, as well as from any other special consumption charges.

(4) Each Contracting Party may keep the goods mentioned in paragraphs 1 to 3 above under customs supervision.

(5) Where no customs duties or other charges are levied on goods mentioned in paragraphs 1 to 3 above, such goods shall not be subject to any economic prohibitions or restrictions on importation, exportation or transit that may otherwise be applicable."

Pursuant to paragraph I, fuels on board Austrian aircraft are exempt from customs duties and other charges on import, export and transit, including in instances when they are used when flying across German territory.

The scope of this latter provision seems questionable. It remains unclear whether it refers to overflights without landing in the Federal Republic of Germany, internal German flights, or both. Since the bilateral agreements as a rule do not grant traffic rights for internal German flights, a historical interpretation suggests the assumption that this provision is intended to refer only to cases of overflight without landing.

Ultimately, however, this question can remain unanswered, since exemption from customs duties and other charges is granted only on import, export and transit of goods. Irrespective of this particular option, a consumption tax on kerosene is in no way based on import, export or transit, but solely on consumption. This results, as already mentioned, clearly from the fact that kerosene taken on board in the Federal Republic of Germany is subject to the same charges and furthermore from the fact that there are no plans to tax aviation gasoline imported into the Federal Republic of Germany on international flights. A systematic comparison with paragraph III underlines this conclusion: kerosene taken on board is explicitly exempted from the customs duties and other charges mentioned in paragraph I and from any special consumption charges. This wording leaves no room for doubt that the charges mentioned in paragraph I do not include consumption taxes, under which kerosene tax unequivocally falls; otherwise, additional mention of special consumption taxes would be completely superfluous. This argument is incidentally not only compelling in terms of legal logic, but also leads to a convincing conclusion in terms of content.

In this way, the freedom of the contracting parties to tax kerosene used on domestic flights ultimately remains – not just for this but also for all conceivable taxation options. For the fuelling option, this results from the explicit link to international flights; for the estimate-

based option from the fact that kerosene already on board is not exempt from consumption taxes. Linked to domestic flights, paragraph I thus ensures that Austrian aircraft or rather the fuel on board are not at a disadvantage because they carry the necessary fuel from abroad. In order to prevent them being at a disadvantage vis-à-vis German aircraft, there is an exemption from all charges that do not have to be paid by German companies buying their aviation gasoline in the Federal Republic of Germany. There is, however, no intention to create an advantage over German aircraft on domestic flights. A consumption tax that affects all aircraft irrespective of the place of fuelling therefore remains permissible.

Thus, in conclusion it can be said that the bilateral aviation agreement between the Federal Republic of Germany and Austria does not preclude an estimate-based taxation of aviation gasoline used on internal German flights.

The clauses relating to charges in the aviation agreements concluded by the Federal Republic of Germany with Finland, Estonia, Latvia, Lithuania, the Czech Republic, Hungary and Malta are identical in structure and content with the agreement concluded with Austria; they similarly do not preclude estimate-based taxation of aviation gasoline used on internal German flights.

The agreement with Portugal is also similar; it has a different structure, but nevertheless makes the same distinction between fuels already on board, which are exempt from customs duties, inspection fees or similar charges and fees, and fuels taken on board, which are in addition exempt from any special consumption taxes. Furthermore, the exemptions under this agreement explicitly apply only to aircraft used for international scheduled air transport.

Although they have distinctly different structures, the same argumentation can also be applied to the agreements concluded by the Federal Republic of Germany with Ireland and the Netherlands; here, too, a distinction is made between fuels already on board, which are exempt from customs duties, inspection fees or similar charges and fees, and fuels taken on board, which are in addition exempt from any special consumption taxes.

The same applies to the agreements concluded by the Federal Republic of Germany with Poland and Cyprus that have a different structure again; these agreements also make the additional link to the existence of international air transport.

2.) Type II: Exemption from charges only for aircraft used in international transport

A number of other aviation agreements grant relief on charges only to aircraft that are used for international air transport. The agreement between the Federal Republic of Germany and Sweden can be quoted as an example of an agreement of this kind:

> *"(1) The contracting States grant the following relief on charges to aircraft that are used by a company designated by the other contracting state exclusively for international air transport :*
> *..."*

For aircraft that are used on internal German flights and the fuels on board or consumed there is no such relief on charges.

The agreements concluded by the Federal Republic of Germany with Luxemburg and Denmark have a comparable structure.

With regard to these three agreements, it must be noted that fuels already on board are also exempt from customs duties and charges levied on import, export and transit for connecting flights between two points within German territory. However, the impermissibility of estimate-based kerosene taxation on internal German flights can similarly not be inferred from these clauses since, firstly, consumption taxes are not covered by the charges named, whereas they are given separate mention in the fuelling clauses of these agreements, and, secondly, the combination of the two terms "connecting flights" and "international air transport" of necessity means that it is a question here of flights on which passengers or goods are not transported solely between places in Germany. In other words, domestic flights are not meant here.

The agreements concluded by the Federal Republic of Germany with France and Spain can also be classified in this category: both agreements make the link to aircraft used for international air transport and also distinguish between fuels already on board, which are exempt from customs duties, inspection fees or similar charges and fees, and fuels taken on board, which are in addition exempt from any special consumption taxes. There is no special provision relating to connecting flights as is found in the three above-mentioned agreements.

3.) Agreement with Italy

Although it has a different structure from the others, the bilateral agreement concluded by the Federal Republic of Germany with Italy makes the same distinction between fuels already on

board, which are exempt from customs duties, inspection fees or similar charges and fees, and fuels taken on board, which are in addition exempt from any special consumption taxes.

4.) Agreement with Belgium

The clause on charges in the agreement concluded by the Federal Republic of Germany with Belgium does not make an explicit link to the use of aircraft enjoying privileges //begünstigten?// in international air transport. As in the other bilateral agreements, fuels already on board aircraft are exempt from customs duties and other charges on import, export and transit. However, for fuels taken on board no further exemption is granted, special consumption taxes are not mentioned at any point. On the basis of the uniform wording used in the aviation agreements concluded by the Federal Republic of Germany, it can nevertheless be ruled out, despite the impossibility of the opposite conclusion in all the agreements considered thus far, that the term “charges on import, export and transit” does include consumption taxes. Thus, this agreement similarly does not preclude estimate-based taxation of aviation gasoline used on domestic flights.

5.) Agreement with the United Kingdom

Finally, the agreement between the Federal Republic of Germany and the United Kingdom must be looked at separately. In this agreement too fuels already on board are exempt only from customs duties and charges on import, export and transit and inspection fees. Special consumption taxes are not mentioned in the fuelling clauses of this agreement, but the comments made on the agreement between Germany and Belgium also apply.

