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<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>		<p style="text-align: center;">PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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Subject: State aid SA.32020 (2011/N) – Germany
Tax reduction for flights to and from certain North Sea Islands

Sir,

1. PROCEDURE

- (1) By electronic notification dated 12 July 2011 the German authorities notified to the Commission, in accordance with Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), § 5(5) of Article 1 of the Haushaltsbegleitgesetz 2011¹ ("Budgetary Law 2011"). This notification was registered by the European Commission as State aid No SA.32020.
- (2) Additional information was provided on 5 October 2011, 22 November 2011, 20 February 2012, 18 May 2012, 23 August 2012, 1 November 2012 and 19 November 2012. A meeting was held on 6 November 2012.

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. The German air transport tax

The notified measure concerns a reduction on the German air transport tax. As of 1 January 2011 any transport by plane or helicopter of a passenger departing from a German airport are 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

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

the tax depends on the destination of the flight. In 2011 it was set at EUR 8 (all countries set out in Annex 1 of Article 1 of the Budgetary Law 2011, including all EEA countries), EUR 25 (all countries set out in Annex 2 of the same provision), EUR 45 (all remaining destinations).

- (3) The air traffic tax has an environmental steering effect. Germany has explained that although the transport of passengers per air is fuel intensive and releases an important amount of CO₂ in the upper layers of the atmosphere, an environmental tax on the fuel consumption is currently not possible due to the Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity. In order to nonetheless tackle the impact on the environment of the air transport of passengers and to induce passengers to environmental choices, Germany has decided to introduce the air transport tax on passenger flights.
- (4) In the Explanatory Memorandum to the Bill², the Government explains that: *"With the law establishing the air traffic tax, air traffic will also be included in the taxation on mobility to provide incentives for an environmentally friendly behaviour. With the tax environmental concerns are to be taken into account. While the consumption-oriented taxation on energy gives an incentive for all other modes of transport to an energy-efficient use of fuels, commercial air traffic is exempted from this requirement."* The tax, thus, is intended to tackle the impact of air transport of passengers on the environment. With the introduction of the tax, Germany aims at orienting consumers to environmental friendlier transport modes or at least at inducing them to take the impact on the environment into account when taking mobility decisions.
- (5) The impact of the tax has to be monitored. The results of the study have been published in a report containing also a chapter on the impact of the tax on the environment³. The report shows that the tax helped slowing down the CO₂ emissions evolution. The report estimates that thanks to the tax 380 000 tons CO₂ could be saved from the air transport sector. If the CO₂ emissions due to the transport modes to which the passengers switched instead is taken into account, the tax led to net CO₂ emissions savings of 210 000 tons. The report also indicates that indirectly the tax might also have helped reducing noise nuisance by inducing air carriers to organise their flights more effectively.

2.2. The tax reduction

- (6) According to §5(4) of Article 1 of the Budgetary Law 2011, the tax does not apply to 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 or c) persons carrying out operations that are part of the public policy remit on a domestic island (police or customs officials, persons from the education authorities or involved in civil protection). The flight must be scheduled to or from a German, Dutch or Danish island of the North Sea and the island concerned must not be served by a rail or road connection that is independent of the tide. Those tax exemptions were examined by the Commission in its

² Bundestag Drucksache 17/3030, A. II.

³ Bericht an den Deutschen Bundestag über die Auswirkungen der Einführung des Luftverkehrsteuergesetzes auf den Luftverkehrssektor und die Entwicklung der Steuereinnahmen aus der Luftverkehrsteuer, Drucksache 17/10225, 29.06.2012 (see in particular p. 58-62).

decision of 29 June 2011 in file SA.32888⁴. They were found to constitute aid having a social character within the meaning of Article 107(2)(a) TFEU and to be compatible with the internal market.

