



## **Strategy Paper**

# **Legal Construction of an Air Ticket Tax**

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## A. Introduction

The term “**air ticket tax**” (**ATT**) is used here in a general sense to denote a **surcharge on air fares** that makes it possible to factor the environmental impacts of air traffic more strongly into the calculations consumers make about costs and, in this way, to exert an **influence on travellers’ behaviour** while, at the same time, also opening up new **sources of revenue** for the performance of public responsibilities. It should always be the traveller on whom the economic burden is placed. The revenue raised can subsequently be deployed for measures of benefit to the public, in the fields of **climate protection or development aid**, for instance.

The **parties liable to pay** an ATT could be individual passengers or airlines, while various options are available for the levying of the tax. As far as its **level** is concerned, an ATT could be set as a lump sum or calculated by reference to a **basis for assessment**, depending, for instance, on the distance travelled, the emissions discharged, the air fare or particular characteristics of the aircraft. Finally, with regard to the **legal construction** too, it is possible to choose between a range of options that differ from each other and are subject to various requirements depending on the level at which the tax is collected.

This strategy paper discusses the **legal framework** put in place by the German fiscal regime as well as Community and international law in so far as it has a bearing on the construction of an ATT in Germany. At the same time, it also discusses the specific features that would characterise an ATT if it were levied by the European Community or an alliance of like-minded states. In each case, the paper sets out concrete **proposals for action** that would be both legally permissible and effective if implemented.

## B. Categorisation of an air ticket tax under fiscal law in Germany

The key requirements for the introduction of an ATT in the Federal Republic of Germany are laid down by the provisions on **fiscal law** in the German Basic Law, which set out the **preconditions for the admissibility** of a strictly limited range of categories of fiscal charge and **how the revenues they raise are to be allocated**, in this way restricting, to a large extent, the legislature’s scope to shape legal relationships (cf. Articles 105 and 106 German Basic Law). Under the superordinate concept of fiscal charges, there are fundamentally three types of mandatory monetary contributions available to the state: taxes, *quid pro quo* charges and special levies in the broadest sense. Depending on its construction, an ATT can, in principle, be assigned to any of these categories of fiscal charge even if, over the shorter term, an ATT could only perform the functions discussed at the beginning of this paper if it were collected as a tax.

## I. Construction as a *quid pro quo* charge

*Quid pro quo* charges are justified by the fact that the state **grants individual benefits** to the parties liable to pay such charges. In most cases of *quid pro quo* charges, the state levies the charge to compensate for expenditure that it has itself incurred. This is not possible in the present case.

According to the recent judgements of the German Federal Constitutional Court,<sup>1</sup> it is clear that state expenditure is not one of the necessary elements of a *quid pro quo* charge. Rather, it is also possible to use such a charge to impose costs on the granting of a (purely) **legal benefit** by the state. It could be viewed as a legal benefit that air passengers are allowed to make use of airspace in a particular manner. From this perspective, the construction of an ATT as a *quid pro quo* charge appears feasible in principle. Logically, however, since the use of airspace has not been regulated by the state in the past, the first step that would have to be taken would be the creation of a comprehensive **system to manage** the use of airspace for activities that cause damage to the climate before any decisions could be taken about whether the changes in behaviour that are being sought in the field of air travel should be achieved by means of such a charge. The preconditions for a legislative project of this kind are not in place at present. Furthermore, the foreseen use of the funds raised for development policy purposes, **among other things**, would appear problematic in such a system because it could be viewed as indicative that the focus of the measure was on the financial objective and not on influencing travellers' behaviour for the purposes of climate protection.

## II. Construction as a special levy

If it were collected in the form of a special levy, the ATT would, by contrast, be subject to very **rigorous requirements**. In particular, these would include the requirement that, at least in a broad sense, the **revenue raised** would have to benefit the group of those obliged to pay the levy ("use of utility to the group liable").<sup>2</sup> This could certainly not be assumed if – as intended in the present case – the funds were **also to be used for development policy purposes**. This option can therefore be ruled out for the introduction of an ATT.

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<sup>1</sup> Cf. *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 93, 319 (342 ff.) – Water Extraction Fee –.

<sup>2</sup> A concept established in BVerfGE 55, 274 (274 f. and 305 ff., in particular 307 f.) – Funding of Apprenticeships –.

### III. Construction as a tax

#### 1. Concept of taxation and categories of tax

Taxes are monetary contributions that do **not** constitute *quid pro quo* charges and are collected by organs of the state governed by public law as a means of **raising revenue**. They are justified by the fact that they serve to cover the **general financial needs** of the state and also impose costs on forms of behaviour that express the taxpayer's **economic power**.