6.) Agreements with Slovenia and Slovakia

The agreements concluded by the Federal Republic of Germany with Slovakia and Slovenia agreements have, as far as we are aware, not yet been ratified and correspondingly not yet published. These agreements can therefore not be included in this study.

7.) Standard EU clauses for future bilateral agreements

A provision similar to the clause described under C.) III.) 7.), explicitly setting out the possibility of estimate-based taxation of kerosene used on domestic flights, is not included in the new standard clauses for agreements with third countries.

Estimate-based taxation would nevertheless be permissible, provided that, in line with practice to date, only fuels already on board are exempt from customs duties and charges on import, export and transit of goods. The standard clauses do not preclude the continuation of this practice. However, the fact that taxation linked to the purchase of aviation gasoline is explicitly mentioned as being permissible will probably not make it easy to infer the permissibility of estimate-based taxation from an interpretation of the agreement.
However, at this point we must stress once more that bilateral agreements with third countries are only relevant for the permissibility of estimate-based taxation of kerosene used on domestic flights if the contracting parties in question have been granted cabotage rights under the agreements.

8.) Import clauses

Finally, it must be pointed out that the vast majority of clauses in the agreements as a result of which fuels temporarily imported into the territory of one contracting party, in order to be taken on board there directly or after storage by an aircraft of the company designated by the other contracting party on board, are exempt from customs duties and import, export and transit charges, do not preclude the imposition of an estimate-based kerosene tax. The fact that fuels are imported under an exemption from customs and import duties does not alter the fact that these fuels may be taxed after they have been taken on board if they are used on a domestic flight.

9.) Conclusion

The bilateral aviation agreements that the Federal Republic of Germany has concluded with the other EU Member States do not preclude the introduction of estimate-based taxation of aviation gasoline used on domestic flights.

IV.) Compatibility with primary Community law

The situation with regard to the compatibility of an estimate-based tax on kerosene with primary Community law is not fundamentally different from the option considered under C.) so that we may simply refer to the comments made there.
Accordingly, estimate-based kerosene taxation is compatible with Art. 90 of the EC Treaty and with the fundamental freedoms.

V.) Compatibility with secondary Community law

In this section, we shall examine whether an estimate-based kerosene tax is compatible with secondary Community legislation. To this end, we must examine not only Directives 2003/96 and 92/12 but also customs provisions.

1.) Excise Duty Directive 92/12 EEC

In the case of estimate-based kerosene taxation, tax would only become chargeable after removal from the tax warehouse, whereas in the option considered under C.) chargeability is at the moment of removal from tax warehouse. It is thus questionable whether a specific point in time for chargeability of tax is mandatorily prescribed under Community law .

The authoritative provisions of Directive 92/12 on this point are in Art. 6:

> *1. Excise duty shall become chargeable at the time of release for consumption or when shortages are recorded which must be subject to excise duty in accordance with Article 14 (3).*
> *Release for consumption of products subject to excise duty shall mean:*
> *(a) any departure, including irregular departure, from a suspension arrangement;*
> *(b) any manufacture, including irregular manufacture, of those products outside a suspension arrangement;*
> *(c) any importation of those products, including irregular importation, where those products have not been placed under a suspension arrangement.*
>
> *(2. The chargeability conditions and rate of excise duty to be adopted shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place or shortages are recorded. Excise duty shall be levied and collected according to the procedure laid down by each Member State, it being understood that Member States shall apply the same procedures for levying and collection to national products and to those from other Member States*

A departure from a suspension arrangement is constituted in particular by removal from a tax warehouse. Cf. the definition of terms in Art. 4 b) of Directive 92/12.

For the consideration of the stipulations on the date and moment at which duty becomes chargeable, it is necessary to distinguish first between aviation gasoline that was taken on board in the Federal Republic of Germany or another EU Member State, on the one hand, and kerosene taken on board in third countries on the other hand.

a) Tax liability for kerosene taken on board in the EU or in Germany

For the estimate-based taxation of both aviation gasoline taken on board in the Federal Republic of Germany on board and that taken on board in another EU Member State it is a situation under which a consumption tax is levied on fuel that has already been released for consumption.

As already explained, the concept of "released for consumption" does not necessarily assume that tax had become chargeable. Kerosene that is removed from a tax warehouse for use under tax exemption circumstances has already been released for consumption. Thus, when aviation gasoline is taken on board from a tax warehouse in Germany or another Member State for use on a domestic flight it is released for consumption; that is also the case when, due to a tax exemption, no grounds for tax chargeability can be substantiated.

With regard to the permissibility of taxing goods that had already been released for consumption in Germany, a further distinction must be made between goods that were released from a German tax warehouse and goods that had already been released for consumption in another Member State.

aa) Tax liability for fuels taken on board in other EU Member States

If in the latter case the goods are used for commercial purposes, the country of destination principle mentioned above applies.[184] Under this principle, tax is chargeable in the receiving country, while tax levied in the dispatching country is refundable, cf. Art. 7 I and VI of Directive 92/12. While Art. 7 I of Directive 92/12 merely establishes only the country of destination principle per se, Articles 7 II and 9 of Directive 92/12 list individual circumstances in which the country of destination principle is applied.[185] The import of fuels in the standard tanks of vehicles //Kraftstoffen – Tippfehler oder?//, comes under Art. 9 of Directive 92/12:

> *"(1) Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State. In this case, the duty shall be due in the Member State in whose territory the products are and shall become chargeable to the holder of the products."*

[184] By contrast, in the case of goods acquired in another Member State for private consumption the country of origin principle applies, under which excise duty is charged in the Member State in which they were acquired. Cf. Art. 8 of Directive 92/12.

[185] On the function of Art. 9 as a catch-all clause see Jatzke, System, p. 204 f.

Unlike Art. 6, Art. 9 of Directive 92/12 does not contain any stipulations regarding the time at which tax becomes chargeable, but it does make stipulations regarding the taxable person.[186] For objective reasons there is no question of applying the provisions of Art. 6 of Directive 92/12, since the goods have already been released for consumption. Taxation must therefore take effect after the removal from the tax warehouse, i.e. once the goods have already been released for consumption. Since there is no regulation on this under Community law,[187] it must be assumed that the Member States have some latitude to make their own arrangements about the time when tax becomes chargeable. Consequently, it seems permissible to link the taxation directly to consumption. The provisions of Art. 9 of Directive 92/12 regarding the taxable person also allow the airlines to be taxed directly since the airlines are the persons holding the taxable kerosene.

The permissibility of this taxation model can also be inferred from the Art. 24 of Directive 2003/96, which states:

> *"(1) Energy products released for consumption in a Member State, contained in the standard tanks of commercial motor vehicles and intended to be used as fuel by those same vehicles, as well as in special containers, and intended to be used for the operation, during the course of transport, of the systems equipping those same containers shall not be subject to taxation in any other Member State.*

The existence of a special provision for vehicles makes clear that the application of the country of destination principle to fuels already in the tanks of vehicles is not only fundamentally possible but even systematically mandatory – otherwise there would have been no need for this special regulation.