- (7) According to § 5(5) of Article 1 of the Budgetary Law 2011, the tax does not (fully) apply to passengers who are not already exempted in accordance with § 5(4) of Article 1 of the Budgetary Law 2011 whose flight is scheduled to or from a German, Dutch or Danish island of the North Sea. These passengers are workers, service providers, business people and tourists. This exemption is not yet in force. The Budgetary Law 2011 contains a suspensory clause making the entry into force of the exemption subject to the Commission's approval
- (8) Initially, §5(5) of Article 1 of the Budgetary Law 2011 contained a tax exemption. On 19 November 2012 Germany indicated that §5(5) would be amended. The tax advantage for passengers other than those mentioned under §5(4) will take the form of a tax reduction of 80%. As a result, passengers to the eligible North Sea island (other than inhabitants and other special passengers mentioned under §5(4) of Article 1 of the Budgetary Law 2011) will pay a tax of 20% of the national rate⁵ once this provision enters into force.
- (9) The objective of the tax reduction is to enable regular and reliable connectivity between the eligible islands and the mainland. It covers islands which are only accessible by sea, depending on the tide. It takes into account the reality that, for access to those 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. Indeed, depending on the tide there may be only one connection per day to the islands. This may be further reduced in winter times, due to bad weather conditions and ice, when the ferries stop running altogether.
- (10) In addition, apart from connectivity problems due to the weather, some of the islands concerned also have the disadvantage of being further away from the coast. The journey by ferry is sometimes relatively long (Cuxhaven-Helgoland: 140 min; Emden-Borkum: 130 min).
- (11) A steady connectivity allows the residents of the islands but also business people, workers and service providers to reach the mainland in order to participate in economic life without the journey being unduly long or requiring an overnight stay. The same is valid for tourists who might be discouraged to visit the islands if the journey is unduly long or inaccessible. Germany adds that the islands are in general too small a market and services like legal advice, insurances and financial services have to be provided from the mainland.
- (12) At the same time, Germany underlined that the flights represented by inhabitants of the islands are not enough in themselves to maintain regular connections at economically viable conditions (see further details below). Maintaining regular connections for inhabitants will thus depend on the flights taken by tourists and business people.

⁴ State aid No SA.32888 – Germany – Exemption from air transport tax as regards flights of people domiciled on islands and other cases

⁵ This would correspond to EUR 2 in 2011 (tax of EUR 8) and EUR 1,5 in 2012 (tax of EUR 7,5 in 2012).

- (13) The eligible island of the North Sea must not be served by a rail or road connection that is independent of the tide. The islands fulfilling these conditions are essentially Baltrum, Borkum, Juist, Langeoog, Norderney, Spiekeroog, Wangerooge and Helgoland.
- (14) The measure is open to all EEA air carriers that wish to provide air services on all or part of the eligible routes and it covers all flights between the eligible islands and all eligible EEA destinations⁶.
- (15) 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 German, Dutch or Danish island of the North Sea. This encompasses all airports on the mainland which are not more than 100 km away from the North Sea coast or the Baltic Sea coast. 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 criterion ensures that all regular flight connections to the concerned islands are included.

2.3. Budget and duration

- (16) The Budgetary Law entered into force on 1 January 2011. The application of the tax advantage foreseen in §5(5) of Article 1 of the Budgetary Law 2011 has been suspended pursuant to Article 108(3) TFEU.
- (17) The annual budget for the aid is estimated to be around EUR 1 000 000.
- (18) Since the tax scheme is unlimited in time, the German authorities have committed to notify the scheme again after ten years.

2.4. Description of the market:

- (19) As far as the German islands are concerned, only Baltrum, Borkum, Helgoland, Juist, Langeoog, Norderney and Wangerooge have a landing space for airplanes.
- (20) Germany has provided a list of all airfields in the *Länder* of Bremen, Hamburg, Mecklenburg-Vorpommern, Lower-Saxony and Schleswig-Holstein that are within the 100 km range and have a regular connection with the German islands concerned.

⁶ As mentioned in paragraph 20 of the decision SA.32888, Germany committed to cover flights between the eligible islands and all eligible EEA destinations.

Bundesland	German Island	Mainland (not further than 100 km of the coast)
Bremen		Bremen
		Bremerhaven Am Luneort
Hamburg		Hamburg
Mecklenburg-Vorpommern	Güttin/Rügen*	Anklam
	Heringsdorf/Usedom*	Barth
	Peenemünde*	Neubrandenburg
		Neustadt-Glewe
		Parchim
		Rostock
		Tutow
		Wismar-Müggenburg
Niedersachsen	Baltrum	Emden
	Borkum	Ganderkesee
	Juist	Harle
	Langeoog	Leer-Papenburg
	Norderney	Norden-Norddeich
	Wangerooge	Nordholz
		Oldenburg-Hatten
		Stade
		Wilhelmshaven-Mariensiel

Schleswig-Holstein	Helgoland-Düne	Flensburg-Schäferhaus
	Westerland/Sylt*	Grube
	Wyk a. Föhr	Hartenholm
		Heide/Büsum
		Husum
		Itzehoe, Hungriger Wolf
		Kiel-Holtenau
		Lübeck
		Neumünster
		Rendsburg-Schachtholm
		St. Michaelisdonn
		St. Peter-Ording
		Uetersen

* can only be point of departure or destination if the corresponding point of destination or departure is located on an island that is not served by a rail or road connection that is independent of the tide.