The prevailing opinion is that the German Basic Law contains a definitive list of permissible **categories of taxation**, for which powers of collection and competences over revenue are distributed between the Federal Government and the *Länder* (German constituent states) in a precisely defined fashion. According to this view, new events giving rise to chargeability may only be established if they can be assigned to the categories of taxation specified in the Basic Law. Of these categories, the only possible constructions that come into consideration for an ATT can be located in the not uncontroversial area where **taxes on expenditures** and **taxes on transactions** intersect. By contrast, categorisation as a tax on consumption can be ruled out because the ATT is not levied on the **consumption** of an economic good.

In brief, taxes on expenditures and taxes on transactions differ from each other in that the German Basic Law provides for the revenues they raise to be allocated in different ways (cf. Article 106 Basic Law). The legislative authority over a tax on transactions may lie with the Federal Government, but the revenue raised accrues solely to the *Länder* (cf. Article 106[2][4] Basic Law). In the opinion of the Federal Constitutional Court,<sup>3</sup> **taxes on expenditures** are to be understood as a special form of taxes on consumption, which is why the quite overwhelming majority of commentators assume that the Federal Government possesses both legislative competence over these taxes as well as competence over the revenues raised from them (cf. Article 106[1][2] German Basic Law). In view of the intended end use of an ATT, however, it is necessary to ensure that the revenue it generates is incorporated fully into the federal budget. There is therefore no question of constructing the ATT as a tax on transactions. This gives the distinctions between the two categories of taxation decisive significance.

If it were a tax on transactions, the ATT would require the consent of the Bundesrat, but not if it were a tax on expenditures (tax on consumption) (cf. Article 105[3] German Basic Law).

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<sup>3</sup> Cf. BVerfGE 16, 65 (74) – Residents' Tax –; BVerfGE 65, 325 (345 f.) – Second Residence Tax –.

## 2. *Definition of categories of taxation*

The constitutional **assignment** of taxes to particular categories of taxation can throw up difficult questions of definition because a tax will often display characteristics that suggest it belongs to several different categories. It is therefore necessary to concentrate on the key characteristics for the categorisation of a tax in each individual case. As regards the ATT, the question of the basis on which the tax should be levied moves into the foreground. **Taxes on transactions** usually impose a charge on **particular** legal transactions that are distinct from everyday transactions for the personal necessities of life (such as real property transfer tax or insurance tax). For the assignment of a tax to the category of **taxes on expenditures**, by contrast, the Federal Constitutional Court requires that – as for taxes on consumption – the chargeable event be associated with the economic power expressed in the use of money for the purposes of **personal consumption**.<sup>4</sup> While in the case of taxes on consumption the chargeable event is the consumption of goods, in the case of taxes on expenditures it is sufficient for the funds to be used in maintaining an externally discernible condition (including, for instance, the use of services provided by third parties).

Since it imposes a charge on travelling by aircraft, the ATT is – particularly in view of the development of tourism – directed at the taxation of a particular type of personal **consumption**. The ATT therefore represents a charge on the economic power of the air traveller in their capacity as a consumer, which is expressed in the **use of income for the personal necessities of life** rather than a particular legal transaction or specific type of legal transaction. Most of the evidence therefore suggests that, under fiscal law, the ATT should be categorised as a **tax on expenditures**. Nor does the fact that the expenditure facilitates the use of **services** and not the use of a tangible object stand in the way of this conclusion. However, it also becomes clear that an extension of the ATT to **cargo** as a tax on expenditures would not come into question because it would then not apply to a form of personal consumption.

The conflicting opinion (not infrequently propounded in judgements delivered on non-constitutional matters as well as in the legal literature<sup>5</sup>) according to which a charge

<sup>4</sup> Cf. BVerfGE 65, 325 (345 f.) incl. further references – Second Residence Tax –; Federal Constitutional Court (BVerfG), *Neue Juristische Wochenschrift* (NJW) 1989, 1152 (1152) – Hunting Tax –; further discussion in BVerwGE 98, 272 (281); Jachmann, in v. Mangoldt/Klein/Starck, *Grundgesetz* (GG), vol. III, 4th ed. 2001, Art. 105 para. 52; Kirchhof, in *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (HdStR), vol. IV, 2nd ed. 1999, § 88 para. 154.