However, application of the country of destination principle to fuels could be organised in such a way that the fuel level is determined when the fuel is imported, i.e. on crossing the border and the amount of fuel recorded is then taxed. Taxation of this kind would not be based on concrete consumption but on the quantity imported; the time of chargeability of tax would be the moment the fuels crossed the border not the moment of consumption.

In the case of kerosene taxation, Member States may, however, unilaterally tax only the kerosene used on domestic flights. Directive 2003/96 permits taxation of kerosene used on intra-Community flights only in cases where corresponding bilateral agreements have been concluded between Member States. Conversely, the introduction of a kerosene tax on

[186] Incidentally, the same also applies to the chargeability circumstances regulated under Art. 7 II, cf. Art. 7 III.
[187] In particular Art. 6 I c) cannot be applied to importation from other Member States, but only to importation from third countries into the territory of the Community. Cf., for example, the legal definition of import in Art. 5 I UA of 1 Directive 92/12.

domestic flights is explicitly left to the discretion of the Member States. Thus, Directive 2003/96 does not permit unrestricted application of the country of destination principle. The Energy Products Directive and the Excise Duty Directive have equal status. However, since the former is more recent and more specialised, it must be assumed that the country of destination principle can only be applied to the taxation of aviation gasoline subject to the modifications stipulated in Directive 2003/96.

Application of the country of destination principle to aviation gasoline that is already on board, taking into account the fact that the possibility of taxation is limited to domestic flights, allows no other solution than comparing the fuel levels in the tanks of the aircraft before take-off and after landing of a domestic flight. This option thus represents the only possible form of the fundamentally possible application of the country of destination principle to aviation gasoline that is already on board, taking into account a restriction in the latitude of the Member States to taxation of kerosene used on domestic flights. The estimate-based scheme, by contrast, does not question this basic concept that has evolved from the country of destination principle; it is based on exactly the same principle and replaces - merely for reasons of administrative economy - the comparison of the fuel levels in tanks by an estimate-based calculation of consumption.

Admittedly, this taxation model does raise problems regarding reimbursement of any mineral oil tax that may already have been charged abroad, since only part of the kerosene already taxed aboard is used on domestic flights and thus comes under German taxation. However, this problem arises irrespective of whether taxation is confined to domestic flights only or whether it extends to all the aviation gasoline used in German air space, since in each case it has to be taken into account that part of the product subject to tax will already have been used before the aircraft reaches German air space. However, these difficulties are an inherent consequence of the systematically required application of the country of destination principle to goods that have already been released for consumption.

bb) Chargeability of tax on fuels taken on board in Germany

With regard to goods that are released for consumption in the Federal Republic of Germany it must be assumed that taxation based on consumption is not permissible. The legal institution of release for consumption would lose its meaning if goods that had been released for consumption in a country were subjected to further taxation in that same country. The very concept of release of goods for consumption is characterised by the fact that tax has already

been chargeable;[188] that "everyone may in principle do what they like with the products without further tax restrictions;"[189] consequently, it is not possible for further tax to become chargeable in the same country on goods that have already been released for consumption. It can therefore be assumed that chargeability conditions are conclusively regulated by Art. 6 I of Directive 92/12.

Viewed systematically and synoptically, Art. 6 I of Directive 92/12 and the stipulation of Art. 6 II 1 of Directive 92/12 that the conditions for chargeability shall be based on the law of each Member State cannot be interpreted in the sense that Member States may depart from the provisions of paragraph I in determining the date at which duty becomes chargeable.[190] The fact that these very conditions for chargeability are meant to be based on the law in force in the Member State in question on the date that duty becomes chargeable proves that the definition of "chargeability conditions" here does not include the date of chargeability.

The following passage in the preamble to Directive 92/12, which is admittedly rather vague, is nevertheless also indicative of the importance of a uniform system in determining chargeability of duty in which the possibility of Member States following their own procedures is ruled out:

> *"Whereas, in order to ensure the establishment and functioning of the internal market, chargeability of excise duties should be identical in all the Member States."*

A tax based on the consumption of fuels taken on board in the Federal Republic of Germany is thus not permissible.

b) Chargeability of tax on fuels taken on board in third countries

Finally, we must consider the legal position with regard to kerosene imported directly into the Federal Republic of Germany from third countries.[191] Here the relevant provision is Art. 6 I c) of Directive 92/12, under which the importation of goods counts as release for consumption and tax thus becomes chargeable on the date of importation.

In order to comply with this stipulation, it would be necessary to base the taxation of kerosene imported from third countries on the amount of kerosene on board an aircraft on crossing the border. However, this would be contrary to the restriction of taxation possibilities to domestic

[188] Reiche in Teichner et al., Energiesteuerrecht,, Section 19 MinöStG Mn. 7.
[189] Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, Mn. D 6.
[190] For another interpretation see Jatzke, System, p. 151, who assumes that "special chargeability circumstances" are permissible in the excise duty laws, but that they nevertheless have to be interpreted and applied in line with the corresponding Directive.
[191] This constellation can occur when aircraft of German airlines enter the Federal Republic of Germany from a third country and then continue to operate a domestic flight without refuelling.

flights stipulated by Directive 2003/96. Thus, the comments on how the stipulations of Directive 2003/96 modify the country of destination principle correspondingly apply here; Art. 6 I c) of Directive 92/12 can thus only be applied taking into account the restricted taxation possibility.
Thus, the only possibility for taxing kerosene used on domestic flights that has been imported directly from third countries is to compare the level of fuel in the tanks on take-off and after landing of a domestic flight.

c) Summary

In summary, it can thus be established that taxation of aviation gasoline based on consumption is compatible with the provisions of Directive 92/12 only in the case of aviation gasoline that was taken on board outside the Federal Republic of Germany, not kerosene taken on board within the country.
From this it follows that it is permissible to undertake the amendments to Section 19 II of the Mineral Oil Tax Act that are necessary for the introduction of estimate-based kerosene taxation (cf. D.) I.). From the point of view of the country of destination principle, an amendment of that kind is imperative.[192] From the point of view of the law on excise duty, a corresponding amendment to Section 21 I of the Customs Regulation is permissible. The introduction of estimate-based taxation for fuels taken on board in the Federal Republic of Germany appears to be incompatible with the Community law.