- (21) The eligible North Sea islands are essentially serviced by the LFH Luftverkehr Friesland Brunzerna & Partner GmbH & Co. KG (LFH), FLN FRISIA-Luftverkehr GmbH, Norddeich (FLN), the Ostfriesische Flugdienst GmbH – OFD (previously Ostfriesische Lufttransport GmbH – OLT), Baltrum-Flug and the Air Hamburg Luft-verkehrsgesellschaft mbH (Air Hamburg).
- (22) Air companies do not really compete on connections: each connection is serviced by one company. However air companies compete with ferries. Despite the flight connections, ferry companies account for 98,5% of the transport to and from the islands thanks to their larger transport capacities and cheaper fares⁷. Due to the long distances, Borkum and Helgoland are also additionally serviced by a katamaran connection.
- (23) The flights are short-distance flights. They do not last more than a few minutes and consumers which are likely to consider both taking the boat or the plane are price sensitive, in particular tourists.

⁷ For instance, in 2010/2011, the flight from Emden to Borkum would cost around 66€ while the journey by ferry would cost around 18€, in 2011 the flight from Norddeich to Juist would cost 38€ while by ferry it would cost 18€

- (24) The air transport companies are small companies with a low level of passengers and small airplanes (three to ten passengers). They are very sensitive to any variation in the number of passengers.
- (25) In order to maintain a regular flight connection to the islands that is economically viable, a minimum level of passengers is necessary. Germany has indicated that the regular flights to Borkum, Juist, Wangerooge and Helgoland represent around [...] to [...]% of the total number of passengers and of the turnover of the respective air transport companies. The rest of the turnover corresponds to other connections and the chartering of the airplanes.
- (26) Germany has further indicated that the number of passengers in the summer months is crucial for maintaining the offer of regular connections to the islands: if the number of passengers during summer months decreases sensibly compared to the previous year, it will influence negatively the viability of the connections and the airlines servicing the connections. Germany has underlined that the flights represented by inhabitants of the islands are not enough in themselves to maintain regular connections at economically viable conditions. Maintaining regular connections for inhabitants will thus depend on the flights taken by tourists and business people. For example, in 2009, out of 156 000 passengers, around 10% were inhabitants and the other passengers mentioned under paragraph (6) of this decision for which the tax exemption has been approved by the Commission in the file SA.32888.
- (27) Germany has indicated that between 2007 and 2012 the regular flight connections have evolved as follows:

		2007-2010	Tax	2011-2012
Baltrum-Flug				
Baltrum	Harle	All regular connections		Regular connections cancelled. Only chartering of the plane remains possible
Baltrum	Langeoog			
Baltrum	Norderney			
Baltrum	Wangerooge			
FLN				
Norddeich	Juist	All regular connections		Maintained
Norddeich	Norderney			Regular connection cancelled. Charter remains possible
Norderney	Juist			Maintained
Norddeich	Helgoland			Regular connection cancelled. Only daytours are offered

LFH				
Harle	Wangerooge	All regular connections		Maintained
Harle	Baltrum			Regular connection cancelled. Charter remains possible
Harle	Langeoog			
Harle	Norderney			Regular connection cancelled. Only daytours are offered
Harle	Helgoland			
Wangerooge	Baltrum			
Wangerooge	Langeoog ⁸			Regular connection cancelled. Charter remains possible
Wangerooge	Norderney			
Wangerooge	Helgoland			Regular connection cancelled. Only daytours are offered
Baltrum	Langeoog			All regular connections
Baltrum	Norderney			
OLT				
Emden Bremerhaven Heide/Büsum	Borkum Helgoland Helgoland	All regular connections		Maintained

(28) Concerning Air Hamburg, Germany has indicated that before 2011 Air Hamburg had the following connections organised as regular flights: Uetersen-Helgoland, Uetersen – Juist, Uetersen-Norderney, Uetersen-Wangerooge and Uetersen-Langeoog. In 2010 the departure point was changed to Hamburg. As of 2011, the number of connections organised as regular flights was reduced. Basically only the connection Hamburg-Helgoland was maintained. The connections Hamburg-Juist and Hamburg-Norderney were also proposed as regular flights in 2011 but only between May and September on Fridays and Sundays.

(29) Factors influencing the number of passengers are:

- Price: especially tourists will be influenced by the price and to a certain extent also business people.
- Weather: when the boats cannot run due to weather conditions, more passengers will use the air planes.
- Economic developments on certain islands: when for instance important public works take place on an island, it will imply important movements of workers, who will be more inclined to use the air planes.

