PionAirLaw
NEW LEGAL ROUTES FOR AIRLINES

February 2026

NOX TAX AND COMMERCIAL AVIATION: THE CJEU REOPENS A KEY FRONT FOR AIRLINES

Since 2015, airlines operating commercial passenger flights from airports located in Catalonia have been subject to a specific regional tax on nitrogen oxide (NOx) emissions generated during the landing and take-off phases of aircrafts (LTO cycle, for short). This tax, formally conceived as an environmental tax and paid annually based on emissions generated, has been the subject of intense legal controversy since its inception.

Its compatibility with European Union law, its true nature as a tax and the limits of regional fiscal power in a highly regulated sector such as air transport have fuelled a debate that has lasted for more than a decade and which, far from being resolved, has just been reactivated at European level following the recent decision by the Spanish Supreme Court to refer the matter to the Court of Justice of the European Union for a preliminary ruling (CJEU).

At this turning point, it is appropriate to review how the tax has been designed since its inception, which arguments have been put forward in the different phases of the conflict, and what is the legal and strategic scope of the matter currently pending before the CJEU, at a time when the debate is once again at the centre of the European regulatory agenda and may have significant consequences both for the future validity of the tax and for the recovery of amounts already paid by airlines.

REGULATORY CONFIGURATION OF THE TAX AND LEGISLATIVE DEVELOPMENTS

To this end, we must begin by recalling that the tax on nitrogen oxide emissions produced by commercial aviation was introduced by Act 12/2014 of 10 October of the Parliament of Catalonia as a tax specific to the Generalitat[1]. The taxable event is the emission of NOx into the atmosphere generated by aircraft operating commercial passenger flights during the so-called LTO cycle, i.e. taxiing, take-off and landing manoeuvres at airports located in Catalan territory. The tax base is determined on the basis of the kilograms of NOx emitted and the tax is settled annually by self-assessment.

Since its approval, the tax has been presented as an environmental measure aimed at internalising the costs of air pollution associated with aviation. However, its original design incorporated certain elements that introduced differentiated treatment between operators and types of flights. In particular, the original wording of Act 12/2014 excluded emissions from freight transport, exempted airlines with more than 20,000 flights per year from taxation and applied reduced rates to certain long-haul routes with connections outside the European Common Aviation Area.

These provisions were removed by a regulatory amendment approved in 2015, which significantly altered the design of the tax and, far from ending the debate, triggered a legal conflict by revealing that the original design of the tax had weaknesses from the perspective of European Union law and opened the door to challenging the lawfulness of the assessments for previous years.

THE ORIGIN OF THE LEGAL CONFLICT SURROUNDING THE TAX

As a result of these regulatory developments, the assessments for the financial years prior to the reform began to be challenged on two different fronts. On the one hand, the focus was placed on certain elements of the original tax design that excluded certain types of flights or certain operators from the tax, which could result in more favourable tax treatment and open the door to their classification as State aid incompatible with European Union law. On the other hand, a more structural challenge was articulated, aimed at challenging the very lawfulness of the tax due to its potential incompatibility with the constitutional distribution of powers, state tax regulations and, centrally, European Union law.

However, following the entry into force of the 2015 reform, the playing field changed significantly. With the removal of elements that could generate selective advantages, challenges relating to subsequent financial years were limited to this second line of argument. Since then, the debate has focused exclusively on the tax's compatibility with the applicable legal framework, particularly European Union law.

From the first requests for refunds of undue payments filed by the airlines[2], the Catalan tax authorities maintained a firm position and systematically rejected all the arguments put forward by the airlines, which led to the submission of lawsuits. The controversy thus moved to the courts.

[1] Act 12/2014, of 10 October, on the tax on nitrogen oxide emissions into the atmosphere generated by commercial aviation, the tax on gas and particle emissions into the atmosphere generated by industry, and the tax on the production of nuclear-generated electricity.

[2] In Spanish tax law, the refund of undue payments is the procedure by which taxpayers can request the refund of amounts already paid when they consider that the payment has been made without the proper legal basis or in application of a rule that is contrary to law. It is processed by the Tax Administration itself and is the usual channel for challenging self-assessments and preserving the right to a possible recovery of the amounts paid, as well as being the preliminary step before resorting to legal action.

It was in this context that the High Court of Justice of Catalonia initially rejected the contentious-administrative appeals on strictly procedural grounds, arguing that the request for the refund of undue payments was not the appropriate channel for challenging the legality of a rule with the force of law. This approach effectively prevented the courts from examining the substance of the issues raised and gave the impression that the debate had been closed without a substantive response.

However, this approach was subsequently corrected by the Supreme Court, which affirmed that the procedure for rectifying self-assessments is a valid channel for these purposes. Consequently, it ordered the proceedings to be referred back to the High Court of Justice of Catalonia for a ruling on the merits of the case.

Following this turn of events, the regional court began to distinguish between the different tax periods. In relation to the years prior to the 2015 reform, it upheld the appeals, finding that the original design of the tax incorporated elements that could constitute selective advantages incompatible with European law. On the other hand, regarding subsequent years, it dismissed the challenges on the grounds that, once those elements had been removed, the tax no longer suffered from that specific defect.