2.) Energy Products Directive 2003/96

Directive 2003/96 explicitly permits taxation of aviation gasoline used on domestic flights; cf. C.) V.) 2.).
However, it seems questionable whether an estimate-based option is compatible with the provisions of this Directive with regard to the taxable event. Pursuant to Art. 1 of Directive 2003/96, Member States impose taxes on energy products which, as defined in Art. 2 I of Directive 2003/96, includes aviation gasoline. Annex I Table A of Directive 2003/96 sets a minimum tax rate for kerosene of € 304 per 1000 litres. Irrespective of the question already examined under C.) V.) 2.) as to whether, pursuant to Art. 14 II 3 of Directive 2003/96,

[192] Whether Section 19 II of the Mineral Oil Tax Act in its current version is in line with Community law seems questionable. Not applying the country of destination principle to the fuels in the standard tanks of all vehicles with the exception of watercraft is clearly contrary to the regulations of the Excise Duty Directive. The only exception provided for under Community law is that for commercial vehicles //Kraftfahrzeuge – gibt sonst keinen Sinn oder?// contained in Art. 24 of Directive 2003/96.

Member States may apply a lower tax rate to domestic flights, a synoptic view of Art. 1 and Table A in Annex I of Directive 2003/96 shows unequivocally that a tax on kerosene is covered by the provisions of this Directive only if it is based on its consumption.
It seems doubtful whether this is so in the case of the estimate-based option. Depending on the number and weighting of the parameters included in calculating the estimated consumption, an estimate-based tax on kerosene could also be understood as being a charge based on distance flown.
This is particularly true if the consumption estimated is entirely or largely proportional to the distance flown. Referring to the estimated consumption to ascertain the tax liability would seem in that case to be a mere formality; it would also be possible in principle to base the tax rate directly on the distance flown since the same level of taxation applies to each kilometre flown.
However, the situation is different if the tax scale is designed in such a way that there is no proportional relationship between distance flown and level of taxation. A relationship of that kind can be prevented firstly by applying a different consumption value per air kilometre to the take-off and landing phases than to the sections of the flight between the two; secondly, it seems preferable from this point of view to include as many parameters as possible in the calculation.
In this context, reference should be made to an ECJ ruling from 1999 that deals with question of the actual taxable event in charges based on average values.[193]
The subject of the ruling was the question of whether a charge levied on domestic flights in Sweden was compatible with the ban on taxation of kerosene that was comprehensive under Community law at the time. The charge in question was called an environmental protection tax; it was calculated on the basis of estimated fuel consumption and specific emissions. The Swedish government submitted that the basis for assessment chosen was the most appropriate method for calculating air pollution, which was the aim of this taxation measure. Furthermore, they claimed, the fact that kerosene consumption was estimated showed that it was not a question of direct taxation of kerosene consumption.
The ECJ did not accept this argumentation but affirmed that it represented a violation of the ban on kerosene taxation effective under Community law at the time. With that it made it

[193] ECJ, Ruling C-346/97, Slg. I-1999, p. 3419 ff.; cf. also the critique by Jatzke, ZfZ 1999, p. 393 ff.

clear that the determination of the actual taxable event is to be based on objective and material criteria and not the formal design of the taxation by the Member State.[194]
In summary, it must thus noted that in the case of estimate-based taxation, the only way to ensure that this charge will be classified as a tax levied on the actual consumption of aviation gasoline is to incorporate as many consumption-based factors into the estimate-based calculation as possible. This in turn would lead to an extremely complicated tax scale, which would have to be constantly adapted to changes in technology. Furthermore, the application of such a detailed tax scale, calculated virtually on a case-by-case basis, holds the high risk of the tax scale itself becoming the object of numerous legal disputes. In terms of legal practice, the introduction of estimate-based taxation is not advisable.

3.) Customs regulations

Articles 133 and 139 of the EC Customs Duty Relief Regulation authorize Member States to grant relief from duty on aviation gasoline imported directly from third countries in the standard tanks of aircraft. However, these provisions are worded as authorisations not imperatives, so that they do not hinder the abolition of these tax exemptions.

4.) Conclusion

EC secondary law permits taxation directly linked to consumption only for kerosene imported into the Federal Republic of Germany from other EU Member States or from third countries in the standard tanks of aircraft. A tax scale based on estimate-based consumption values would have to be designed in such a way that the basis for assessment was indisputably kerosene consumption and not distance flown.

VI.) Compatibility with constitutional law

With regard to the compatibility with constitutional law, there are no fundamental differences from the option considered under C.).
Estimate-based taxation of aviation gasoline does mean inequality of treatment by comparison with the taxation of mineral oil based on purchase //das verstehe ich einfach nicht?//; nevertheless, this inequality of treatment cannot be seen as violating Art. 3 of the Basic Law. Firstly, the risk of tankering strategies represents an objective reason for estimate-based

[194] It will not, however, be possible to draw the opposite conclusion from this ruling that estimated kerosene taxation is permissible because the ECJ included the Swedish charge in the ban on kerosene taxation.

taxation; secondly, the introduction of a tax on kerosene of whatever kind will at least reduce the current inequality in the taxation of kerosene compared to other mineral oils.
It must also be stressed that direct taxation of consumption is compatible with the provisions of the German financial system.[195]
Like the necessary amendments to the Mineral Oil Tax Act, amendment of the Customs Regulation also comes under the authority of the federal government; this means that it is a case of exclusive power to legislate as defined in Art. 73 No. 5 in conjunction with Art. 105 I of the Basic Law.[196] The approval of the *Bundesrat* (Upper House) is not required.

VII.) Compatibility with national law

National law below the constitution in the legal hierarchy does not preclude the introduction of estimate-based kerosene taxation due to the legislature's freedom of discretion, cf. C.) VII.). To introduce the taxation option considered here it would be necessary to amend Sections 4 I No. 3 a and 19 II 3 of the Mineral Oil Tax Act, 21 I of the Customs Regulation and to establish a separate provision for estimate-based taxation within the Mineral Oil Tax Act; for more details of this see D) I.) 2 above).

VIII.) Summary

The Chicago Convention does not preclude the introduction of estimate-based kerosene taxation since the relevant provisions firstly do not apply to domestic flights and secondly do not apply to consumption taxes.
Bilateral agreements concluded by the Federal Republic of Germany with other EU Member States do not prohibit the imposition of consumption taxes on aviation gasoline already on board aircraft. Aviation agreements with third countries are not relevant to the taxation of domestic flights, since they do not grant traffic rights for domestic flights.
An estimate-based taxation of kerosene would also be compatible with the relevant provisions of primary Community law, since it would not lead to discrimination of foreign goods or services.

[195] Also the opinion of Peters/Bongartz/Schröer-Schallenberg, Verbrauchsteuerrecht, Mn. C 11.
[196] Cf. On the relationship between these two definitions of power see, for example, Maunz in Maunz/Dürig, GG, Art. 73 Mn. 93.

