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Fuel Tax & Business Aviation

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A legal impact analysis
of the European
Energy Taxation Directive
on Business Aviation
in Germany, France and Austria

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INTRODUCTION

EBAA was founded in 1977 to defend the interests of the business aviation sector, which employs 371,000 Europeans either directly or indirectly, and contributes 86 billion EUR (96 billion USD) to the EU economy[1].

Today, more than 715 business aviation companies (commercial operators, corporate operators, ground operations and members of associate organisations) rely on EBAA to protect their business interests. It is the only voice representing business aviation vis-à-vis the European institutions.

As an association, EBAA keeps its members informed on issues that impact the sector. One such issue is the interpretation and implementation of the Council Directive 2003/96/EC of 27 October 2003 (the **"Energy Taxation Directive"**) by local jurisdictions. European Member States apply the Energy Taxation Directive to the aviation sector and business aviation in different ways, which leads to gaps in the interpretation of European law, and to implementation issues.

EBAA calls for a harmonized implementation of the Energy Taxation Directive, with a common understanding and interpretation of these rules.

This legal impact analysis outlines the specific challenges faced by business aviation operators in France, Germany and Austria with respect to the implementation and interpretation of the Energy Taxation Directive into national law, and the administrative practice of the respective national customs authorities.

The analysis has been drafted by the law firms HSP Schaefer & Partner (Germany, Austria) and Chesneau Fischel (France), both members of EBAA.

EXECUTIVE SUMMARY

In accordance with Article 14 of the Energy Taxation Directive, Member States exempt *Aviation fuel* supplied to aircraft from excise duties, provided that the aircraft are used for *"[purposes other] than private pleasure-flying"*.[2]

However, Business aviation companies in France, Germany and Austria are subject to incomplete and varying interpretations and applications of the European legislation. This is mostly due to a lack of clarity of the definitions used in the Energy Taxation Directive.

The unintended consequences include:

- **Inconsistencies in the tax practice of the national tax and customs authorities;**
- **An insufficient understanding of aviation-related operational and contractual specifications by the competent authorities;**
- **And heavy administrative burden on operators with respect to the evidence requirements.**

The consequences above further hamper and reduce the competitiveness of the affected operators.

FRANCE

French customs authorities consider that when the passenger is also – either directly or otherwise – the owner of the aircraft carrying him/her, the Aviation fuel cannot be exempted from excise duties.

They conclude that the operator who presents its AOC to benefit from excise duties exemption, is guilty of "energy products embezzlement to a privileged destination", an offence punishable by three years' imprisonment and a fine of between one and two times the amount of the value of the fraud.

GERMANY

In Germany, business aviation companies are subject to significant inconsistent tax procedures with respect to eligibility for energy tax exemption and reimbursement claims.

This is applicable to corporate flights conducted by flight operation entities within a concern that render commercial aviation services to other entities of the same concern. Comparable cases are decided upon completely differently by the competent tax and customs authorities, depending on the region where the claim is filed.

In addition, the energy tax exemption and reimbursement for jet fuel used for training flights, maintenance flights and positioning flights is an unresolved issue, which leads to high financial burdens and reduced competitive capacities of German operators.

Lastly, corporations which apply for energy tax reimbursements generally have no claim for interest on the reimbursement amount, even if there is an extensive delay caused by the competent authority and the application for reimbursement is ultimately granted. However, German tax and customs authorities are generally entitled to claim interest on outstanding energy tax amounts against the applicant after an appeal is rejected during which the enforcement of the respective tax assessment was suspended.

AUSTRIA

In Austria, due to the high burden of proof, a company seeking an exemption or reimbursement is often forced to break their non-disclosure agreement with their customer, or at least the principle of confidentiality, thus endangering their business relationship.

The exceptionally high burden of proof and the unsubstantiated requirement of non-redacted confidential documents result in reduced competitiveness of Austrian operators in direct comparison to operators in other Member States.

Legal Analysis by Member States


GO AROUND
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ONLY WITH
ENGINES
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FRICTION
LOCK
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A. FRANCE

1. Evolution of the French regulation

Until 2008, France exempted[3] from excise duties Aviation fuel supplied to the aircraft, whether or not they were used commercially. In order to comply with the Energy Taxation Directive, France changed its legislation[4] to limit the exemption to the jet fuel supplied to aircraft used for commercial purposes[5].

However the concept of a "commercial purpose" by French customs authorities has evolved significantly closer to the decisions rendered by the *CJEU* on 1st and 21 December 2011.

1.1. An extensive application of the notion of "commercial activity"

The French authorities[6] considers that aircraft exempted from excise duties were notably the ones operated by a private entity holding either an *AOC* or an authorization from the customs authority issued to companies having previously demonstrated the commercial nature of their activity."[7]

France maintained the excise duties exemption for all aircraft's users, justifying that they were using the aircraft within the scope of their commercial or professional activities, thereby limiting the payment of the excise duties only to aircraft used for private pleasure-flying purposes.

It is in this context that, on 1st December 2011, the CJEU[8] gave the interpretation of the following terms of Article 14, 1 b) of the Energy Taxation Directive *"air navigation other than travel for private pleasure-flying purposes"*.

The CJEU reminded that the "air navigation" operations exempted from excise duties, corresponded to the ones for which the aircraft *"is used directly for the supply of air services for consideration"*, which implies that *"the supply of services for consideration is an inherent reason for the aircraft's movements"*. The Court thereby deduced that the use by a company of an aircraft for its professional activities (in said case, transporting its staff to visit clients or to trade fairs) could not benefit from the tax exemption, in so far as that travel is not directly used for the supply, by that company, of air services for consideration.

