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**PUBLIC VERSION**

**WORKING LANGUAGE**

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Subject: **State aid No SA.32888 – Germany – Exemption from air transport tax as regards flights of people domiciled on islands and other cases**

Sir,

## **1 PROCEDURE**

- (1) By electronic notification dated 11 May 2011 the German authorities notified to the Commission, in accordance with Article 108(3) TFEU, § 5 No. 4 of Article 1 of the Budgetary Law 2011 (Haushaltsbegleitgesetz 2011<sup>1</sup>). This notification was registered by the European Commission as State aid No SA.32888.

## **2 DETAILED DESCRIPTION OF THE MEASURE**

### **2.1 Title, scheme, budget and duration**

- (2) The notified measure constitutes a tax exemption under the German scheme on air transport tax. As of 1 January 2011 all passengers departing from a German airport by plane or helicopter will be subject to an air transport tax (Article 1 of the Budgetary Law 2011). The tax is levied on the air transport company and is imposed when the passenger departs from a German airport. The amount of the tax depends on the destination of the flight: EUR 8 (all countries set out in Annex 1 of Article 1 of the Budgetary Law, including all EEA countries), EUR 25 (all countries set out in Annex 2 of the same provision), EUR 45 (all remaining destinations).

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<sup>1</sup> Law Bulletin (Bundesgesetzblatt Teil I Nr. 63 vom 14. Dezember 2010, S. 1185-1892).

Seiner Exzellenz Herrn Guido WESTERWELLE  
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- (3) According to the notified measure, the tax does not apply to passengers whose flight directly serves the general interest of the residents of domestic islands. The exception concerns a) persons with their main residence on a domestic island, b) persons that stay on a domestic island and need to take a flight for medical reasons (for example due to a medical emergency or a need to have medical treatment available only on the mainland) or c) persons carrying out operations that are part of the public policy remit on a domestic island (for example, police or customs officials, or persons from the education authorities or involved in civil protection). The island must not be served by a mainland connection by rail or road which is independent of the tide and the point of departure or arrival on the mainland must be not more than 100 km away from the coast or it must be on another domestic island.
- (4) The Budgetary Law entered into force on 1 January 2011. The application of the notified tax exemption is currently suspended pursuant to Article 108(3) TFEU.
- (5) The first beneficiaries of the measure are air transport companies. The estimated number of beneficiaries is below ten<sup>2</sup>. However, on the basis that the tax will, when levied, be passed on to the passenger as part of the ticket price, the final recipients of the aid are individual consumers. According to the German authorities there will be around 15 000 passengers annually to which the exemption applies.
- (6) The objective of the aid is to enable connectivity between the eligible German islands and the mainland. The tax exemption covers islands which are only accessible by sea, depending on the tide. The exceptions reflect the reality that, for people domiciled on the islands, there is often no comparable alternative to a flight given the fact that transport by sea depends on the tide and the weather conditions. The law also limits the exemption to flights with a destination on the mainland not more than 100 km from the coast. In this respect, the German authorities have confirmed that the exemption must be interpreted as encompassing all airports on the mainland which are not more than 100 km away from the North Sea coast or the Baltic Sea coast. In order to define this geographic area the North Sea coast is defined as the stretch of coast between Leeuwarden (NL) in the West and Esbjerg (DK) in the East. The Baltic Sea coast is defined as the stretch of coast between Kolobrzeg (PL) in the east and Sonderborg (DK) in the west. This ensures that only flights aiming to provide a service in terms of connectivity to the mainland to the residents of domestic islands are covered by the tax exemption.. Germany has provided a list of airfields in the *Länder* of *Bremen*, *Hamburg*, *Mecklenburg-Vorpommern*, *Lower-Saxony* and *Schleswig-Holstein* that are within the 100 km range.
- (7) The annual budget for the aid is estimated to be around EUR 120 000.
- (8) Germany has made several commitments: since the tax scheme is in theory of indefinite duration the German authorities have committed to review the scheme after five years; Germany agrees to extend the tax exemption to flights between the domestic islands and other EEA destinations.

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<sup>2</sup> The airlines currently providing services to the islands in question are e.g. Air Hamburg, Baltrum Flug, FLN Frisia Luftverkehr, LFH and OLT.

### 3 ASSESSMENT OF THE MEASURE

#### 3.1 Existence of aid

- (9) By virtue of Article 107(1) TFEU "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".
- (10) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measure constitutes State aid within the meaning of that provision, all of the following conditions need to be fulfilled:
- the financial support is granted by the State or through State resources,
  - it favours certain undertakings or the production of certain goods,
  - it distorts or threatens to distort competition, and
  - affects trade between Member States.
- (11) The concept of State aid applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or by any intermediary body acting by virtue of powers conferred on it. In this context the decision of the German Government to grant a tax exemption under the tax scheme constitutes a grant of State resources. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure<sup>3</sup>In the present case the public funding is not a general measure as it is directed at a particular group being the residents of the eligible islands, people with medical needs on the eligible islands or officials carrying out operations that form part of the public policy remit on the eligible islands. Furthermore, the financial compensation is likely to favour the operation of air services between the eligible islands and the mainland by generating additional demand for tickets. It will therefore indirectly benefit those companies providing eligible air transport services to and from the islands in question. The measure is therefore selective.
- (12) This increased demand is capable of having an effect on inter-state trade taking into account the inherent international character of intra-EEA air transport, this is all the more the case since the entry into force of the "third liberalisation package"<sup>4</sup> liberalising air-transport services throughout the EU on 1 January 1993. The Commission recognises that the measure threatens to distort competition since it favours those companies which offer air transport services to and from the eligible islands.
- (13) Therefore the Commission considers that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

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<sup>3</sup> See, for example, Case C-156/98 Germany v Commission [2000] ECR I-6857, paragraphs 25-28.