The Excise Duty Directive does not permit taxation based on the consumption of fuels purchased domestically, since after removal from a tax warehouse they would for the territory of this country, as it were, already have been “irrevocably” released for consumption.
The Energy Products Directive makes it necessary to design the tax scale in such a way that leaves no doubt that the tax is based on kerosene consumed and not on the distance flown.
German law on all levels of the legal hierarchy does not preclude the introduction of estimate-based taxation of kerosene.
The introduction of estimate-based kerosene taxation is consequently from the legal perspective permissible only for fuels imported from other EU Member States or from third countries in the standard tanks of aircraft; it is not permissible for fuels taken on board domestically.

E) Permissibility of a kerosene tax based on reporting obligations

This section will look at whether, with a view to preventing airlines pursuing tankering strategies, on the one hand, and avoiding the disadvantages of a highly complex estimate-based tax scale on the other hand, it would be possible to design a tax scheme in such a way that the kerosene used on domestic flights is taxed irrespective of the place of fuelling with the airlines being obliged to report the amount of kerosene used to the tax authority.

I.) Description of the specifics of this option and the legal framework

The option under consideration here differs only slightly from the estimate-based option examined under D.), namely only in the fact that the amount of kerosene actually used on domestic flights is calculated not on estimates but on the basis of details supplied by the airlines. Thus, this option would not require a detailed tax scale to be worked out, but instead consumption data for all domestic flights would have to be collected. It is not possible to judge from the legal perspective whether this would actually entail greater administrative costs than the estimate-based option, but it should certainly be taken into account that an estimate-based tariff incorporating diverse factors would also require the collection of various data.

For a description of the legal framework please refer to comments under D.) I.) 2.).

II.) Compatibility with the Chicago Convention

With regard to compatibility with the Chicago Convention, the option under consideration here raises the same question as estimate-based taxation as to whether it is permissible to impose consumption taxes on kerosene already on board. Again the comments under D.) II.) may be referred to.

There are no apparent reasons to suggest that it would be incompatible with the Chicago Convention to oblige airlines to declare the amount of kerosene actually used on a domestic flight.

The option under consideration here is therefore compatible with the provisions of the Chicago Convention.

III.) Compatibility with bilateral aviation agreements

Similarly, with regard to bilateral aviation agreements, reference may be made to the arguments presented under the section dealing with the estimate-based option.

In addition, it is necessary to consider whether the bilateral agreements preclude the possibility of imposing the necessary reporting obligations. The aviation agreements do not contain any prohibitions of this nature. Numerous aviation agreements stipulate reporting requirements for flight schedules, planned type of aircraft and the statistical documentation necessary to review their transportation offer. It is not possible to draw any conclusion to the contrary - namely that it would not be permissible to justify further reporting obligations – from these clauses or at most for the area of documentary evidence needed to review the exercise of any traffic rights granted.

Thus, in conclusion, it can be said that bilateral agreements do not preclude the introduction of kerosene taxation in the option considered here.

IV.) Compatibility with primary Community law

With regard to the compatibility of taxation as such with Art. 90 of the EC Treaty and with the fundamental freedoms, we may make reference to the arguments cited under D.) IV.); according to these arguments the introduction of this taxation would not be in violation of the fundamental freedoms.

In terms of its legal character, imposing a reporting obligation is a further non-discriminatory restriction of the relevant fundamental freedoms, but one which would not have a negative effect on market access and thus does not require justification.

V.) Compatibility with secondary Community law

With regard to the problem of the time at which tax becomes chargeable, reference may be made to the arguments cited under D.) V.) 1.). These state that taxation that is directly linked to consumption is permissible only for fuels that are imported from other EU Member States or from third countries in the standard tanks of aircraft but not for fuels taken on board domestically.

Unlike in the case of the estimate-based option, no problems arise with regard to the taxable event: in an option based on reporting obligations there can be no doubt that it is a tax on aviation gasoline and not on the distance flown.

VI.) Compatibility with constitutional law

Taxation of kerosene based on reporting obligations of airlines would be compatible with the Basic Law. For further details see also C.) VI.).

VII.) Compatibility with national law

National law below the level of the constitution in the legal hierarchy does not preclude the introduction of kerosene taxation based on reporting obligations due to the legislature's freedom of discretion. Cf. on this C.) VII.).

To introduce the taxation option considered here, it would be necessary to amend Sections 4 I No. 3 a and 19 II 3 of the Mineral Oil Tax Act, 21 I of the Customs Regulation and to establish a separate provision for taxation based on reporting obligations within the Mineral Oil Tax Act; for more details of this see D) I.) 2 above).

VIII.) Summary

The Chicago Convention does not preclude the introduction of a kerosene taxation scheme based on reporting obligations since the relevant provisions do not apply to domestic flights nor to consumption taxes.

Bilateral agreements that the Federal Republic of Germany has concluded with other EU Member States do not prohibit the imposition of consumption taxes on aviation gasoline that is already on board. Aviation agreements with third countries are not relevant for the taxation of domestic flights, since they do not grant traffic rights for domestic flights.

A kerosene tax based on reporting obligations would also be compatible with relevant regulations of primary Community law, since it would not lead to any discrimination against foreign goods or services.

The Excise Duty Directive does not permit taxation linked to the consumption of fuels purchased domestically, since after removal from a tax warehouse they would, as it were, have already been "irrevocably" released for consumption in the territory of this state.

No level of German law precludes the introduction of kerosene taxation based on reporting obligations.

The introduction of a kerosene tax based on reporting obligations is thus from the legal point of view permissible only for fuels imported from other EU Member States or from third countries in the standard tanks of aircraft but not for fuels taken on board domestically.

F) Preferred option

The advantages and disadvantages of the options considered above can be summarised as follows:

A taxation scheme linked to the act of purchase in the Federal Republic of Germany entails relatively little administrative cost and is from the legal point of view unconditionally permissible. However, the airlines can be expected to respond to the introduction of taxation of that kind with evasion strategies for fuelling with the result that the fiscal and ecological objectives of the taxation scheme would not be fully achieved.

The only way to effectively counteract tankering strategies of that kind is to ensure that the taxation also covers aviation gasoline that was taken on board abroad and is still on board. Possible models that would be appropriate here would be introducing an estimate-based scheme or imposing reporting obligations. Here the latter option seems preferable because an estimate-based tax scale seems to be legally problematic in itself and could also trigger frequent legal disputes. The administrative cost in determining actual consumption, i.e. collecting the corresponding data from airlines, would probably not exceed that involved in recording all the data that would be needed to create a sufficiently differentiated estimate-based tax scale. However, the disadvantage of a taxation scheme based on airlines' reporting obligations is that it would not be possible to cover the kerosene taken on board in Germany since it has already been released for consumption.