1.2. Compliance of French legislation with the CJEU decision

France, acknowledging the CJEU interpretation, modified its legislation[9] to limit the excise duties exemption to those aircraft used only for the supply of *air services for consideration*.

Article 265 bis, 1 of the French Customs code, in its latest version, thus provides that:

"The energy products mentioned in article 265 [including jet fuel] are exempted from excise duties when they are used: (…)

b) As fuel on aircraft used by their owner or the person who enjoys its use through hire, chartering or any other means for a commercial purpose, notably for the purposes of carriage of passengers or goods or for the supply of services for consideration. (…)"

The French customs authorities published on 17 December 2015, a Ministerial Decree[10] defining the persons eligible for excise duties exemption and the uses of the aircraft which are subject to this exemption:

1. Public authorities using the aircraft within the scope of their public-service work. The Decree includes French or foreign, civil or military, local or national authorities;
2. Aircraft operators carrying passengers for consideration (holding an AOC);
3. Other users (not holding an AOC) having obtained a certificate of identification from the customs and excise authority;
4. Operators with mixed (commercial/non-commercial) activity, but only for the portion of the flights operated for commercial purposes. However, these persons cannot benefit from exemption, but only request a reimbursement of the amount of excise duties corresponding to the fuel used for commercial purpose.

The above users can claim exemption from excise duties, whether they enjoy the use of an aircraft in their capacity as owner, lessee, charterer, or in any other capacity.

2.The uses of an aircraft which are subject to exemption

Except when it is used by public authorities, jet fuel can only benefit from excise duties exemption when it is used for commercial purposes, notably for operations involving the transport of passengers or goods, or the supply of air services for consideration.

The fuel used for the provision of those services will thus be exempted from excise duties as long as the user of the aircraft produces, with regard to refuelling, an AOC or certificate from the customs authorities, and, in case of requests of verifications by customs authorities, documents proving the pecuniary nature of the services rendered via the aircraft.

French authorities, in response to a letter sent by EBAA France, ruled specifically11 on the following types of flights:

2.1. Positioning flight made within the scope of an air transport contract for consideration

French customs authorities, referring to the decision of the CJEU[12] of 13 July 2017, confirmed that the fuel necessary for flights *"operated without goods, freight or passengers, for that portion of the journey necessary to get the point where the goods/freight/passengers are taken on board and come back [to their base] after depositing the goods/freight/passengers"*, was exempt from excise duties,

provided that these ferry flights were necessary to operate the flight for consideration.

2.2. Maintenance flight

French authorities[13] confirmed that, in accordance with the case law of the CJEU of 10 November 2011 Vakaru Baltijos laivu statykla, are eligible for the exemption the fuels used for flights to and from aircraft maintenance facilities, construction and development when these flights are directly necessary to the operation of aircraft used for the performance of services for consideration in the framework of commercial navigation.

3. Outstanding issues: flights with the "owner on board"

Since the entry into force of the new legislation (see § 3.1.1.2), French customs authorities consider that, when the passenger is either directly or otherwise, the owner of the aircraft carrying him/her, the jet fuel cannot be exempted from excise duties.

They conclude that an operator who presents his/her AOC to benefit from an exemption , is guilty of the offence of *"energy-product embezzlement to a privileged destination"*,[14] punishable by three years' imprisonment and a fine of between one and two times the amount of the value of the fraud.

Therefore, French customs authorities (i) apply excise duties and VAT, (ii) seize the fuel contained in the aircraft tanks and, in order to release the aircraft from seizure, (iii) offer the pilot the option of resolving the proceedings by paying a fine.

It seems that French Customs authorities base its analysis on the following argumentation:

3.1. The contract binding the passenger to the operator of the aircraft is a chartering contract and not an air transport contract

3.1.1. Analysis of French customs authorities

French customs authorities assert that the contractual relationship between an aircraft operator and his/her passenger must be qualified as a charter contract (and not an air transport contract), thereby implying that it is the passenger, or charterer, who must be considered as the final user of the aircraft, not the operator.

French Authorities base their view on the decision[15] rendered by the CJEU on 21st December 2011, from which it results that when an aircraft is chartered, it is the charterer who is presumed to be the user according to the Energy Taxation Directive. Consequently, the fuel supplied to the aircraft by the lessor (who provides the charterer with an aircraft and crew), will only be exempted from excise duties provided the charterer proves that the aircraft is assigned to supply air services for consideration[16].

As a result, French customs authorities consider that flights operated by business aviation companies cannot benefit from excise duties exemption unless they prove that the passenger uses the aircraft within the scope of supply of air- services for consideration.

This analysis highlights the difficulties in distinguishing an air transport contract from a charter contract.