<sup>5</sup> This line of reasoning is followed in the judgements delivered over many years by the Federal Finance Court (BFH) on turnover tax (cf. BFH, *Bundessteuerblatt* [BStBl.] II 1987, 95, 96) and motor vehicle tax (cf. *Entscheidungen des Bundesfinanzhofs* [BFHE] 110, 213, 217); also discussed by

always represents a tax on transactions if the chargeable event is associated with the performance of a legal transaction, is not persuasive because it fails to recognise the common character of taxes on consumption and expenditures as subcategories of consumer taxes. If this opinion is, nevertheless, to be followed, the question of whether the tax liability arises due to the purchase of a ticket (= legal transaction) or due to other defining elements (such as the commencement of the journey) would move into the foreground in any discussion of its definition.

## C. Introduction of an air ticket tax as a tax on expenditures

In certain circumstances, therefore, the categorisation of the ATT as a tax on expenditures also depends to a not insignificant degree on its **construction**, in particular the **basis for assessment** and the **way the tax is collected**. Important points relating to these issues are discussed in the following sections.

### I. Construction as a departure tax

#### 1. *Event giving rise to chargeability*

As a **departure tax**, the ATT could be levied on air journeys that are commenced in Germany. It would be levied on **departures** from airports and airfields located in **German national territory**. The levying of a departure tax on internal flights would be subject to the least stringent requirements. However, an ATT could also be imposed on **cross-border flights**, provided compliance with the additional requirements – specified in greater detail below – of Community and international law were ensured. Under this approach, the destination and the place where the aircraft landed would be of secondary importance for a departure tax and would only be considered when assessing the level at which it should be levied, if at all.

Since establishing a relationship between the tax and the purchase of a ticket in a legal transaction would also involve the risk of the ATT's categorisation as a tax on transactions, it is to be recommended that chargeability instead be linked with the **commencement** of the air journey. Consequently, if a journey that had been booked were not commenced, the tax liability would not arise – regardless of whether the ticket nonetheless had to be paid for. Furthermore, with regard to the **name of the tax**, terms that include the word “ticket” should consistently be avoided. The tax liability would therefore arise with the **beginning of the flight** in Germany. This would also make it possible to preclude difficulties with collection or the complete

avoidance of the tax – for instance by travellers who purchased tickets abroad or over the Internet.

## 2. *Taxpayer and procedure for collection*

The **taxpayer** is the party from whom a tax is collected, while the persons in question do not necessarily have to be identical with those who bear the economic burden. It is even typical of taxes on consumption that the tax is collected from the persons who place a consumer good onto the market, but passed on to their customers.

The direct collection of an ATT from individual **passengers** would throw up numerous difficulties with monitoring and enforcement as soon as it came to be implemented. It would be more practical to define the taxpayer as the **airline** concerned and – in emulation of the model of taxes on consumption – to design the departure tax in such a way that it would be passed on to the end customer. A construction of this kind would be associated with the least expense overall. This approach would also be advisable with regard to the question of the departure tax's categorisation either as a tax on expenditures (a subcategory of the taxes on consumption) or as a tax on transactions.

In this model, the **number** of passengers actually carried would be of decisive significance. This figure – which is always recorded electronically in any case – could be determined if provision were made for an additional **reporting duty** and the ATT collected on that basis. Like other requirements to which airlines are subject, the **truthful communication of the relevant statistics** would have to be monitored in a suitable fashion. An **automated procedure** based on a software system created for this purpose could close gaps in enforcement at the same time as helping to prevent excessive costs being incurred.

By contrast, the costs and administrative effort associated with the deployment of new **payment devices**, which would have to be developed, and the levying of the charge on the number of **boarding cards** collected on departure militate against these systems; and even if they were implemented, it would by no means be possible to effectively exclude abuse were someone determined to evade the tax. If need be, greater security could be offered by a further option in which the tax would be levied on the **total number** of seats. The ATT would then have to be reimbursed if the airline demonstrated in a suitable fashion that available seats had remained unoccupied on the flight in question. Ultimately, this would make it possible to reverse the burden of proof, although it would also impose greater costs on the airlines.

## 3. *Choice of basis for assessment*

In general, it is accepted that a higher ATT could also exert a stronger influence on behaviour and generate greater financial yields. At the same time, if constructed as a tax, the ATT should not come to resemble a prohibition on a particular form of

behaviour, either in terms of its weight or its impact; nor should it *de facto* suppress the behaviour on which the tax has been imposed. In the present case, however, it would be possible to rule out such unacceptable negative effects in practice, particularly since it has to be taken into account that air passengers are not required to pay mineral oil tax.

Even below the threshold of constitutional acceptability, the purely economic effects of an ATT set too high should speak for a prudent balance between the level of charges and the interests affected. Subject to these considerations, apart from collection as a lump sum, various bases for assessment present themselves as means of setting the **level** of an ATT, each of which may be evaluated differently.