⁸ Regular flight launched in 2010

3. ASSESSMENT OF THE MEASURE

3.1. Existence of aid

- (30) By virtue of Article 107(1) TFEU a measure constitutes State aid under Article 107(1) TFEU if it fulfils four conditions. Firstly, the measure is funded by the State or through State resources. Secondly, the measure confers an advantage to the beneficiaries. Thirdly, the measure favours certain undertakings or economic activities. And fourthly, the measure has the potential to affect the trade between Member States and to distort competition in the internal market.
- (31) A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure⁹. The decision of Germany to grant a tax reduction thus constitutes a grant of State resources.
- (32) The tax reduction 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.
- (33) Germany considers that there is no aid involved because the measure would not be selective. Germany submits that all airlines in the EU can claim the application of the tax reduction provided they demonstrate that they fulfil the conditions.
- (34) However, the tax reduction does not correspond to a general measure. It is directed at a particular group of airlines: only those airlines that transport passengers to/from the eligible islands and to/from the mainland within 100 km from the coast line can claim the application of the reduction. As indicated under paragraph (21) of this Decision, those connections are offered only by a limited number of airlines. Also, the Commission notes that from the point of view of the objective of the measure (taking into account the impact on the environment of the air transport of passengers, see paragraph (3) of this Decision) the eligible airlines are in a comparable situation with other airlines and the tax reduction cannot be justified by the logic of the tax system¹⁰. The Commission concludes that the measure confers a selective advantage to eligible airlines.
- (35) Germany considers that the measure is not capable of distorting competition, because the effects of the notified measure are confined to a particular region, the number of passengers involved is very low and all domestic and foreign airlines that offer the relevant transport services may benefit from the reduction. Germany also indicated that since ferry services are not affected by the new air transport tax, the tax reduction will prevent a distortion of competition to the detriment of air transport services to and from the islands.
- (36) Germany further considers that the measure does not impair trade between Member States because the tax reduction comprises all flights to islands in the southern North Sea, irrespective of which Member State they belong to.

⁹ See, for example, Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraphs 25-28.

¹⁰ Case C-159/01 *Netherlands v Commission* [2004] ECR I-4461, paragraph 42; Case C-279/08P *NOx emission trading scheme*, paragraph 62.

Germany adds that flights are operated only on a regional basis and that the airfields on the concerned islands are either not at all linked to international airports or only to a limited degree since in general only small aircraft can land on the islands concerned.

- (37) In connection with the impact on competition and trade between Member States, the Commission notes that it has already concluded in file SA.32888 (see paragraph (6) of this Decision) that the tax exemption for inhabitants of the island involved State aid. It indicated in particular that it was 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 so since the entry into force of the third liberalisation package¹¹ liberalising air-transport services throughout the EU on 1 January 1993.
- (38) In addition to that, the Commission notes that the islands concerned are close to the Netherlands and Denmark. Also the tax reduction relates to the transport of tourists, service providers, business people and workers. Therefore, the Commission concludes that the tax and the tax reduction are capable of influencing trade flows between in particular Germany, the Netherlands and Denmark.
- (39) As to the impact on competition, the Commission notes that the tax reduction (compared to the situation without a reduction) is liable of increasing the demand for tickets for the airlines servicing the connections to the islands concerned. The tax reduction can thus reinforce the position of the airlines concerned. The Commission considers that this can have an impact on competition between airlines given that the airlines servicing the connections to the concerned islands sometimes also provide air transport services to other destinations where they compete with airlines not necessarily present on the connections concerned by the tax reduction¹². Also the tax reduction will have an impact on competition between the airlines and ferry companies. The Commission notes in this respect that the impact on competition of the tax reduction has to be measured against the situation without any reduction and not against the situation before the tax was introduced.
- (40) Finally the Commission notes that the aid measures concerned cannot be considered as *de minimis* since the anticipated amount of the tax relief per airline in a three-year period is likely, in the case of most – if not all – of the airlines concerned, to exceed the maximum *de minimis* amount of EUR 200 000.
- (41) Therefore the Commission considers that the measure constitutes State aid within the meaning of Article 107(1) TFEU.

3.2. Legality of aid

- (42) As indicated under paragraph (7), the notified measure is not yet in force. Germany has thus fulfilled its obligations under Article 108(3) TFEU.

¹¹ Council Regulations (EEC) No 2407/92, 2408/92, 2409/92 published in OJ L 240, 28.8.1992.