<sup>4</sup> Council Regulations (EEC) No 2407/92, 2408/92, 2409/92 published in OJ L 240, 28.8.1992.

### 3.2 Compatibility of the aid

- (14) Since the measure constitutes State aid it is therefore necessary to examine the measure in the light of Article 107 TFEU. In this regard it should be noted that it is the contention of the German authorities that the measure involves 'aid of a social character' and is therefore in line with the provisions of Article 107(2)(a) TFEU which provides that "aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned" shall be compatible with the internal market.
- (15) Paragraph 24 of the Communication on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (1994 Aviation Guidelines)<sup>5</sup> explains that aid of a social character, as set out in what was then Article 92(2)(a) EEC, may apply in "the case of direct operational subsidisation of air routes " provided the following requirements are fulfilled:
- The aid must effectively be for the benefit of final consumers.
  - The aid must have a social character, that is, it must, in principle, only cover certain categories of passengers travelling on a route such as children, handicapped people, people with low incomes, etc. However, in the case where the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.
  - The aid must be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operate the service. This also implies the absence of any barrier to entry on the route concerned for all EEA air carriers.
- (16) In the present case, the Commission finds that the notified tax exemption is indeed for the benefit of final consumers. The air transport companies that operate the routes to the eligible islands will pass on the tax in its entire amount to the passenger. Hence, when the tax exemption applies, the eligible passengers are thereby relieved from the payment of the tax. Tickets must clearly state the fare price and the amount of the tax. The airlines will require proof that a passenger is eligible (for example by checking the identity card or passport of the passenger)., In the case of flights for medical reasons and passengers carrying out public policy remit functions, additional proof is required. Germany has committed to ensuring that the airlines will carry out these checks.
- (17) The Commission can also conclude that the benefit to be granted has a social character because it is reserved for a particular category of passengers whose situation justifies the payment of aid for social reasons. In the case of persons who are residents of the islands, the measure is designed to allow them to travel to the economic and administrative centres on the mainland. The residents of the eligible islands face a problem of steady connectivity. Since these islands can only be

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<sup>5</sup> OJ C 350 of 10.12.1994, p. 5.

serviced by ferries which depend on the tide there may be only one connection per day. This may be further reduced in winter times, due to bad weather conditions and ice, when the ferries stop running altogether. A steady connectivity allows the residents of the islands to reach the mainland in order to participate in economic life without the journey time being unduly long or requiring an overnight stay. It is established Commission practice in this regard as set out in the previously mentioned Commission Communication as well as in a number of decisions concerning similar schemes that residence on an island may be regarded as a social handicap which justifies the grant of such individual aid<sup>6</sup>.

- (18) In the case of medical flights, only people that are residing or staying on the eligible islands and need to leave the islands for medical reasons are covered. This includes for example tourists on the islands needing medical treatment or residents of the islands who have to travel in order to undergo treatment which is only available on the mainland.
- (19) In the case of persons acting under a public policy remit, the exemption is granted to officials that are required to travel to the islands in order to carry out their functions in the public policy remit (for example, police or customs officials, or persons from the education authorities or involved in civil protection).
- (20) Finally, the Commission finds that the notified measure is open without discrimination to all EEA air carriers that wish to provide air services on all or part of the eligible routes. Germany has undertaken to modify the notified measure so that it is not restricted to destinations in Germany but covers flights between the eligible islands and all eligible EEA destinations. According to the German authorities there are no public service obligations within the meaning of Article 16 of Regulation (EC) No. 1008/2008<sup>7</sup> in place for the routes in question.

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<sup>6</sup> Decision N386/1998 of 29 July 1998 concerning links between the Balearics and the rest of Spain, Decision N387/1998 of 29 July 1998 concerning links between the Canaries and the rest of Spain, Decision N414/1998 of 27 August 1998 concerning links between Madeira and the rest of Portugal, Decision N399/1998 of 3 September 1999 concerning support for air links in favour of the residents of the minor islands of Sicily, Linosa, Lampedusa and Pantelleria, Decision N26/2003 of 5 March 2003 concerning links between Paris and Corsica, Decision N24/2000 of 3 March 2000 concerning links between Marseille, Nice and Corsica, Decisions N638/2000 and N639/2000 of 5 October 2000 concerning links between Lyon, Montpellier and Corsica, Decision N385/2004 of 20 October 2004 concerning aid of a social character for certain categories of passenger on air services between Guadeloupe and metropolitan France, N516/2004 of 20 April 2005 concerning aid of a social character for certain categories of passenger on air services between Martinique and metropolitan France, Decision N471/2007 of 11 December 2007 concerning air links to/from the autonomous region of Madeira, Decision N 27/2008, United Kingdom, Aid of a Social Character Air Services in the Highlands and Islands of Scotland (prolongation of N 169/2006), Decision N 169/2006, United Kingdom, Aid of a Social Character Air Services in the Highlands and Islands of Scotland), Decision N 426/2010, France, Régime d'aides à caractère social au bénéfice de certaines catégories de personnes ayant leur résidence habituelle dans la Région de La Réunion), Decision SA.32497, United Kingdom, Aid of a Social Character for Air Services in the Highlands and Islands of Scotland (Scottish Government's Air Discount Scheme; prolongation of N 27/2008)

<sup>7</sup> OJ L 293 of 31.10.2008, p. 3.

#### 4 CONCLUSION

The Commission has accordingly decided that the aid is compatible with the internal market pursuant to Article 107(2)(a) TFEU.

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Your request should be sent by registered letter or fax to:

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Yours faithfully,  
For the Commission

*Joaquín ALMUNIA*  
Vice-President