Therefore the solution that seems to make the most sense by far is a combination of the purchase-based and reporting obligations option. Here tax would basically become chargeable when kerosene was removed from a tax warehouse in Germany for use on domestic flights. For the kerosene taxed in this way no further tax on consumption would be chargeable. If kerosene is imported in the standard tanks of aircraft and it is therefore not possible to link the tax to removal from the tax warehouse, the airlines would be obliged to declare their consumption data to the tax authority.

A combination of this kind would cover kerosene taken on board in the Federal Republic of Germany on board and that imported into the Federal Republic of Germany from other EU Member States or third countries in the standard tanks of aircraft. This comprehensive coverage of all the fuels used on domestic flights guarantees that the ecological and fiscal goals being pursued would be fully achieved. At the same time it would render tankering strategies pointless, so that no major changes in the fuelling behaviour of aircraft are expected. It is therefore to be expected that for the vast majority of domestic flights the necessary

aviation gasoline would continue to be taken on board at the departure airport, i.e. in this case in the Federal Republic of Germany. The main part of the kerosene tax can therefore be collected in the most administratively simple way, using the option based on removal from the tax warehouse.

From a legal point of view, this "combination model" does not strictly speaking constitute the combination of different options but an option that follows the logic of Community excise duty law. The Excise Duty Directive also contains different bases for taxing goods, depending on whether they are removed from a domestic tax warehouse, imported from another EU Member State or imported from a third country. The model favoured here also uses this differentiation, which is indispensable due to the EC's decision to use the country of destination principle and in turn avoids tax competition.
What is important here is that domestic and foreign mineral oils and domestic and foreign aircraft are taxed in the same way. The sole decisive factor in the application of the proposed model is the place at which an aircraft takes fuel on board, irrespective of the aircraft's owner or nationality.
For this reason the proposed model is not in violation of the discrimination prohibitions enshrined in different legal frameworks. Art. 6 II 2 of Directive 92/12 prescribes equal treatment of domestic and foreign goods; there is no violation of this principle since it is not the origin of the fuels that is important but solely the place at which they are taken on board. Furthermore, it is not possible for there to be any violation of the provisions of this Directive because the model proposed is based on the differentiation made by this very Directive. Similarly, there is no violation of the fundamental freedoms nor of Art. 90 of the EC Treaty, since ultimately all mineral oils and airlines are taxed in the same way and the form of levy used has no connection with origin or nationality.
Finally, the model proposed does not affect the discrimination prohibition based on nationality in Art. 11 of the Chicago Convention.

To introduce this model the following legislative amendments would be necessary:
The tax exemption in Section 4 I No. 3 a) of the Mineral Oil Tax Act would have to be restricted to kerosene "used as aviation fuel by airlines for the commercial transportation of persons, goods or for the provision of remunerated services on international flights." A provision would have to be incorporated into Section 19 II 3 of the Mineral Oil Tax Act,

giving precedence to a regulation to be incorporated into that Act relating to direct taxation of imported kerosene based on reporting obligations; the reference of Section 1 of the Import Duty Regulation (EverbStV) to conditions for relief from customs duties would have to be restricted to kerosene used on international flights.

However, the application of the EU's excise duty system to the taxation of kerosene used only on domestic flights does raise the problem that if imposition of the tax was based on the act of fuelling it could lead to taxation of aviation gasoline that is not actually used on domestic flights. This problem would arise whenever more kerosene was taken on board before a domestic flight than was then actually used on that flight.[197] In that case, where an international flight followed on from a domestic flight, the kerosene tax intended for the domestic flight would also be levied on the aviation gasoline that was only used later for the international flight.

This levying of tax for international flights, which are to remain exempt from tax, could fundamentally be avoided in a system in which the tax was based exclusively on consumption data supplied by the airlines, but – as already explained – that method of levying the tax is out of the question due to Community law, since contrary to Art. 6 para. I of the Excise Duty Directive it would lead to taxation on fuelling of kerosene that has already been released for consumption.

The solution that seems to present no major practical difficulties in implementation and is legally compatible with the provisions of Community law on excise duty is the introduction of a tax refund procedure. The airlines must be given the possibility of proving through exact consumption data that on fuelling[198] they paid tax on a larger amount of kerosene than was actually used on the ensuing domestic flight. If in this constellation, an international flight

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[197] It is important not to confuse this question with the question whether double taxation occurs when kerosene that has already been released for consumption in other Member States is imported into the Federal Republic of Germany. However, since Community law also permits other Member States to unilaterally introduce a taxation scheme for kerosene used on domestic flights, double taxation can be ruled out. If, pursuant to Art. 14 II 2 of Directive 2003/96, a bilateral agreement is concluded between the Federal Republic of Germany and another Member State on the taxation of kerosene used on intra-Community flights, double taxation would be possible. However, presumably it would be possible to regulate any issues connected with this within the bilateral agreement.

[198] By contrast, in levying tax based on the importation of kerosene from third countries or importing kerosene that has already been released for consumption in other Member States similar problems cannot arise, since the tax levied in these cases would in any case be based on the consumption data supplied by the airlines.
Thus, the only question is whether, in view of the fact that every aircraft that enters German air space has kerosene on board, the tax based on consumption data should be confined to those cases in which no refuelling takes place in Germany before operation of a domestic flight. It is not possible from the legal point of view to estimate the risk of misuse of a regulation of that kind by carrying aviation gasoline taken on board abroad in amounts surplus to requirements for the flight to the first airport in Germany and then taking on board in Germany an insufficient amount of fuel for the domestic flight within Germany (in other words by carrying out "fictitious fuelling" activities).

followed on from the domestic flight the excess amount of kerosene tax levied would be refunded on the basis of the consumption data provided by the airlines.[199]

The introduction of a refund procedure of this kind would not be jeopardized by the fact that the taxable persons are not the airlines, but the keeper of the tax warehouse. Since only the airlines are the economic taxpayers, which means that the keeper of the tax warehouse has no need for reimbursement from an economic point of view, it is possible to directly refund the airlines as the users. A scheme under which a tax refund can be claimed[200] by users of aviation fuels that are initially taxed but then used for purposes that are exempt from tax is not unfamiliar in the current law on mineral oil tax: cf. Section 50 of the Mineral Oil Tax Regulation, which is based on Section 31 sub-section II No. 7 b of the Mineral Oil Tax Act.[201]

In practice, this problem will probably not be very significant since, in the interest of economical operating, aircraft do not as a rule take on board more kerosene than required.

[199] In the implementation of this refund procedure what would actually happen would be that kerosene already on board and therefore untaxed (cf. previous footnote a.E.) would be "offset against" the kerosene "surplus to requirements" for the domestic flight.

[200] Terminologically, a distinction is made between the taxpayer's right to a refund and a third party's right to reimbursement, Cf., for example, Peters/Bongartz/Schröer-Schallenberg, Verbrauchssteuerrecht, Mn. J 162.