3.1.2. Difference between a charter contract and an air transport contract

CJEU[17], in its decision rendered on 18th October 2017, ruled that *"a chartering contract differs from a contract for the carriage of goods in that it requires one party, the ship-owner, to make available to the other party, the charterer, all or part of the vessel, whereas, in the case of a contract for the carriage of goods, the undertaking which the carrier assumes towards the customer relates only to the transport of those goods."*

This paragraph is enlightened in the findings of the Advocate General, who – regarding the difference between a transport contract and a charter contract – recalled that; *"(…) When a vessel (…) is subject to an agreement for charter and hire, it is provided for a certain purpose, for example transportation, whereas an agreement for the carriage of goods is a contract by which the carrier undertakes the obligation to deliver goods to a certain destination. Put differently, while contracts for charter or hire concern the means of transportation as such, a contract of carriage concerns the contents which are to be carried by the means of transportation. It follows that while the charterer and the hirer have a right over the use of the vessel which is the subject of the agreement, (…) the owner of the goods being carried on a vessel under an agreement for the carriage of goods has no such right, but can expect only that the goods are delivered to a given destination."*[18]

This distinction is also used in French law, which provides that the purpose of a transport contract[19] is to carry by aircraft *"passengers, goods or mail from a departure point to a final point" whereas chartering*[20] *"is the operation by which a lessor makes available to the charterer an aircraft and crew (…)".*

3.1.3. The issue in business aviation

Although the French authorities have not expressly confirmed it, it cannot be excluded that their reasoning is flawed with respect to the operation mode of business aviation;

- Unlike airlines, business aviation operators commercialize the capacity of the aircraft and not a seat, thus the price of the flight does not vary (or varies only slightly) depending on the number of passengers carried;

- The contracts binding the operators to the owners can provide for an invoicing method based on the time of use of the aircraft and not on the distance of travel.

These criteria are normally used by the French courts[21] to qualify the contractual relationship as a chartering contract versus a transport contract.

Thus, both French authorities[22] and French courts[23], using their power of interpretation of contracts, apply the following criteria to distinguish between a transport service and a charter service;

- Provisions related to the control of the aircraft[24]: contracts for which the itinerary is decided not by the parties (in the contract), but by the client (who communicates his/her/its instructions to the pilot), must be qualified as charter contracts and not as transport contracts;

- Provisions related to pricing[25]: a contract in which the provision of the aircraft is invoiced on an hourly basis, the price being totally independent from the distance travelled, or indeed from any travel at all, as well as services based on unlimited mileage or for which the price is exclusively based on an hourly rate and on time, must be qualified as a charter contract.

Notwithstanding the above, it remains true that;

- The passenger, even if he/she is the owner of the aircraft in which he/she travels, does not have the control of the aircraft, which in fact remains under the technical and commercial control of the carrier;

- Nothing about the qualification of the contract (as transport / chartering) depends on the number of passengers, the modes of commercialization of the flight or the identity of the passenger (owner / simple passenger). Admitting the contrary would imply creating a distinction between airlines and business operators, even though the constraints and the means used therefore are exactly the same.

The passenger could therefore not be qualified as a charterer on the sole basis that he/she is the owner of the aircraft in which he/she travels.

3.2. The aircraft operator filed a "non-commercial" flight plan

French customs authorities, in a Ministerial circular[26] published on 27 May 2019, recalls that, only the following private persons are deemed able to use the aircraft for commercial purposes;

- Operators holding a certificate of identification issued by the relevant French customs authorities;

- Air carrier, the status of which is presumed on the basis of holding an AOC.

However, French customs authorities indicate that, this being a simple assumption, customs authorities "may at any time undertake the necessary examinations of the real exempted nature of the activity performed by the users benefiting from such an assumption", which authorizes them to conduct investigations based on the "flight plans filed" by the aircraft operators.

Nevertheless, the notion of "commercial flight" is not the same in customs regulations as it is in aviation regulations.

3.2.1. "Commercial flights" in customs and aviation regulations: flights operated as "commercial transport"

French customs authorities consider[27] that "the distinction between public and private transport is based (…) on the fact that [the flight] organized for a person in the name of another person (public transport) or in his/her own name (private transport, such as the transport of its own staff by a company)."

This definition complies with the French aviation regulation, which provides that public transport corresponds to *"any transport of passenger or goods, with the exception of transport organized by a public or private person in his/her/its own name, and the journeys subject to other regulations"*.

However, the French Civil Aviation authority adds that the notion of public transport *"also covers the case where a passenger pays a third person mandated to ensure the technical operation of the aircraft, whether or not the passenger is the owner of all or part of the aircraft in which he/she flies"*[28]. The French Civil Aviation authority thereby refers expressly to the rules of operation of aircraft by business aviation operators.

Finally, the European aviation regulation[29] considers that a flight must be qualified as *"commercial"* when it is operated *"in return for remuneration or other valuable consideration" and (i) is available for the public or, when not made available to the public, is performed under a contract between an operator and a customer, where the latter has no control over the operator. The following can thus be qualified as "commercial flights"*:

- Flights operated as commercial transport[30] for which the aircraft is used to *"carry passengers, goods or mail for consideration or in any other paid nature"*, provided the operators hold an AOC[31] (corresponding to the activity of public transport);

- Flights performed by aircraft operated for consideration for any other purpose[32] (for example, aerial work, etc.).

3.2.2. "Non-commercial" flights performed by operators holding an AOC

The aviation regulation allows operators to operate as "non-commercial" an aircraft listed in the operational specifications of their AOC.

This procedure, known as "ORO AOC 125"[33], thus allows an operator holding an AOC (and not a third party) to use the aircraft for operations which do not require the compliance with the CAT regulations. This may notably be the case when a business aviation operator carries, within the scope of transport for consideration, a passenger who is also the owner of the aircraft used for said flight.