The assessment of the level of charges by reference to the measured or calculated **discharge of greenhouse gases** is often described as desirable in terms of environmental policy. Since the level of emissions is not an indicator of the economic power of the consumers who have to pay the tax (a pure **tax on emissions** would encounter legal objections under German fiscal law), assessment **solely** by reference to the yardstick of emissions is ruled out. In addition to this, there is the fact that particularly in aviation – by contrast to other transport modes – the emission of pollutants as such is **only partly** responsible for the radioactive effects of air traffic and so for its damaging impact on the climate. According to recent research, the effects of the formation of condensation trails and clouds by flight operations are also just as significant.

Moreover, according to the judgements of the European Court of Justice, due to the direct and indivisible connection between the emission of pollutants and consumption of fuel, a tax levied exclusively on emissions would be subject to the restrictions of the Directive restructuring the Community framework for the taxation of energy products and electricity (2003/96/EC, cf. Article 14[2] of the Directive), including the fundamental prohibition of a general **kerosene tax**, and therefore less practical.<sup>6</sup>

If, on the basis of this argument, emission-related criteria are not to be taken as the exclusive basis for assessment, this does not mean that they cannot play any role in the assessment of the level of the charge. From the perspective of fiscal law, it is crucial that the basic approach adhered to should continue to involve taxing consumers' economic power, which is expressed in catching a flight. Besides, further-reaching objectives of influencing behaviour may certainly find expression in the criteria for assessment. Consequently, for instance, the load carried, the route taken or the flying time could also be taken into consideration. Criteria of this kind make sense in terms of environmental policy, but require expensive calculation and

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<sup>6</sup> Cf. EJC, Case C-346/97, para. 23 f. (although this is concerned with the predecessor directive, 92/81/EEC).

collection methods that would markedly reduce the practicality of an ATT collected in this way.

By contrast, a uniform assessment method based on the **distance covered** with graduated charges for various distance classes appears both more practical and legally unobjectionable. A degressive construction would also make it possible to exert a clearer influence on travellers' behaviour in favour of the markedly more environmentally friendly mode of transport that is certainly available over shorter distances, i.e. the railways. However, the charge should not increase above a particular distance. There are no environmental policy grounds for this recommendation, but it would help to prevent undesirable **switching responses**. For otherwise travellers might increasingly switch to more environmentally damaging routes that included stopovers as a way of ensuring that they were only liable for the tax rate levied on short-haul flights. It would not be advisable to distinguish between internal and cross-border flights, as otherwise the prohibitions on discrimination that apply under Community and international law might be contravened.

#### 4. *Use of revenue*

At the level of the **use of revenue**, the extent to which the ATT restricts the legislative organs with responsibility for budgetary law in their freedom to shape legal relationships is decisive. Certain types of hypothecation are permissible for the revenues raised, provided they do not **restrict** the legislative organs with responsibility for budgetary law to an **unjustifiably great extent**. Were the revenue raised even to be channelled past the budget and allocated to a separate **fund**, the ATT would have to be classified as a **special levy**, but if this were done the use of the revenue for environmental and development policy objectives would not be allowed either.

Apart from the case of allocation to a fund, it is not completely clear where the threshold of impermissible restriction of the legislative organs with responsibility for budgetary law would be crossed. After all, when delivering judgement on the ecological financial reform, the Federal Constitutional Court ruled that, in view of the comparatively low level of revenue raised by the taxes involved, no excessive restriction of the legislative organs with responsibility for budgetary law was to be assumed.<sup>7</sup> The expected revenue from a domestic German ATT is unlikely to exceed the yield from the eco-tax, which amounted to a double-figure billion sum in 2001, and it consequently appears justified to apply this legal assessment to the envisaged charges on air traffic.

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<sup>7</sup> Cf. Federal Constitutional Court, 1 BvR 1748/99 and 1 BvR 905/00 – Eco-Tax –, C II 2. (para. 65 ff.), *Deutsches Verwaltungsblatt* (DVBl.) 2004, 705.

In this respect, however, it is necessary to consider that, in its decision on the eco-tax, the Federal Constitutional Court had to rule on a fiscal charge for which the taxing act itself did not stipulate any express hypothecation, whereas indications as to the use foreseen for the funds raised were only to be derived from the government's explanatory memorandum on the draft bill and the public presentation of the legislation. In order to avoid constitutional risks, it is therefore also advisable not to provide for any legally binding hypothecation of revenue in the present case. This applies all the more as the influence on travellers' behaviour that is being sought and the foreseen use of the funds (solely for the purposes of development aid, for instance) are evidently quite unconnected. Instead, the revenue could be incorporated into the **general federal budget**, while new budget titles for climate protection and development aid measures would have to be set up at the same time, but in a legally independent form.