¹² See for instance Air Hamburg offering charter services to several destinations in Europe.

3.3. Compatibility of the aid

- (43) Since the measure constitutes State aid it is therefore necessary to examine the measure in the light of Article 107 TFEU.

3.3.1. *No aid of social character the meaning of Article 107(2)(a)*

- (44) Contrary to what was the case in file SA.32888 the aid measure at hand cannot be considered as aid of a social character within the meaning of Article 107(2)(a) TFEU.
- (45) 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")¹³ explains that aid of a social character, as set out in what was then Article 92(2)(a) EEC (now Article 107(2)(a) TFEU), may apply in the case of direct operational subsidisation of air routes provided among others that the aid measure has a social character, which implies that it must, in principle, only cover certain categories of passengers travelling on a route such as children, handicapped people, people with low incomes, etc. In the case where the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.
- (46) The tax reduction granted under § 5(5) of Article 1 of the Budgetary Law 2011, however, does not cover certain categories of passengers such as children, handicapped people, people with low incomes, nor does it cover the population of the islands. It covers by contrast all passengers except those covered by §5(4) of Article 1 of the Budgetary Law 2011, i.e. tourists, workers and business people. Such categories of passengers are not mentioned in paragraph 24 of the 1994 Aviation Guidelines. They do not have specific social needs within the meaning of Article 107(2)(a) TFEU.
- (47) The Commission therefore considers that the aid cannot be considered as aid of a social character.

3.3.2. *No public service obligation*

- (48) According to Article 16 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community Member States¹⁴ can impose public service obligations in respect of certain routes. However, in this case, there are no public service obligations within the meaning of Article 16 of Regulation (EC) No. 1008/2008 in place for the routes in question

3.3.3. *Assessment under the Environmental Aid Guidelines*

- (49) Given that the tax on air traffic follows an environmental objective, the Commission has examined the tax reduction under chapter 4 of the

¹³ OJ C 350 of 10.12.1994, p. 5.

¹⁴ OJ L 293 of 31.10.2008, p. 3.

Environmental Aid Guidelines ("EAG")¹⁵ that concerns operating aid in the form of reductions of environmental taxes.

- (50) Environmental taxes are defined under point 70(14) EAG as *"taxes whose specific tax base has a clear negative effect on the environment or which seeks to tax certain activities, goods or services so that the environmental costs may be included in their price and/or so that producers and consumers are oriented towards activities which better respect the environment."*
- (51) The concerned tax on air traffic corresponds to this definition of environmental taxes. Indeed it is imposed on an activity (air transport) having a negative impact on the environment (high CO₂ emissions that are released higher in the atmosphere). The Commission also notes in this connection that the tax was imposed on the flights and not on the fuel consumption because of the taxation constraints imposed by Article 14(1)(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity.
- (52) In addition, as documented by the legislative preparatory works and Governmental declarations accompanying the introduction of the tax, the tax aims at orienting consumers towards transport modes with lower CO₂ emissions and less energy consuming and aims at inducing them to take the impact on the environment into account when they choose their transport mode.
- (53) Finally, as mentioned under paragraph (5) of this Decision, the concrete impact of the tax on the environment is monitored by Germany. Germany has provided a report examining the impact that the tax has had on CO₂ emissions in 2011. The report indicates that the tax has led to savings of CO₂ emissions in the air transport sector.
- (54) On the basis of those elements, the Commission concludes that the tax on air traffic constitutes an environmental tax within the meaning of point 70(14) EAG and that the notified tax reduction needs to be assessed under Chapter 4 EAG.

3.3.3.1. Environmental benefit

- (55) According to point 151 EAG aid in the form of reductions from environmental taxes will be considered compatible with the internal market provided that it contributes at least indirectly to an improvement of the level of environmental protection and that the tax reductions do not undermine the general objective pursued. As explained in point 57 EAG, reductions from environmental taxes concerning certain sectors or categories of undertakings are accepted under Chapter 4 EAG if they make it feasible to adopt higher taxes for other undertakings, thus resulting in an overall improvement of cost internalisation, and to create further incentives to improve on environmental protection. The Commission considered that this type of aid may be necessary to target negative externalities indirectly by facilitating the introduction or maintenance of relatively high national environmental taxation.

¹⁵ Community guidelines on State aid for environmental protection, OJ C 82, 1.4.2008, p.1.