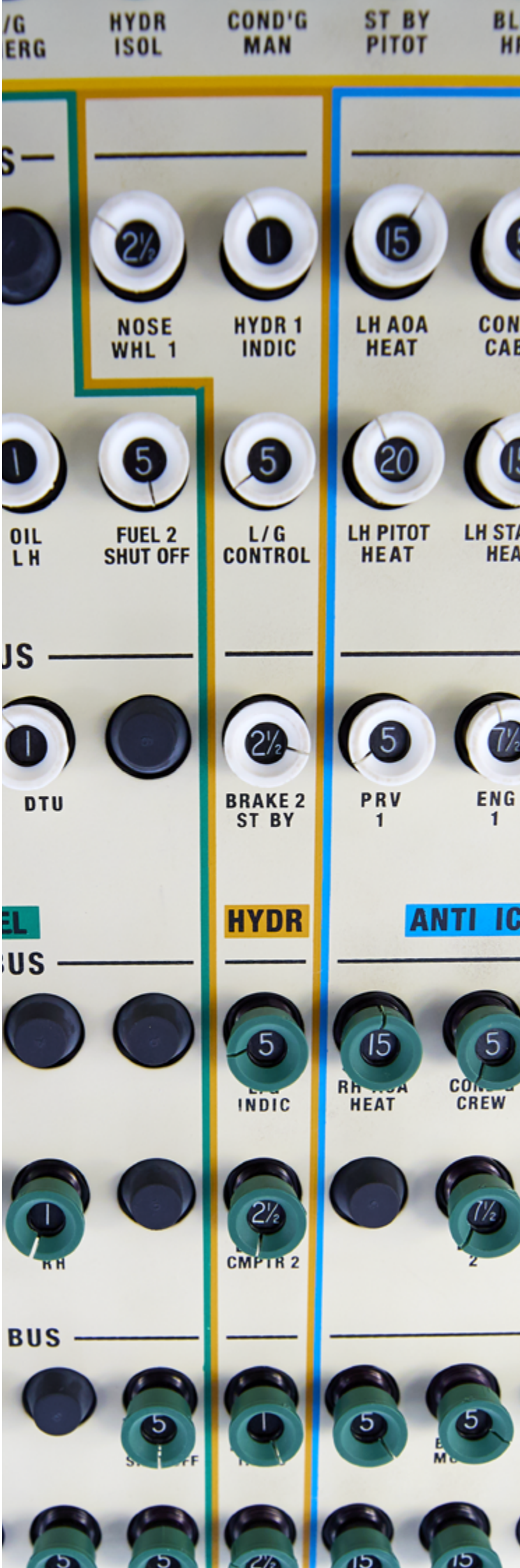
This kind of flight falls within the scope of the Energy Taxation Directive, since;

- The aircraft is indeed used by the business aviation operator (which operates it in application of a dry lease or a management contract) and not by a third party (a case not covered by ORO AOC 125);

- The business aviation operator retains the control of the aircraft;

- The business aviation operator operates the flight for consideration. Thus the flight cannot be qualified as a "private pleasure-flying" flight.

In this case, although the flight is made for commercial purpose and with a passenger on board, French Civil Aviation authority offer the possibility for the company to operate its flight under a "non-commercial" status. However, the examination by French Customs Authorities of the flight plan, in which the flight will have been declared as "non-commercial", will lead them to consider that the flight must be qualified as "private" as defined by the customs regulations.



B.GERMANY

1. Legal impact analysis

1.1. Legal basis

The regulative framework for mineral oil tax in Germany, including the respective procedural law, is based on numerous provisions on different levels of the hierarchy of legal norms.

The Energy Taxation Directive is the foundation of the directly applicable German national energy tax law.
The Energy Taxation Directive is, unlike an European regulation, not directly applicable in the Member States. It must be transposed into national law by way of an implementation act. In this process, Member States have a certain degree of discretion with respect to the specific scope and wording of their respective national provisions. The German parliament (the "Bundestag") transposed the Energy Taxation Directive into German national law by way of the Law regarding the Revision of the Taxation of Energy Products and Modification of the Electricity Tax Act ("Implementation Act")[34].

The result of the Implementation Act was the Energy Tax Act (*"Energiesteuergesetz"*), which constitutes the currently applicable law with respect to the taxation of energy products. In addition to the Energy Tax Act, the German Finance Ministry (*"Bundesministerium der Finanzen"*), in agreement with the Ministry of Environment (*"Bundesministerium fuer Umwelt"*) and the Ministry of Agriculture and Consumer Protection (*"Bundesministerium fuer Landwirtschaft und Verbraucherschutz"*), promulgated the German Energy Tax Implementing Provision (*"Energiesteuerverordnung"*)[35], which contains specific implementing provisions with respect to the interpretation of the Energy Tax Act.

The procedural law regarding the taxation of energy products is governed by the Energy Tax Implementing Provision, the general German fiscal code (*"Abgabenordnung"*) and formal Letters of the Ministry of Finance.

1.2. Eligibility requirements for energy tax exemption / reimbursement

In accordance with the Energy Taxation Directive, the German Energy Tax Act permits a tax exempted use of aviation turbine fuel for the operation of aircraft other than those operated privately and non-commercially, for the maintenance of commercially operated aircraft and for the development and production of aircraft.[36] The eligibility requirements for reimbursement correspond to the requirements for exemption.[37]

The eligibility requirements for exemption and reimbursement are substantiated by the Energy Tax Implementing Provision, which contains a negative delimitation in the form of a definition of private non-commercial operation. According to the Energy Tax Implementing Provision, private non-commercial operation is the use of an aircraft by its owner or other authorized user for purposes other than:

- Commercial transport of passengers or cargo by an AOC-holder
- Rendering of commercial services
- Air rescue by air rescue operators
- Scientific research and
- Official use by a public authority.[38]

As a corollary, this stipulates the aforementioned purposes of use as a definitive catalogue of eligibility requirements for exemption and reimbursement with respect to the intended use of an aircraft. In this context, the Energy Tax Implementing Provision defines an activity as being commercial if it is conducted by an entrepreneur for remuneration, at his/her/its risk and under his/her/its responsibility and with the intent of making a profit.[39]

The requirement "rendering of commercial services", is a very broad definition, which leads to extremely inconsistent interpretation and handling by the competent authorities.