##### 5. *Community and international framework*

With regard to the implementation of an ATT, **general international law** contains the fundamental prohibition on undertaking executive acts on the territory of a foreign state without the permission of the state concerned. By contrast, there is nothing to prevent the extension of an ATT that is collected for landing or taking off on German territory to foreign aircraft, as these are always events that occur within the domestic jurisdiction of the Federal Republic of Germany and the location of the destination or the aircraft's place of origin abroad alone does not negate the relevance of domestic German law. Nor do the binding provisions of **international air law**, i.e. the Chicago Convention and bilateral aviation agreements, represent a barrier to a pure surcharge on air fares, provided the levying of charges solely on emissions does not constitute grounds for it to be viewed as a hidden kerosene tax.

In the field of **world trade law**, by contrast, according to the Annex on Air Transport Services the ATT does not fall within the scope of the General Agreement on Trade in Services (GATS) – which is relevant in this case. Nor does the Agreement on Subsidies and Countervailing Measures (SCM) apply, as there are no plans for the revenues from the ATT to be allocated to domestic enterprises or economic sectors. The application of Community state aid law does not come into question for the same reason.

## II. **Construction as an arrival tax**

As far as this approach is concerned, the requirements that would have to be satisfied by the construction of the ATT as an **arrival tax**, under which the tax liability would be triggered by leaving an aeroplane in Germany (or leaving a German airport or airfield), are no different from those to which a departure tax would be subject. It is not evident that Germany would be hindered by fiscal law from establishing indirect

taxes that (among other things) would be levied according to the financial power of citizens who are not resident in Germany (tourists, for instance). This is the normal state of affairs with respect to taxes such as turnover tax and mineral oil tax.

Overall, however, an arrival tax does not appear **very practical**. Indeed, very great difficulties would have to be expected when it came to implementation since passengers are registered individually before they start their journey, at the latest during check in or on boarding, but not usually recorded in a comparable fashion on arrival. In principle, a suitable additional registration procedure could be prescribed if there were a willingness to accept the extra expense involved. However, such an approach would only be expedient if it were regarded as important that charges also be imposed on (the small number of) air passengers who only arrive in Germany (without leaving the country again by air). For all other passengers could easily be covered by the departure tax at relatively little expense. Especially for domestic flights, limiting the ATT to a departure tax would also have the advantage that it would not be necessary to filter passengers who had already paid the departure tax out of the calculations for the arrival tax.

Limiting the ATT to a departure tax would not inevitably result in any significant reduction of the total **tax yield**, as the decision not to impose a tax on arrivals could be taken into account as appropriate in the tax rates set from the beginning. Nor would there be any need, in this case, to fear that the tax might reach the threshold at which it would cease to be constitutionally acceptable.

### III. Recommendations

The following **recommendations** for the introduction of an ATT as a tax on expenditures in the Federal Republic of Germany can be derived from the discussion above:

The **taxpayer** should be any party who carries third parties in an aircraft in return for a fee or without a fee, and any party who uses their own aircraft or an aircraft transferred to them by a third party for flights starting from Germany. The taxpayer should have to notify the authorities of their activity once and submit **tax declarations** for all flights on a monthly basis. They should name an officer responsible for compliance with the fiscal charges specified. The carriage of passengers should have to be recorded and information about these records supplied on request. The law should provide for the tax to be **passed on** to passengers.

The tax should be levied on every departure from a German airport or airfield and every passenger. If travellers catch connecting flights with stopovers, the tax should only be collected from the first airline. All crew with the aircraft, any other employees who perform functions on the aircraft and any children under two years of age who do

not occupy their own seats should be exempted. Stopovers should not result in the repeated collection of the tax.

The tax should be assessed according to the **passenger occupancy** of the aircraft and the **distance** to the destination. The charge should be graduated by distance, with a degressive surcharge being levied on four distance classes. It should be further graduated by passenger class, with the cheapest passenger tariff on each flight (tourist class or economy) being distinguished from other tariffs (business class and first class). This would do greater justice to the basis on which the tax was levied, i.e. the economic power of the passengers carried, at the same time as making it possible to raise higher levels of revenue. Consequently, by way of example, the surcharge could be set at € 15 for tourist class and € 30 for other classes on flights of up to 300 kilometres, € 20 and € 40 on flights of between 300 and 500 kilometres, € 25 and € 50 on flights of between 500 and 700 kilometres and € 30 and € 60 on flights of more than 700 kilometres. Where travellers catch **connecting flights**, the tax should be determined according to the ultimate destination, provided any stopover between the legs of the journey does not last longer than a period of 24 hours. A system for the assessment of the ATT that, apart from the distance travelled, also took account of the emissions discharged and the environmental characteristics of the aircraft and its engines would have a markedly greater influence on the airlines' behaviour and create stronger incentives for them to change their practices. However, depending on its construction, this would considerably increase the expense of enforcement as well.