In the context of these disputes, the Generalitat lodged an appeal against the favourable judgments and the Supreme Court, in its judgment of 30 April 2024, introduced a nuance of great practical relevance, arguing that the possible illegality of certain aspects of the tax from the perspective of state aid did not imply the nullity of the tax as a whole. Consequently, the self-assessments made by operators who had not benefited from those specific advantages had to be maintained, provided that they were based on provisions not affected by that classification.

This ruling significantly reduced, once again, the scope of challenges based exclusively on state aid and shifted the focus of the debate to broader issues: the structural compatibility of the tax with European Union law.

THE LEAP TO THE EUROPEAN ARENA: THE PRELIMINARY RULING BEFORE THE CJEU

In this context, the Supreme Court has recently adopted a decision that marks a new turning point in the debate. In its Order of 11 November 2025, it agreed to refer the matter to the Court of Justice of the European Union for a preliminary ruling, expressly acknowledging that there are real and unresolved doubts about the compatibility of the Catalan tax with the European regulatory framework.

In essence, the Supreme Court questions whether this tax, despite being presented as an environmental tax, actually fits within the framework of harmonised taxation in the Union or whether, on the contrary, it invades areas that European law reserves for fuel exemptions and excise duties. It acknowledges, in turn, that despite the intense litigation accumulated in recent years, neither the Administration nor the courts of first instance had analysed whether the tax on NOx emissions from commercial aviation violates the mandatory exemption for fuel used in commercial aviation, provided for in Article 14.1.b) of Directive 2003/96/EC, or whether it can fit into the indirect taxation scheme allowed by Directive 2008/118/EC. These issues, repeatedly raised by airlines since the beginning of the dispute, had been systematically excluded from the judicial debate, which explains the need to turn to Luxembourg now.

Another relevant element of the order is the direct comparison made by the Supreme Court between the Catalan tax and the Swedish tax analysed by the CJEU in Braathens[3]. The High Court finds significant similarities between the two taxes: in both cases, polluting emissions

associated with commercial aviation are taxed, technical emission parameters by aircraft type are used and, above all, there is a direct and inseparable link between fuel consumption and NOx emissions. Based on this analogy, the Supreme Court argues that, although the tax is formally presented as an environmental tax, it cannot be ruled out that, in practice, it is acting as a form of indirect taxation on fuel, which would place it in conflict with an exemption that EU law expressly and mandatorily imposes.

Alongside this issue, the order includes a broader reflection on the true nature of the tax. The Supreme Court questions whether the tax can be considered an indirect tax with a specific purpose within the meaning of Article 1.2 of Directive 2008/118/EC or whether, on the contrary, it is an excise duty on consumption lacking that specific purpose that would allow it to be compatible with the European framework. On this point, the High Court does not limit itself to a theoretical doubt, but instead analyses the design of the tax itself and highlights various inconsistencies that weaken its extra-fiscal profile. These include the absence of a clear link between the revenue obtained and the effective reduction of environmental damage associated with the taxed activity, as well as the consistent application of the tax to flights of a very different nature, without taking into account variables that would allow its real environmental impact to be modulated.

Finally, the Supreme Court adds a comparative element that reinforces the need for the European ruling, striving to differentiate the Catalan tax from other regional taxes on air pollution that have previously been endorsed by case law. Unlike these, it considers that in the case of commercial aviation there is a clear possibility of passing on the tax to passengers through the ticket price. This potential transfer of the cost to the final consumer not only reinforces its nature as a consumption tax, but also intensifies doubts about its place in a sector subject to particularly strict harmonisation in tax matters.

[3] Judgment of the Court of Justice of 10 June 1999, Braathens, Case C-346/97, ECLI:EU:C:1999:291.

CONCLUSION: A DEBATE ENTERING ITS DECISIVE PHASE

In a nutshell, more than ten years after its creation, the Catalan tax on NOx emissions from commercial aviation remains a legally controversial levy. The preliminary ruling reopens a legal debate of undoubted relevance, which may prove decisive both for the future design of the tax and for the options for recovering revenue already paid by airlines.

The Supreme Court is not limiting itself to requesting a specific clarification, but is referring to the CJEU a set of structural doubts about the compatibility of the tax with the principles and limits that EU law imposes on the taxation of commercial aviation. And while it is true that until the CJEU rules, the tax remains enforceable, the pending proceedings reinforce the advisability of preserving rights by filing refund requests within the deadline[4].

Pending the CJEU's response, the situation calls for caution, technical analysis and a properly weighted strategy. The outcome may be decisive both for the future of the tax and for the possibility of recovering revenues already paid by airlines, bringing back to the forefront a controversy that once again places environmental taxation of aviation under European scrutiny.

PionAirLaw

Andrés Valverde Tejedor
Silvia Frade Sosa

[4] The time frame is particularly important in this context. The general time limit for requesting a refund of undue payments is four years from the date of submission of each self-assessment, which means that it is necessary to carefully review the financial years that are not yet time-barred and, in particular, the specific dates of submission. For these purposes, it should be noted that self-assessment and payment of the tax are made between 1 and 20 February of the year following the corresponding tax period (or within the following month in the event of cessation of activity). Filing the application within the legal deadline preserves the possibility of recovering the amounts paid, pending the European ruling.