2. Case law of German Federal Fiscal Court

The German Federal Fiscal Court (*"Bundesfinanzhof"*) substantiated the aforementioned eligibility requirements for mineral oil tax exemption / reimbursement by various court decisions over the last years.

Building on the principles of the European Court of Justice (CJEU) decision regarding corporate flight operations[40], the German Federal Fiscal Court issued three decisions[41], negating a claim for reimbursement of a corporation that used its aircraft for internal business purposes. In this case the claimant operated the aircraft as an asset of the corporation, without implying a corporate structure that envisages a contractual relationship between two separate entities. The German Federal Fiscal Court justified the decision on the basis that the claimant did not hold an AOC and the business purpose of the claimant was not directly connected to the use of aircraft.

In 2012, the German Federal Fiscal Court issued a decision[42], negating a claim for reimbursement of a corporation that leased an aircraft to other corporations. The aircraft was leased in an airworthy condition, insured, including jet fuel and including a pilot. The German Federal Fiscal court argued that the requirements for reimbursement were not fulfilled because the claimant did not render any air transport services and the lessor temporarily assigned the control over the aircraft to the lessee, which leads to the lessee being qualified as the user of the energy product.

In 2014, the German Federal Fiscal Court issued two decisions[43] in favor of corporations that rendered air transport services to other corporations within the concern and to shareholders of the corporation. The court concluded that the reimbursement claim does not require the claimant to hold an AOC and that air transport services for remuneration are generally eligible for reimbursement, even if they are rendered only within a concern. The competent tax and customs authority, being the defendant, did not dispute the classification of the services rendered by the claimant, thus preventing a clear differentiation by the court between the commercial transport of passengers and the rendering of other commercial services.

In 2016, the German Federal Fiscal Court issued a decision[44], confirming the principles established in the decisions from the year 2014 and extending the eligibility for reimbursement to individuals who render commercial services with their privately-owned aircraft within a concern. The court ruled that a commercial service, as stipulated in the Energy Tax Implementing Provision, shall be presumed if the services are rendered for merchantable remuneration.

2.1. Corporate flights

In Germany, corporate flights are subject to very inconsistent tax procedures with respect to the eligibility for exemption and reimbursement claims. In particular, this regards corporate flights conducted by flight operation entities within a concern that render commercial aviation services to other entities of the same concern. Comparable cases are decided upon in a completely different manner by the competent tax and customs authorities, depending on the region where the claim is filed. This contradicts the fact that tax and customs authorities are obliged to decide on the basis of federal law, which has to be interpreted consistently. Same comment as FR section – possible to clarify – not understandable…, only chance and the geographical place of business decide whether an exemption or reimbursement claim is granted or denied. Corporate flight departments all over Germany experience a considerable degree of legal uncertainty.

With respect to aforementioned corporate flights, there is a wide range of tax casuistry regarding the various exemption and reimbursement requirements. The tax and customs authorities use a wide array of definitions of the specific exemption and reimbursement requirements, randomly mixing definitions from public aviation law and tax law.

The exemption and reimbursement requirement "rendering of commercial services" is subject to inconsistent interpretation by the tax and customs authorities. In some cases the competent authority, contrary to the explicit case law of the CJEU and the German Federal Fiscal Court, still requires the applicant to prove that it holds an AOC. In other cases, the classification of the respective services as being "commercial" is negated because the services are not offered on the public market. Furthermore, in some cases the classification as aviation services is being questioned and the services rendered are interpreted as rental or lease agreements. However, the aforementioned interpretations of the tax and customs authorities are not applied consistently. In some cases, the competent authority grants the application, without applying any interpretation; in other cases interpretations are confused with each other or requirements for proof are gradually changed or increased within a proceeding.

A very common argument of the tax and customs authorities is to negate the requirement of "rendering commercial services" regarding corporate flights by referring to the definition of commercial transport services stipulated in the respective EU regulations. In the opinion of some local tax and customs authorities, corporate flight corporations without an AOC are prohibited from rendering commercial transport services and therefore do not meet the requirements for energy tax exemption or reimbursement. This constitutes a false legal conclusion with enormous financial strains for affected corporations. Flight corporations without an AOC are prohibited from rendering commercial transport services to external customers. However, according to EU aviation law[45], under certain circumstances and with the correct corporate and contractual structure they are

permitted to render commercial aviation services within the concern.

The inconsistent tax practice of German tax and customs authorities in this context is, to a large extent, a result of insufficient and unspecified requirements in the Energy Taxation Directive and an inadequate transposition of the Energy Taxation Directive into national law.
Article 14 of the Energy Taxation Directive stipulates:

"(…) Member States shall exempt the following from taxation under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application (…):

(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 services for consideration or for the purposes of public authorities."