In their advertising and when selling tickets, carriers and travel agents would have to refer to the fact that the carrier was obliged to pay an additional tax for each passenger, for which a corresponding sum would be collected from passengers (at the latest) **before they boarded the aircraft**.

The revenue raised would be incorporated into the **general budget**, and its use for climate protection and development policy purposes would have to be secured separately by the establishment of new budget titles. It would appear sensible to use at least 50 percent of the revenue raised for climate protection measures, above all in order to make it clear to the parties who had to bear the economic burden of the tax how the levying of the ATT and its use were connected.

#### IV. Comparative account of British Air Passenger Duty

A surcharge on flight prices known as **Air Passenger Duty** (APD) was introduced in the UK on 1 November 1994. This measure was justified by reference to the exemption of air traffic from value added tax and the tax exempt status of fuels in the aviation sector. The duty is levied on **every passenger** travelling on **flights that depart** from British airports. APD is usually collected at the time when the air ticket is purchased. To begin with, APD was set at a **rate** of £ 5 for flights to destinations in

most European states and £ 10 for all other flights. These rates were doubled on 1 November 1997 in view of the fact that aviation kerosene continued to be tax-exempt. Furthermore, since 2000 a distinction has been made between tourist class and business class/first class, so that £ 5 has to be paid in tourist class and £ 10 in business and first class for most European destinations, with the duty rising to £ 20 and £ 40 respectively for other destinations. The level of APD is set each year by the British Chancellor of the Exchequer. The annual **revenue** from the APD is currently between £ 800 million and £ 900 million.

APD differs from the recommended construction of an ATT as a departure tax for flights from Germany primarily in that the level of duty set is differentiated by destination (European/other destinations). Otherwise, the party that bears the economic burden of the tax (the individual passenger) and the event giving rise to chargeability (departure from a domestic airport) are identical. No further information is available concerning the use of the revenue raised from APD or further details of its collection.

## **D. Introduction of an air ticket tax in the European Community**

### **I. Special features of an ATT levied at Community level**

In its recently presented report on new sources of finance for development aid, the **European Commission** considered the collection of a **tax** on all flights that take off from an airport in the Community. This would be a lump sum surcharge of € 10 for intra-Community flights and € 30 for international flights and would be intended to generate annual **revenue** of about € 6 billion. The idea of an ATT is therefore encountering interest at the supranational level.

However, were an ATT to be levied at the level of the **European Community**, the requirements that would have to be satisfied would differ in numerous respects from those discussed above for the introduction of an ATT in Germany. Due to the primacy of Community law, the provisions of German fiscal law would only apply to a limited extent. This means that even the allocation of the revenue raised to a **fund**, which would have led to the charge's categorisation as an impermissible special levy under German law, would come within the bounds of the permissible.

It is, furthermore, necessary to distinguish between an act of the Community that merely creates a **regulatory framework** for the Member States and **harmonises** national taxes, and the ATT's introduction as a primary Community levy that would be collected and administered **autonomously** by the Community. Both scenarios presuppose the Community would possess the requisite **legislative powers**. In addition to this, in the latter case the Community would need to have **competence over the revenue raised**, while it would necessary for the requirements of **budgetary law** concerning the levy's construction to be complied with.

## II. Legislative powers and competence over revenue

Due to the principle of the **restricted prerogative**, the Community can only take measures if and in so far as the Community Treaties contain a legal foundation for them. One special feature of an ATT would be that both its collection as well as the deployment of the revenue raised would have to be covered by European legislative competences. In general, when it comes to the use of revenue, the power to disburse the funds raised for the performance of Community responsibilities depends on the requirements of the responsibility in question: **competence over expenditure** is therefore a necessary consequence of the **competence over particular responsibilities**. The crucial issue for any decision about which legal provision should be taken as the legal foundation for the measure would be the **principal focus of the measure in question**, which is to be determined in accordance with the **objective circumstances** by reference to its content and purpose.