[201] For more details on this see Soyk, Mineralölsteuerrecht, p. 207 f.; Peters/Bongartz/Schröer-Schallenberg, Verbrauchssteuerrecht, Mn. J 180 f.

G) Taxation of kerosene on intra-Community flights

Finally, this section gives a brief overview of the principal legal issues connected with the taxation of kerosene used on intra-Community flights.

I.) The current legal situation

At present it is not possible for the Federal Republic of Germany to introduce any kind of scheme to tax aviation gasoline used on intra-Community flights. Art. 14 II 1 of Directive 2003/96 permits a unilateral departure from the general tax exemption on aviation gasoline established in Art. 14 I of Directive 2003/96 only with regard to taxation of domestic flights. This is clearer in the English and French versions which speak of "international *and* intra-Community transport" and "transports internationaux *et* intracommunautaires" respectively, whereas the German text of the Directive talks of the possibility of restricting the tax exemption to international *or* intra-Community flights. Thus, tax exemption is mandatory for international and intra-Community flights.

II.) The legal situation if bilateral agreements were to be drawn up

If the Federal Republic of Germany were to conclude a bilateral agreement with another EU Member State, e.g. with France, the legal situation would be as follows:

1.) Chicago Convention

Art. 15 of the Chicago Convention does not refer to consumption taxes, but only to charges that do not have the character of a tax and are levied for transit over, entry into or exit from a Contracting State, and thus does not preclude kerosene taxation.
Similarly, Art. 24 of the Chicago Convention prohibits only charges that are structurally similar to customs duties or inspection fees. Consumption taxes are therefore not covered by Art. 24 of the Chicago Convention. Furthermore, Art. 24 of the Chicago Convention is in no case applicable to taxation of aviation gasoline taken on board. Finally, it may be helpful to point out that, as explained under D.) II.) 2.), the applicability of Art. 24 of the Chicago Convention to domestic flights seems extremely questionable. With regard to the character of the EC as a customs union, it would be necessary to consider whether, with regard to the relief on charges regulated in Art. 24 of the Chicago Convention, the EC should be interpreted not

as a supranational confederation of many countries but as a single, albeit non-state, entity, supplanting the individual Member States in their position as signatories to the convention. On these grounds, it would be possible from the perspective of Art. 24 of the Chicago Convention to treat intra-Community flights as domestic flights, so that it would be essentially questionable whether Art. 24 of the Chicago Convention was valid for intra-Community flights.

2.) Bilateral agreements

With regard to bilateral agreements it is necessary to make a more nuanced consideration: The extent to which in the example cited above German and French airlines could be taxed depends fundamentally on the provisions of the newly concluded bilateral agreement.[202] However, the signatory States would not be granted unrestricted freedom in this respect. Art. 14 II 2 of Directive 2003/96 speaks of the possibility of tax exemptions on aviation gasoline being waived under bilateral agreements. Thus, it is not possible for Member States to agree on a completely autonomous taxation system; they can simply agree to remove a tax exemption and consequently design a tax scheme within the framework of the Community's excise duty system. The actual design of the tax scheme would thus have to be based on the "combination model" described under F.

According to the wording of the Directive, the permissible constellations for taxation after conclusion of a bilateral agreement are not entirely clear: however, it would in any case be possible to tax kerosene used on flights between Germany and France. By contrast, the permissibility of taxing kerosene taken on board French aircraft departing from a German airport on flights to other EU Member States or a third country is questionable. It would therefore be necessary to examine whether any stipulations are to be inferred from Art. 14 II 2 of Directive 2003/96 by way of a systematic and teleological interpretation or on the basis of legislative material. Also the possibility of taxing aviation gasoline that is already on board and intended for use on flights to another EU Member State or a third country also seems questionable.

By contrast, taxation of a Spanish airline, for example, which, on the basis of secondary Community law (Art. 3 I VO 2408/92), is also entitled to traffic rights for air routes between Germany and France, would not be possible on the basis of a bilateral agreement between Germany and France.

[202] The new standard clauses are of no significance in this context, because they refer solely to aviation agreements negotiated between EU Member States *and third countries*.

The same also applies to airlines from third countries, in so far as they have traffic rights of this nature.[203]

3.) Community law

Taxation of the kerosene used on intra-Community flights raises problems with regard to the discrimination prohibitions contained in the fundamental freedoms because it would place French airlines at a disadvantage compared with airlines from other Member States. It can be inferred from Art. 14 II 2 of Directive 2003/96 that inequality of treatment in this respect is intended to be permissible, since the possibility of regulating taxation through bilateral agreements inevitably implies the permissibility of inequality of treatment.
However, in terms of the hierarchy of norms, it must be taken into account that no exemption from the requirements of primary Community law and thus of the fundamental freedoms can be granted under secondary law; on the contrary, the legality of secondary law must be evaluated against the criterion of primary Community law.
It would therefore be necessary to review in detail to what extent the discrimination possibility granted by Art. 14 II 2 of Directive 2003/96 is compatible with the fundamental freedoms.
A taxation scheme using the "combination model" described under F.) raises no problems with regard to secondary Community law.

4.) National law

Taxation would be compatible with the Basic Law and other German law.

5.) Tax scale

With regard to taxation of kerosene on the basis of newly concluded bilateral agreements, Member States are, pursuant to Art. 14 II 3 of Directive 2003/96, not obliged to apply the minimum levels of taxation set out in Annex I, Table A of Directive 2003/96.

6.) Summary

It would be fundamentally permissible to tax the kerosene used on intra-Community air transport if corresponding bilateral agreements were concluded first.

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[203] Many bilateral agreements also grant the airlines of one Contracting state the freedom to transport passengers, freight and mail from one airport of the other Contracting state to a third country. This right is also known as the Fifth Freedom of the Air, cf. Schwenk, Luftverkehrsrecht, p. 481 and 491.

However, on the basis of such agreements it would only be possible to tax those flights that are operated by airlines from one of the two signatory States. Since similar traffic rights are granted to all EU airlines, competitive disadvantages would be unavoidable for the airlines from the Member States concluding the agreement. However, this distortion of competition could not be faulted from the point of view of Community law, which explicitly permits bilateral agreements of this kind.

It would be necessary to clarify whether it would be possible to tax other aircraft movements beyond flights between the signatory Member States on the basis of these agreements.

H) Summary

The subject of this legal opinion is the permissibility of introducing taxation of aviation gasoline used on domestic flights.
Currently, aviation gasoline intended for use in commercial aviation is exempt from mineral oil tax pursuant to Section 4 I No. 3) of the Mineral Oil Tax Act, with the result that air transport has a clear tax advantage over other modes of transport. Whereas in the past Community law prescribed that this tax exemption be retained, the new Energy Products Directive 2003/96 now allows Member States to remove this exemption for domestic flights. Against this background, we considered the legal permissibility of taxing kerosene used on domestic flights,[204] taking into account all the relevant legal frameworks. Three different possibilities for designing a tax scheme of this kind were considered.