The provision is divided into two sections. The first section addresses the manner in which the Member States shall transpose the Directive into national law (*"ensuring the correct and straightforward application"*). The second section stipulates the categories for which an exemption shall be granted. Whereas the first section contains language typical for directives, leaving the Member States a certain margin of discretion with respect to the transposition into national law, the second section contains relatively specific privileged case groups. However, the individual case groups are structured as very loose and unspecific definitions. This combination of principally strict provisions regarding the privileged case groups and the lack of clarity with respect to the specific meaning leads to deficiencies in the transposition into national law and the tax practice of the national tax and customs authorities.

2.2. Training flights / maintenance flights / positioning flights

The energy tax exemption and reimbursement for jet fuel used on training flights, maintenance flights and positioning flights is an unresolved issue, which leads to high financial burdens and reduced competitive capacities of German operators.

Pursuant to the legal opinion of the CJEU and the German Federal Fiscal Court, the aforementioned flight categories are not eligible for energy tax exemption or reimbursement. In the opinion of the courts, the specific use of the respective aircraft does not directly serve the purpose of rendering a commercial service and therefore does not qualify for an exemption or reimbursement.[46]

The German tax practice did not consistently adopt the principles established by the CJEU and the German Federal Fiscal Court, and approached the subject in a manner that led to a high level of legal uncertainty amongst the operators, and ultimately to an administrative deadlock.

Initially, the German Ministry of Finance (BMF) issued a formal letter, informing the operators that due to recent decisions of the CJEU and the German Federal Fiscal Court, jet fuel used for maintenance flights and training flights would no longer be exempted from energy tax.[47] In May 2016, the German General Directorate of Customs issued a formal letter, declaring that the regulations contained in the aforementioned formal letter of the German Ministry of Finance would be suspended until clarification on a European level was provided.[48] In November 2016, the German Ministry of Finance issued another formal letter, reinstating the taxation of jet fuel used for maintenance flights and training flights.[49] The legal reason for that reinstatement was an impending limitation on the taxation of the use of such energy products for the taxation period of 2015. The German Ministry of Finance pointed out that the taxation of energy products plays a major role in the highly competitive aviation sector and that they urged the European Commission to provide the basis for a harmonized taxation within the European Union. Almost three years later, no action has been taken. The European Commission refers to the Member States, arguing that fiscal legislation falls within the remit of the Member States, while the Member States refer to the need for harmonized energy taxation by the European Commission and thus creating a legislative deadlock.

2.3. Interest on pending reimbursement claims

Contrary to other forms of tax reimbursements in Germany[50], pending energy tax reimbursement claims are not subject to interest payment by the competent authority. An interest claim only accrues if the applicant already received a tax assessment and files a claim against such tax assessment with the competent financial court. In some cases, the duration of proceedings involving energy tax reimbursement claims is more than five years, due to complicated legal issues, and in many cases due to delays on the side of the competent authority.

While the corporations that apply for energy tax reimbursements generally have no claim for interest on the reimbursement amount even if there is an extensive delay caused by the competent authority and the application for reimbursement is ultimately granted, German tax and customs authorities are generally entitled to claim interest from the applicant on outstanding energy tax amounts after an appeal is rejected during which the enforcement of the respective tax assessment was suspended.[51]

C. AUSTRIA

In Austria, operators face challenges with respect to the burden of proof in connection with the procedural law and the practical implementation of the Energy Taxation Directive.

1. Legal Basis

Austrian energy tax law stipulates three categories of exemptions from mineral oil tax:

- Global exemption;
- Limited exemption;
- Single exemption.

The global exemption entitles AOC-companies that conduct scheduled airline traffic to tax-exempted use of jet fuel and covers all aircraft operated by the respective AOC-company, as long as all aircraft are used for scheduled airline traffic[52].

The limited exemption entitles companies that conduct non-scheduled commercial aviation services to tax-exempted use of jet fuel. The exemption only covers the aircraft which are proven to be used exclusively for the rendering of commercial aviation services.[53]

The single exemption entitles companies to tax-exempted use of jet fuel in one particular aircraft that is used for the rendering of commercial aviation services.[54]

In each of the aforementioned cases, the competent Austrian tax and customs authority issues a fuelling permission for each eligible aircraft.[55]

2. Legal Impact Analysis

Procedurally, the company that applies for one of the exemptions and fuelling permission in Austria is obliged to provide proof that it meets the legal requirements.[56]

In practice, the competent Austrian tax and customs authorities set an extremely high level of evidence requirements which are often incompatible with business aviation standards. In many cases, the competent authority requires management contracts and invoices, and does not accept the evidentiary function of a document if the data of the customer of the company rendering commercial aviation services is redacted.

As a result, a company seeking an exemption or reimbursement is forced to break their non-disclosure agreement with their customer, or at least the principle of confidentiality, thus endangering their business relationship. The exceptionally high burden of proof and the unsubstantiated requirement of non-redacted confidential documents result in reduced competitiveness for Austrian operators in direct comparison to operators in other Member States.

RECOMMENDATIONS

The general goal of European legislation is the harmonization of legal standards across the Member States. In view of the specific irregularities within the tax practice of France, Germany and Austria and the inconsistencies within Germany with respect to corporate flights, training flights and maintenance flights, there is a high demand for rectification of the Energy Tax Directive. In order to ensure an appropriate level of harmonization of energy tax law in Europe, European legislation should focus on in-depth regulations, which should include precise definitions of the legal prerequisites for the exemption and reimbursement from energy tax. The considerably high leeway given to the Member States with respect to the transposition into national law should be reduced to one level, which allows for a harmonized standard across the European Union.