- (56) In this case, the possibility to grant reductions for the transport of certain passengers on certain North Sea islands has enabled Germany to introduce a general tax on air transport that is not prescribed at EU level. Without the reduction the tax would not have been approved by Parliament¹⁶. The possibility to grant tax reductions also for the transport of tourists, business people, service providers, workers etc. was of particular importance for the acceptability of the tax where, as in the present case, the transport of those passengers is of vital importance for the participation of the concerned islands in the economic life.
- (57) By allowing the introduction of the air traffic tax, the Commission thus considers that the notified tax reduction contributes indirectly to environmental protection.
- (58) The Commission notes in addition, that the tax reduction does not undermine the purpose of the tax. On the one hand, the airlines will still be subject to a 20% tax and on the other hand the tax reduction applies only for journeys to and from islands that do not have a connection with the mainland that is independent of the tide. It thus concerns connections for which passengers do not have a lot of available alternatives (in particular nor train or bus possible, which are – according to the report mentioned under paragraph (5) of this Decision - the transport means towards which Germany intended to mainly orient consumers).

3.3.3.2. Tax reliefs above the harmonised Community minima and other reliefs

- (59) Taxation of flights have not been harmonised at EU level and the Commission has therefore analysed the necessity and proportionality of the proposed measure in the light of points 158 and 159 EAG.

3.3.3.3. Necessity of the aid

Objective and transparent criteria

- (60) In accordance with point 158(a) of the EAG, the choice of beneficiaries must be based on objective and transparent criteria and aid should be granted in the same way for all competitors in the same sector if they are in a similar factual situation.
- (61) The tax reduction is based on criteria established in the law. They are thus transparent. The criteria are also objective: the absence of connection to the mainland that is independent of the tide and the distance from the coast line. Finally the tax reduction is non-discriminatory. It is open to all EEA air carriers that wish to provide air services on all or part of the eligible routes and it covers all flights between the eligible islands and all eligible EEA destinations¹⁷. As regards the 100 km limit, it has been defined so as to

¹⁶ Germany has indicated that the tax exemption foreseen in Article 5(5) of the Budgetary law had not been foreseen initially in the law proposal (*see BT-Drucksache 17/3030*). A majority in Parliament could only be achieved after the exemption was added under Article 5(5) Budgetary law.

¹⁷ As mentioned in paragraph 20 of the decision SA.32888, Germany committed to cover flights between the eligible islands and all eligible EEA destinations.

encompass all regular and usual routes between the mainland and the islands concerned and Germany confirmed that all airports from which regular flights to the islands are offered are included in the 100 km range.

Substantial increase in production costs

- (62) In line with point 158(b) of the EAG, the tax without reduction must lead to a substantial increase in production costs for each sector or category of individual beneficiaries.
- (63) In the case of taxes related to energy, companies which fall within the definition on energy-intensity are presumed to meet these criteria, without a further test on the absolute share of additional costs on the production costs being carried out. For the purposes of energy taxation, a company is presumed to fulfil the criterion of a substantial increase in production costs, if it is energy-intensive, i.e. if it has costs for energy and electricity exceeding 3 % of its production costs. Germany has provided information showing that the fuel costs represent between [...] * and [...] of the costs of the concerned companies, hence well above the 3%.
- (64) However, although the tax is aimed at addressing the impact that the air transport of passengers has on the environment, impact that is to a large extent linked to the importance of the fuel consumption and CO₂ emissions in the air transport sector, the tax is not directly linked to the consumption of fuel nor is it directly distance related either. Indeed, although marginally, fuel consumption and CO₂ emissions will increase with the number of passengers, there is no direct proportionality relationship between the number of passengers and the fuel consumption. The main portion of the fuel consumption is related to the effort of taking the plane off the ground and not so much to the number of passengers. As pointed out by Germany, a tax displaying a direct link with the fuel consumption was not possible because it would have been incompatible with Article 14(1)(b) of Directive 2003/96/EC, even if it is not levied on the fuel itself¹⁸.
- (65) Given that the tax base (number of passengers) is not proportionate to the energy consumption, the criterion mentioned under paragraph (63) cannot be used as such in order to determine whether the tax has led to a substantive cost increase. The Commission has thus examined in what proportion the tax increases the ticket price of the regular flights.
- (66) With prices for one-way flights per adult varying between 37 and 87 EUR in 2010, the tax established for 2011 (EUR 8), including VAT, represents a price increase of EUR 9,52 which corresponds to between 11 to 25% of the 2010 ticket price. As for Air Hamburg, the price increase would be lower, but it would still amount to between 4,8% and 12,1%, depending on the time when the flight was booked.