### 1. Construction as a harmonised tax

In order to perform the responsibilities assigned to it, the Community has previously harmonised measures of the Member States on numerous occasions by enacting directives, for instance in the fields of energy taxation and road use charges (e.g., the "Eurovignette" scheme). An ATT could also be introduced in the form of a **harmonised tax**, which would be collected and administered by the Member States. Various legal foundations come into question for such measures, while the **regulatory focus** of the measure is crucial to the distinctions made between them. Due to the environmental policy influence that an ATT will always have on the behaviour of passengers, Article 175 EC Treaty initially comes into consideration as the legal foundation for an ATT. In accordance with Article 175(1) EC Treaty, if the measure mainly pursued the environmental policy goal of influencing travellers' behaviour, so that its character as a tax receded into the background, the Council would be able to decide on it by a qualified majority. A corresponding directive could thus be used to create a binding framework for the introduction of an ATT by the Member States that, apart from the tax's fundamental objectives, would also set decisive parameters for its assessment and the use of the revenue raised.

By contrast, legal objections would arise if it were certain that the revenue raised by a harmonised ATT was to be deployed to fund development policy measures. For then the principal focus of the measure would no longer lie unambiguously on the field of environmental policy, for which reason basing it solely on Article 175(1) EC Treaty would appear questionable at least. The legal foundation of Article 93 EC Treaty, which also comes into question and allows the harmonisation of **indirect** taxes, i.e. taxes that are not levied on income or assets, does not for its part permit the harmonisation of the use of revenue. Where revenue is allocated to development aid

measures, therefore, Article 179 EC Treaty, which in turn requires a decision of the Council by a qualified majority, is also available.

However, despite this, with a view to the ATT's environmental policy goal of influencing travellers' behaviour, it would appear legally more secure to base the harmonised levying of the charge on the legal foundation of Article 175(1) EC Treaty. If it were a harmonised tax, no strict linkage would be required between the collection of the ATT and the use of the funds raised, certainly provided the **regulatory focus** were still supported by the chosen legal foundation, it would then be sufficient for an ATT if at least a proportion of the expenditure were earmarked for the field of environmental policy. Consequently, if the tax were levied on the basis of Article 175(1) EC Treaty, it would be conceivable for a proportion of the revenue raised – 25 %, for example – to be assigned to environmental policy objectives on a mandatory basis, while greater flexibility would have to be provided for in the deployment of other funds. The requisite legal foundations for the collection of the ATT as a harmonised tax are therefore in place. However, it is necessary to consider that, if it were adopted by means of the enactment of a directive, the Member States would have to retain certain decision-making freedoms in relation to the concrete implementation of the measure.

## 2. *Construction as a primary Community levy*

In this field, the distribution of responsibilities between the Community and its Member States is characterised by a careful balance between the preservation of the Member States' budgetary interests and measures to secure the effective performance of the responsibilities assigned to the Community. In order to protect the Member States' competences over the use of revenue, more rigorous requirements are placed on the decision making procedure at the Community level if the objective of **raising revenue** is the focus of a mandatory monetary contribution, going as far as the involvement of national parliaments. By contrast, if a fiscal charge primarily serves the performance of a **sectoral policy objective** of the Community, existing legislative powers with their partly simplified decision making procedures can be applied, although additional requirements would then have to be placed on the use of revenue.

If an ATT is to be **collected and used** autonomously by the Community, the Community must also, in the nature of the matter, be accorded the right to establish a basis for the mandatory charge this involves – and in particular the payment entitlement that allows it to raise revenue in this way – as well as setting the level of the levy. In many fields of responsibility, the Community has introduced what are known as **sectoral levies**, which are collected and administered by the organs of the Community. These are fiscal charges that have been introduced within the framework of a sectoral competence of the Community. They primarily serve the attainment of a

sectoral policy objective, not the raising of revenue, which is why they can also be introduced using the simplified decision making procedures instituted for the relevant sectoral competences. In the past, the European Court of Justice has repeatedly confirmed the **legality** of such levies, which are imposed in the context of Community policies and used to finance them. In this respect, therefore, the foundation for the levying of a charge must also support the subsequent end use of the revenue. The principle form of action applied in this field is the directly effective regulation.

Regardless of any subsequent use of the revenue raised, an ATT would certainly always pursue the environmental policy **objective of influencing travellers' behaviour** as well. Against this background, the relevant legal foundation for its introduction would be Article 175(1) EC Treaty, which merely stipulates that decisions be taken by a qualified majority of the Member States. However, due to the close linkage required between the collection and use of revenue (connexity), the funds raised would then have to be deployed to finance measures that had a clear **environmental relevance**. In the case of an ATT, which as a levy on air traffic would be justified by reference to the damage air operations do to the climate, this connexity would be demonstrated most clearly if the funds were deployed for climate protection measures. Legally, a construction of this kind, under which the levying and use of revenue would be based on Article 175(1) EC Treaty, would encounter the least significant objections. With regard to the use of revenue, this would certainly not exclude the funding of measures that simultaneously pursued **environmental** as well as a **development policy** goals.