In its report on the evaluation of the Energy Taxation Directive[57], the EU Commission recently pointed out that: *"the identified difficulties with the Energy tax Directive's implementation related to the complexity, the lack of clarity, ambiguous wording and interpretations of some of the ETD provisions. This in turn led to uncertainties such as unclear conditions for eligibility to preferential tax treatment. Such uncertainty can represent a cost for tax authorities and economic operators, particularly when it leads to litigation, expressed as opportunity costs or legal expenses"*.

European and Member States legislation has the tendency to focus on airlines with respect to any aviation related regulative framework. The modern business aviation sector has a great impact on the European economy and should be accepted, to a large extent, as a commercial branch.
It does not seem possible to find a solution to the issue deriving from the double definition of the notion of "commercial flight" at the EBAA level. Indeed, on one hand, the possibility offered to the operators to operate a "non-commercial" flight for consideration is based, to a large extent, on the application of the rules of application of the EU Regulation 965/2012 (notably on the definition of "commercial flight" as defined in article 2 of said Regulation).

On the other hand, the qualification of a flight as "commercial", or not, in the flight plan, is a mere indication of the "commercial nature" of the flight, the main evidence of this "commercial nature" remaining the provision to the customs of an invoice justifying that the flight is operated for consideration. Yet, a "passenger owner" does not necessarily have, at the time of the flight, an invoice (the service being generally invoiced at the end of the month). Operators and FBOs must thus first alert their clients of the imperious necessity to have an invoice on board, mentioning the identity of the passenger as a client or beneficiary of the flight.

The issue related to the legal qualification of the contractual relationship between the "passenger-owner" and the operator, and, furthermore, to the determination of the final user of the aircraft, should be brought before the EU Commission.

This notion of "final user", which is currently the subject of litigation before the European courts[58], is also part of the notions being currently debated within the Central Board[59] of Indirect taxes and Customs.

It is in this context that EBAA has been invited by the Directorate-General for Taxation and Customs Union (DG TAX UD) to present the issues currently faced by business aviation. These considerations will be transmitted to the Central Board of Indirect taxes and Customs, which advise the Commission and ensure the exchange of best practices on the application of Union legislation on indirect taxes other than VAT. ITEG is notably in charge[60] of writing *a guideline (recommendation) in order to ensure the harmonised application of the provision of articles 14, 1 b and c by all the Member States.* And, furthermore, to reflect on the reform of Energy Taxation Directive.

ANNEX: COMPARISON OF CHARTER CONTRACT / TRANSPORT CONTRACT

Passenger Transportation Contract	Charter/Rental Contract

Major Obligation of the Registration-holder

The Operator owes the transportation of the client as a passenger, including the success of transportation in form of arriving at the destination in a specific time.

- The Owner owes the provision of the aircraft to the Charterer for a certain time. "Rental"
- The Owner can delegate a crew to the Charterer as a part of the Rental. The delegated crew must be employed by the same entity, which is providing the aircraft. Otherwise the Owner must not delegate a crew.

Major difference between Transportation and Charter/Rental

- The Operator owes the transportation.
- The passenger is not involved in aircraft operation etc.
- The aircraft is "only" the transport vehicle.

- The Owner owes no transportation or operation of the aircraft at all. It is the own matter of the Charterer to get to his destination.
- The Charterer has to be aware of and understand his responsibilities and liabilities.

Responsibilities

The Operator is responsible for:

- Organization and performance of all flight related matters
- Arriving at the destination in time

Passengers responsibilities:

- None directly transportation related, except being on time at the departure airport.
- Other responsibilities in regards of providing travel documents and comply with the rules regarding dangerous goods

Owners responsibilities:

- Providing the aircraft in an airworthy condition, properly insured, including fuel
- Providing the crew to operate the aircraft under the authority of the Charterer
- Providing access to his Management System, if necessary

Charterers responsibilities:

- Organization of all flight related matters
- Operating the aircraft within all relevant scopes and limitations
- Full responsibility for the aircraft, the operation of the aircraft and its occupants
- Proper licensing of the crew, even if it is delegated from the Owner

Problem:

- NCC-Aircraft regarding the requirement of a management system

Passenger Transportation Contract	Charter/Rental Contract

Liabilities

The Operator is (generally) liable for:

- Any delays in arriving at destination airport
- Any injuries of Passengers
- Any damages of Passengers belongings

The Passenger is liable for:

- Paying the ticket price.

The Owner is liable for:

- Not providing the aircraft in the agreed condition. (e.g. other aircraft type; unairworthiness)

The Charterer is liable for:

- Damages to the aircraft occurring during his rent
- Any Injuries of Occupants
- Any damages of Occupants belongings

Payments

The Passenger pays one "all inclusive" price and, if agreed, ancillary costs

The Owner pays all aircraft related expenses:

- Fixed costs
- Variable costs
- Ancillary costs

The Charterer pays:

- Rent to the Owner
- Perhaps certain parts of the variable costs directly, if agreed
- Ancillary costs

The Owner pays:

- Fixed costs
- Variable costs, except some certain parts of it, if agreed

GLOSSARY OF TERMS

A

Air services 10

Means a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire

Airlines 13

A scheduled commercial air transport operator

AOC 7

Air Operating Certificate (AOC) means a certificate delivered to an undertaking confirming that the operator has the professional ability and organisation to ensure the safety of operations specified in the certificate, as provided in the relevant provisions of Community or national law, as applicable;