¹⁸ Case C-346/97, *Braathens Sverige*, ECR [1999] I-3419.

* Business secret

Airline company and connection	Price (one-way - adult)	Tax 2011 + VAT	Price increase induced by the tax	Increase due to the air transport tax in percentage	
Air Hamburg:					
Hamburg – Helgoland (standard)	199 €	<u>9,52 €</u>	208.52	4,8 %	
Hamburg – Helgoland (early booking)	149 €		158.52	6,4 %	
Hamburg – Helgoland (last minute)	79 €		88.52	12,1%	
Baltrum Flug					
Baltrum – Harle	55 €		64.52	17,3 %	
Baltrum – Langeoog	40 €		49.52	23,8 %	
Baltrum – Norderney	40 €		49.52	23,8 %	
Baltrum – Wangerooge	55 €		64.52	17,3 %	
FLN					
Norddeich – Juist	38 €		47.52	25,1 %	
Norddeich – Norderney	65 €		74.52	14,6 %	
Norderney – Juist	38 €		47.52	25,1 %	
LFH					
Harle – Wangerooge	37 €		46.52	25,7 %	
Harle – Baltrum	55 €		64.52	17,3 %	
Harle – Langeoog	55 €		64.52	17,3 %	
Harle – Norderney	60 €		69.52	15,9 %	
Harle – Helgoland	85 €		94.52	11,2 %	
Wangerooge – Baltrum	55 €		64.52	17,3 %	
Wangerooge – Langeoog	55 €		64.52	17,3 %	
Wangerooge – Norderney	60 €		69.52	15,9 %	
Wangerooge – Helgoland	85 €		94.52	11,2 %	
Baltrum – Langeoog	40 €		49.52	23,8 %	
Baltrum – Norderney	40 €		49.52	23,8 %	
Langeoog – Norderney	55 €		64.52	17,3 %	
Langeoog – Helgoland	85 €		94.52	11,2 %	
OLT					
Emden – Borkum	66 €		75.52	14,4 %	
Heide/Büsum –	81,50 €		91.02	11,7 %	

Airline company and connection	Price (one-way - adult)	Tax 2011 + VAT	Price increase induced by the tax	Increase due to the air transport tax in percentage
Helgoland				
Bremerhaven – Helgoland	87 €		96.52	10,9 %

(67) The Commission considers on this basis that the tax represents a substantial increase in production costs for the airlines servicing the connections concerned.

Impossibility to pass on the substantial increase in production costs

(68) According to point 158(c) of the EAG, compliance with the necessity criteria requires that the above-mentioned substantial increase in production costs cannot be passed on to customers without leading to important sales reductions.

(69) The German authorities have explained that the price increase cannot be passed on to customers without important sales reduction.

(70) As mentioned above under paragraphs 25 to 27 of this Decision, the concerned local air transport companies can only maintain regular connections to the islands throughout the years if a sufficient number of passengers can be maintained.

(71) The most important connections are to the islands Borkum, Juist, Wangerooge and Helgoland. The flights to those islands represent around [...] to [...] % of the total number of passengers of the companies servicing those islands. They also represent around [...] to [...] % of their turnover. If companies suffer material decreases of passengers during the summer season on those connections, it directly endangers the entire connection.

(72) Given the short distances (and the corresponding expectations of customers to pay a rather low price), and the availability of ferries, customers are rather price sensitive. Germany has submitted data showing that the introduction of the tax had been followed by a decrease in the number of passengers.

Table comparing the number of passengers from 2007 to 2011

	2007	2008	2009	2010	2011	Compare	Compare %
Total year per company							
LFH Friesland			[...]	[...]	[...]	[...]	[...]
OLT Ostfriesland			[...]	[...]	[...]	[...]	[...]
Detailed connections							
Bremerhaven-Helgoland*	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Bremerhaven-Helgoland**					[...]	[...]	[...]
Emden-Borkum***	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Harle-Wangerooge	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Juist-Norddeich	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Büsum-Helgoland****			[...]	[...]	[...]	[...]	[...]
Norddeich-Norderney	[...]	[...]	[...]	[...]	[...]	[...]	[...]

*Of which [...] passengers attributable to the absence of boats during 25 days to Helgoland in 2011 while on average only 10 journeys are cancelled

**Bremerhaven-Helgoland minus [...] of [...] passengers

***Important public works are taking place on Borkum; hence an important number of workers were transported to the islands. This trend will stop as soon as works are finished.

****Also here the number of passengers has been influenced by the suspension of the ferry during 25 days in 2011. Without that the decrease in the number of passengers would have been more pronounced.