The first option that seems conceivable would be the introduction of a tax which, following the system underlying current mineral oil tax law, would be based on the removal of the aviation gasoline from tax warehouse for use on domestic flights.
The provisions of what is known as the Chicago Convention, a multilateral agreement regulating international civil aviation, do not preclude a taxation option of this kind, since they apply neither to fuels taken on board nor to consumption taxes. Any Resolutions to the contrary adopted by the Council or Assembly of the International Civil Aviation Organisation are not legally binding.
The aviation agreements concluded by the Federal Republic of Germany with the other EU Member States prohibit only the imposition of consumption taxes on kerosene taken on board for use on international flights. Aviation agreements with third countries are not relevant to the taxation of domestic flights, since they do not grant traffic rights for domestic flights.[205]
Community law does not preclude the introduction of kerosene taxation, provided that it does not lead to foreign goods or services being placed at a disadvantage and provided that it fits into the system underlying Community law on excise duty. A taxation scheme linked to the

[204] The term domestic flights covers all air movements in which passengers, freight or mail may be taken on board at a German airport and transported to another German airport. It is immaterial whether passengers etc. are actually transported between the two domestic airports. The decisive factor is that the airline makes this possibility available.
[205] If, when new aviation agreements are negotiated with third countries, the airlines of these countries are granted cabotage rights, the imposition of a tax on kerosene taxation would still only be possible if the tax exemption clauses of these new agreements either do not apply to international flights or do not apply to consumption taxes.

removal of the fuel from a tax warehouse meets these requirements. No level of German law precludes the introduction of this form of kerosene taxation.
Thus, from the legal point of view, the introduction of a kerosene tax based on the purchase of kerosene in the Federal Republic of Germany would be unreservedly possible.

We also investigated the question of whether a taxation scheme could be designed in such a way that the kerosene actually used on domestic flights was taxed irrespective of the place of fuelling, in particular when aviation gasoline is imported into the Federal Republic of Germany in the tanks of aircraft to then be used here on a domestic flight. Here we distinguished between a scheme where consumption would be estimated on the basis of distance flown and various other technical data as one option and another in which consumption data was collected for each individual flight.
The Chicago Convention does not preclude the introduction of either of these two taxation options, since its provisions apply neither to domestic flights nor to consumption taxes. Bilateral agreements concluded by the Federal Republic of Germany with other EU Member States do not prohibit the imposition of consumption taxes on aviation gasoline already on board aircraft. Aviation agreements with third countries are not relevant to the taxation of domestic flights since they do not grant traffic rights for domestic flights. These options for taxing kerosene would also be compatible with the relevant norms under primary Community law since they do not lead to foreign goods or services being placed at a disadvantage. However, the Excise Duty Directive 92/12/EC does not permit taxation based on the consumption of fuels purchased domestically, since in that case their removal from a tax warehouse would be tantamount to their having already been “irrevocably” released for consumption in the territory of that country. With regard to the estimate-based option, it must also be taken into account that the Energy Products Directive 2003/96/EC requires that the tax scale be designed in such a way as to eliminate any doubt about the fact that the tax is based on the kerosene consumed and not the distance flown. No level of German law precludes the introduction of these taxation options.
The introduction of these two taxation options is thus from the legal point of view permissible only with regard to fuels that are imported from other EU Member States or from third countries in the standard tanks of aircraft and not with regard to fuels taken on board domestically.

The advantages and disadvantages of the three options considered can be summarised as follows. The points in favour of the option based on the purchase of kerosene in the Federal Republic of Germany are its unrestricted legal permissibility and, more particularly, the relatively low administration costs. However, it does harbour the risk that the airlines would respond to the introduction of a tax of that kind with evasion strategies when fuelling their aircraft, so that it would not be possible to fully achieve the ecological and fiscal objectives.
A taxation scheme based on reporting obligations for airlines would seem preferable to an estimate-based option, since, from the legal point of view, an estimate-based tax scale could pose problems and would probably also trigger numerous legal disputes.
In the case of a scheme based on reporting obligations, the opposite of the purchase-based option is true: it would not be possible to tax kerosene taken on board in Germany, whereas it would be possible to tax kerosene imported into the Federal Republic of Germany on board aircraft. Furthermore, ascertaining consumption data would involve considerable administrative cost.
Therefore, the most appropriate solution seems to be to combine the purchase-based option and the option based on reporting obligations. That would fundamentally mean that tax would become chargeable on removal of kerosene from a tax warehouse in Germany for use on domestic flights. No further tax related to consumption would be chargeable for kerosene taxed in this way. For kerosene imported in the standard tanks of aircraft, for which it would not possible to base the tax on removal from the tax warehouse, airlines would have to report their consumption data to the tax authority.
This combination would cover both kerosene taken on board in the Federal Republic of Germany and that imported into the Federal Republic of Germany from other EU Member States or third countries in the standard tanks of aircraft. This comprehensive cover of all fuels used on domestic flights would guarantee that the ecological and fiscal objectives pursued would be fully achieved.
It must be stressed that in the application of this model domestic and foreign mineral oils and domestic and foreign aircraft would be taxed in the same way. The sole decisive factor for the taxation procedure applied here is the place at which an aircraft takes fuel on board, irrespective of the aircraft's owner or nationality. For this reason, the proposed model is not in violation of the discrimination prohibitions enshrined in different legal frameworks. On the contrary, this model corresponds exactly to the distinction made in the Excise Duty Directive

between imposition of excise duty on goods from domestic tax warehouses, on the one hand, and imported goods on the other.
The amendments to the Mineral Oil Tax Act and the Customs Regulation necessary to introduce this taxation model come under the legislative power of the federal government. The approval of the *Bundesrat* (Upper House) is not required.

We also considered, as an additional factor, under what circumstances it would be permissible to introduce taxation of kerosene used on intra-Community flights. Pursuant to Art. 14 II 2 of Directive 2003/96/EC, taxation of kerosene used on intra-Community flights requires that bilateral agreements to be concluded to that effect.
If agreements of that kind were concluded, taxation would basically be permissible. In particular the provisions of the Chicago Convention would not preclude it since they do not generally prohibit the imposition of consumption taxes.
However, under these bilateral agreements it would only be possible to tax flights operated by airlines from one of the two signatory States. Since similar traffic rights are granted to all EU airlines, competitive disadvantages would be unavoidable for the airlines from the Member States concluding the agreement. However, this distortion of competition could not be faulted from the point of view of Community law, which explicitly permits bilateral agreements of this kind.

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