B

Business aviation companies 13

Means a non-scheduled on demand commercial air transport operator

C

Chartering 11

Means the operation by which an air carrier makes a crewed aircraft available to a charterer

CJEU 10

Court of Justice of the European Union

D

Dry lease 16

Means an agreement between undertakings pursuant to which the aircraft is operated under the AOC of the lessee

E

EBAA 6

European Business Aviation Association

J

Jetfuel 7

Fuel for the purpose of air navigation

P

Positioning flight 11

A flight for the sole purpose of positioning the aircraft to conduct another flight from another airport

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[2]Article 14, b) of the Council Directive 2003/96/EC

"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 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: (…)
(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 services for consideration or for the purposes of public authorities. (…)"

[4]Decree of September 9th, 1993 setting out, for jet fuel used in aviation, the conditions of use allowing full exemption from Domestic Consumption Tax (NOR: BUDD9370011A)

[4]Article 62 of French Law no. 2007-1824 of December 25th, 2007

[5]Article 265 bis of the French Customs code (in effect as of January 1st, 2008)
"1. The energy products mentioned at article 265 are subject to exemption from domestic consumption tax when they are used as: (…)

b) fuel in aircraft, to the exclusion of private pleasure-flying aircraft.

For the application of the present (b)), the following are considered as private pleasure-flying aircraft: aircraft used, as the case may be, by their owner or the person who disposes of the aircraft through a hire or any other way, for a purpose other than a commercial one; (…)"

[6]Article 2 of the Decree no. 2009-805 of June 26th, 2009 setting out the implementing rules of b of 1 of article 265 bis of the French Customs code, related to the exemption from domestic consumption tax for energy products used as fuel or combustible in aircraft:

"Aircraft, other than private pleasure-flying aircraft, refer to aircraft operated by public authorities, persons detaining an operating license mentioned at article L. 330-1 of the French civil aviation code; persons holding an authorization, valid for 5 years, issued by the French administration on the basis of an application proving the commercial nature of the activity. The renewal of this authorization is subject to the submission of a new application. (…)"

[7]Instruction no. 09-051 published in BOD no. 6832 of July 20th, 2009, § 6 and 9

[8]CJEU, no. 79-10, December 1st, 2011, Systeme Helmholz GmbH v Hauptzollamt Nürnberg

[9]French Financial law no. 2013-1278 of December 29th, 2013 for 2014, article 32

[10]Decree of December 17th, 2015, as modified by the Decree of October 17th, 2017, setting out the implementation rules of article 265 bis of the French Customs code in terms of exemption from domestic tax of consumption on energy products used as fuel in aircraft (NOR : FCPD1515503A)

[11]Courrier de la DRDDI de Roissy – Voyageurs, du 8 février 2018

[12]CJEU, n° 151/16, 13 July 2017, Vakarų Baltijos laivų statykla' UAB v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos

[13]Ministerial Circular dated 27 May 2019, NOR : CPAD1914953C

[14]Articles 427, 1 paragraph 6 et 414, paragraph 1 of the French Customs code

[15]CJCE, no. C 250/10, 21 décembre 2011, Haltergemeinschaft LBL GbR c/ Hauptzollamt Düsseldorf

[16]See also Deloitte's report "Technical and legal aspects of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, Final report, 8 May 2018", page 140

[17]CJEU, C 97-06, October 18th, 2007, Navicon.

[18]Opinion of the Advocate General Mr. Mazák — Case c-97/06

[19]Article L. 6400-1 of the French Transport Code

[20]Article L. 6400-2 of the French Transport Code

[21]Case law on VAT matters distinguishing the reduced rate applying to transports (for which the price depends on the

distance travelled) from the full rate applicable to the hiring contract of a car with a driver (for which the invoicing depends on the time of use of the car and the driver does as instructed by the passenger)

[22]BOI-TVA-LIQ-30-20-60 no. 20, 220

[23]CE QPC October 7th, 2015 no. 389306, 3e s.-s., Sté Laisser-Passer

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[29]Regulation (EU) 2012/965 of 5 October, 2012, article 2, 1d)

[30]Regulation (EU) 2018/1139, article 3§ 24)

[31]Regulation (EU) 965/2012, Annex III, ORO-AOC-100, § a)

[32]Regulation (EU) 965/2012, article 2, 7)

[33]Regulation (EU) 965/2012, Annex III, ORO-AOC-125

[34]July 15, 2006; BGBl. I page 1534.

[35]July 31, 2006; BGBl. I page 1753.

[36]Art. 27 par. 2 German Energy Tax Act.

[37]Art. 52 par. 1 German Energy Tax Act.

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[50]Interest rate of 0.5% per month.

[51]Art. 237

[52]Art. 2 par. 2 lit. 1 Luftfahrtbeguenstigungsverordnung (Austria).

[53]Art. 2 par. 2 lit. 2 Luftfahrtbeguenstigungsverordnung (Austria).

[54]Art. 2 par. 2 lit. 3 Luftfahrtbeguenstigungsverordnung (Austria).

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[56]Art. 3 Luftfahrtbeguenstigungsverordnung (Austria).

[57]Commission Staff Working Document Evaluation of the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity, SWD(2019) 332 final, 11 September 2019, page 64

[58]See notably CJEU, no. C 116/10, December 22nd, 2010, Bacino (VAT case) and C250/10, cf. supra

[59]Central Board of Indirect taxes and Customs expert group (iteg) composed of representatives of the customs administration of each Member State to propose to the European Commission a common solution to the issues raised by the application of a European text

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