- (73) The Commission notes that the information submitted in this table shows there is a negative correlation between the number of passengers on flights and the tax.
- (74) This decrease in the number of passengers does not correspond to the national trend. Germany has provided passenger figures for the years 2007 to 2011. It appears that for both the total traffic and the internal German traffic, the number of passengers increased between 2010 and 2011 despite the introduction of the tax.

Jahr	Passagiere Gesamtverkehr in Mio.			Passagiere innerdeutscher Verkehr in Mio.		
	Einsteiger	Aussteiger	Gesamt	Einsteiger	Aussteiger	Gesamt
2007	93,7	93,9	187,6	24,3	24,3	48,7
2008	95,1	95,3	190,4	24,9	24,9	49,7
2009	90,8	90,8	181,6	23,8	23,8	47,6
2010	95,0	95,3	190,3	24,3	24,3	48,5
2011	99,6	100,0	199,6	24,4	24,4	48,8

Quelle: Statistisches Bundesamt Fachserie 8 Reihe 6.1

- (75) Also, Germany could provide the comparison of the evolution of the number of passengers in the flights and ferries. These comparisons shows either that the number of passengers on flight decreases while it increases on ferries, or that where there is a decrease on both sectors, the decrease is much more pronounced for the flights. In the following figures the evolution of the number of passengers on flights is shown in red and the evolution of the number of passengers on ferries in blue.

Diagram: number of passengers transported to Wangerooge

[..]

Diagram: evolution of the number of passengers transported to Wangerooge

[..]

Diagram: number of passengers transported to Juist

[..]

Diagram: evolution of the number of passengers transported to Juist

[..]

- (76) Finally as can be seen from the table under paragraph (27) of this Decision, since the introduction of the tax a very important number of routes were cancelled as regular flights due to a sharp drop of passengers that rendered the connections uneconomical. Except for the connections Norddeich-Juist, Norderney-Juist; Harle Wangerooge, Emden-Borkum, Bremerhaven-Helgoland, Heide/Büsum-Helgoland all other connections have been cancelled in 2011 as regular connections. A similar trend can be observed for Air Hamburg where the offer of regular flights was also reduced in the wake of the introduction of the tax (see paragraph (28) of this Decision).
- (77) On the basis of these elements, in particular the sharp decrease in the number of passengers and the cancelling of the routes as regular flights, the Commission considers that Germany has adequately demonstrated that due to the specificities of the local market and the price sensitivity of the customers, the airline companies concerned by the notified aid were not able to pass on the tax without suffering substantial market share losses.

3.3.3.4. Proportionality of the aid

- (78) With respect to proportionality, each beneficiary must according to point 159 of the EAG fulfil one of the following criteria:
- (a) It must pay a proportion of the national tax which is broadly equivalent to the environmental performance of each individual beneficiary compared to the performance related to the best performing technique within the EEA. The beneficiaries can benefit at most from a reduction corresponding to the increase in production costs from the tax, using the best performing technique and which cannot be passed on to customers.
 - (b) It must pay at least 20 % of the national tax unless a lower rate can be justified.
 - (c) It can enter into agreements with the Member State whereby they commit themselves to achieve environmental objectives with the same effect as what would be achieved under points 1 or 2 or if the Community minima were applied.

- (79) Germany will apply a 20% tax rate to the flights falling under the scope of §5(5) of Article 1 of the Budgetary law 2011. The Commission therefore concludes that the aid is proportional in the light of paragraph 159(b) EAG.

3.3.3.5. Duration

- (80) In addition, in accordance with point 154 of the EAG, the German authorities have committed to renotify the scheme after 10 years.
- (81) However, the Commission reminds the German authorities that the Environmental Guidelines are due to expire on 31 December 2014 and the Commission may, if necessary, propose appropriate measures to ensure that the existing schemes are adapted to the new applicable rules.

3.3.4. Conclusion

- (82) On that basis, the Commission finds that Germany has demonstrated that the proposed tax reduction for passengers (not already exempted in accordance with Article 5(4) of the Budgetary Law 2011) whose flight is scheduled on the one hand to/from a German, Dutch or Danish island of the North Sea that is not served by a rail or road connection that is independent of the tide and on the other hand from/to the mainland situated within 100km of the coast line is in line with the EAG. It can therefore be considered compatible with the internal market on the basis of Article 107(3)(c) of the TFEU.

4. CONCLUSION

The Commission has accordingly decided to raise no objections to the notified aid measure because the aid can be found compatible with the internal market.

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For the Commission

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