By contrast, if the revenue from an ATT were to be disbursed **exclusively** for purposes outside the field of environmental policy, development aid for instance, the connection between the levying and use of the revenue could not be justified unreservedly. It is true that the broad authorisation to take executive measures set out in Article 179 EC Treaty would come into consideration as the legal foundation for its introduction, which would mean that only a qualified majority would be required, but the objection would remain that the ATT primarily pursued the environmental policy objective of influencing travellers' behaviour and there was therefore **no direct connection** between the purpose of levying the charge and the use of the revenue raised. The charge's compliance with the requirements placed by the European Court of Justice on a sectoral levy would then also be called into question. Consequently, there would be a danger of the ATT having to be **classified primarily as a tax**, in which case the focus of the measure would be on the raising of revenue. It has already been shown that, in order to preserve the Member States' sovereignty in tax matters, more rigorous requirements apply to the decision making procedure for such measures. In the present case, it might be possible to draw on the procedure set out in Article 269(2) EC Treaty, which apart from a unanimous decision of the Council also requires adoption by the national parliaments of the Member States. Basing the

ATT on the own resources decision under this provision would certainly ensure greater flexibility in the use of the revenues raised.

If an ATT were collected as a primary Community levy, the **budgetary principles** set out in the EC Treaty and the relevant secondary legislation would apply to the collection, administration and disbursement this charge on the use of airspace. Furthermore, the principles for the preparation and implementation of the **budget** and the – modifiable – **maximum limit** on non-obligatory expenditure would have to be complied with. A **special fund** for the administration of the revenue raised could be established within existing executive competences at the levels of primary and secondary legislation and through international treaties, although in the latter case no provision would be made for the compulsory assignment of revenue to the Community budget.

### **III. Recommendations**

A **tax harmonised** by a directive at the Community level would allow the creation of a legal framework for the collection of an ATT and the subsequent use of the funds raised. There are sufficient legal foundations for such a step. However, under a construction of this kind, the Member States would always retain **room for manoeuvre**, which could, in particular, lead to variations in the implementation and enforcement of the tax. The uniform collection and disbursement of the funds could only be ensured if the ATT were implemented as a **primary Community levy** by means of a regulation. With regard to the decision making procedure this would involve, it would then be advisable to base the ATT on Article 175 EC Treaty and deploy the revenue raised for environmental policy objectives. The use of the funds for other purposes would remain possible, but might require a more stringent decision making procedure.

The concrete construction of an ATT introduced at Community level would differ only insignificantly from the model already recommended for the national level. Ultimately, the event giving rise to chargeability would have to be changed to make departures from any airport or airfield within the European Community subject to an ATT. The ATT would be collected by the Member States and, depending on its construction, used for further measures within the responsibility of the Member States or transferred to the Community. Furthermore, if a lack of support for a compulsory ATT meant that consideration could only be given to the collection of a levy on a **voluntary basis**, it would be advisable to use a construction under which the tax would initially be collected from all passengers, but they would be allowed the option of reimbursement by an “**opt-out**” clause. This would at least create a *de facto* incentive for individual passengers to pay the charge despite the fact it was not mandatory.

## E. Introduction of an air ticket tax by a “coalition of the willing”

If an ATT were introduced in a form not subject to the decision making procedures and legal requirements of European Community law by a **group of states that were willing to act on the issue**, the conclusion of an international treaty would be available as one option for action. In this case, the requirements of fiscal law in the individual participating states would have to be observed, as each state legal system regulates its relationship to international law differently – for instance by determining which source of law has supremacy in a particular context.

For Germany, according to the judgements of the Federal Constitutional Court, it is to be assumed that, in principle, the provisions of constitutional law are also binding for the conclusion of treaties under international law.<sup>8</sup> Against this background, it would not be advisable to agree to provisions under international law that would be incompatible with the requirements of German fiscal law. For this reason, it would be better to avoid agreeing to any arrangement under which, for instance, the fiscal charge would be payable directly to a fund. Nor should provision be made for any express direct hypothecation of the revenue raised.

Nevertheless, such a treaty could succeed in ensuring that fiscal charges, which would largely be **uniform in construction**, were levied in the participating states and the **revenue** raised used for the purposes of climate protection **and/or** development aid. Apart from the express hypothecation of the funds raised under national law, it would be possible, for example, to include an independent clause in the treaty that would commit the parties to make a corresponding level of financial resources available for a joint **environmental and development fund**.

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<sup>8</sup> Cf. BVerfGE 36,1 (14) – Treaty on the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic –.