EUROPEAN COMMISSION

Brussels, 25.7.2012
C(2012) 5037 final

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 […].		PUBLIC VERSION This document is made available for information purposes only.

COMMISSION DECISION

of 25.7.2012

on State aid case
SA.29064 (2011/C, ex 2011/NN)

Differentiated air travel tax rates implemented by Ireland

(Only the English version is authentic)

(Text with EEA relevance)

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those provisions[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) In 2009, the Commission received a State aid complaint from an airline operator (hereafter "complainant") regarding several aspects of the air travel tax implemented by Ireland including the differentiated tax rates applicable to flights with destinations located no more than 300 km from Dublin airport, which allegedly favoured Aer Arann.

(2) By letter dated 13 July 2011, the Commission informed Ireland that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the differentiated tax rates applied under the Irish air travel tax. The Commission asked the Irish authorities to forward a copy of the decision to the beneficiaries.

(3) On 9 August 2011 and 5 September 2011, the airline operator Ryanair Ltd. (hereafter "Ryanair") submitted letters regarding the Commission's decision to initiate the proceedings. The Commission responded to those letters on 5 October 2011. On 17 October 2011, Ryanair submitted another letter.

[1] OJ C 306, 18.10.2011, p. 10.

(4) Following an extension of the deadline to reply, the Irish authorities submitted their observations on the Commission's decision on 15 September 2011.

(5) On 18 October 2011, the Commission decision to initiate the procedure was published in the *Official Journal of the European Union*[2]. The Commission invited interested parties to submit their observations on the measure.

(6) On 17 November 2011, Ryanair submitted its response to that invitation. By letter of 28 November 2011, the Commission asked Ryanair whether any information in Ryanair's submission was confidential and could not be disclosed to the Irish authorities. By letter of 30 November 2011, Ryanair confirmed that the submission of 17 November 2011 could be forwarded to the Irish authorities.

(7) By letter of 12 December 2011, the Commission forwarded Ryanair's comments to the Irish authorities, which provided their comments thereon on 13 January 2012.

2. DESCRIPTION OF THE MEASURE

(8) As of 30 March 2009, the Irish authorities introduced an excise duty on air passenger transport. The national legal basis for the tax is section 55 of the Finance (No. 2) Act 2008, which introduces an excise duty referred to as the "air travel tax" which the airline operators are liable to pay in respect of "*every departure of a passenger on an aircraft from an airport*" located in Ireland[3]. The tax becomes due at the time a passenger departs from an airport on an aircraft capable of carrying more than 20 passengers and not used for State or military purposes. While the tax *in fine* is intended to be passed on to the passengers via the ticket price, it is the airline operators that are accountable for it and liable to pay it[4].

(9) At the time of its introduction, the tax was levied on the basis of the distance between the airport where the flight began and the airport where the flight ended, at the rate of (i) EUR 2 in the case of a flight from an airport to a destination located no more than 300 km from Dublin airport and (ii) EUR 10 in any other case.

(10) Following an investigation by the Commission regarding a possible infringement 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[5] and Article 56 of the Treaty on the freedom to provide services, the rates were changed as of 1 March 2011 so that a single tax rate of EUR 3 is applicable to all departures, regardless of the distance travelled.[6]

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[2] See footnote 1.

[3] Aircraft that are capable of carrying less than 20 passengers and aircraft used for State or military purposes are excluded from the scope of the tax. The same applies to departures from airports with less than 10,000 passengers per year.

[4] Every airline operator liable to pay the tax must register with the Revenue service and must, within 20 days or such other period that the Revenue service may determine, furnish the Revenue service with a return showing the number of departures by passengers during the previous month.

[5] OJ L 293, 31.10.2008, p. 3.

[6] In the context of the infringement procedure, the Commission provided its formal notice by letter of 18 March 2010, in which it took the position that Ireland by the differentiation in air travel tax rates failed to fulfil its obligations under Regulation (EC) No 1008/2008 and Article 56 of the Treaty. Following the letter of formal notice, the Irish authorities amended the tax system.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(11) The Commission initiated the formal procedure regarding the lower tax rate, which was applicable for certain routes during the period 30 March 2009 until 1 March 2011, because it considered that it appeared to constitute State aid and had doubts regarding its compatibility with the internal market.

(12) In its assessment of whether the measure was selective, in line with established case-law[7], the Commission first identified the relevant tax system of reference, and thereafter analysed whether the measure constituted a derogation from that system and, if so, whether Ireland had demonstrated that the derogation was in the nature and logic of the tax system.

(13) It concluded that, in the case at hand, the system of reference is the taxation of air passengers departing from an airport situated in Ireland.

(14) The Commission noted that the air travel tax system provided for one general or normal rate applicable to nearly all flights and a reduced rate for flights to a destination located no more than 300 km from Dublin airport. It found that the normal rate constituted the reference system, while the reduced rate, that was applicable to a well delimited category of flights, appeared to be an exception from the reference system.

(15) The Commission had doubts whether the reduced rate was justified on the basis of the distance between the starting point and the final destination of the journey.

(16) First, it was not applicable on the basis of the actual length of the journey, but on the basis of the distance between Dublin airport and the destination.

(17) Second, the structure and objective nature of the tax did not seem to relate to the distance of the flight, but to the fact of departing from an Irish airport. The connection with the fiscal authority, the taxable event (the departure from an Irish airport) and the negative externalities for the Irish society (noise and air pollution) were precisely the same for all passengers departing from an Irish airport regardless of the destination of the flight and the distance travelled. The concerned airline operators were in the same as each other legal and factual situation with regard to that objective.

(18) Third, the tax system was not characterised by an articulated differentiation in the tax level in relation to the flights' distance, but it fixed only two rates: one for very short distance flights and the other for all other flights. That criterion seemed to favour flights within Ireland and to certain western parts of the United Kingdom and, consequently, discriminated between national and intra-Union flights. In the case at hand, the Irish authorities argued that a higher charge on the destinations for which the lower rate applied would be disproportional in relation to the price. The Commission found that the price of tickets for domestic destinations is not necessarily lower than that of flights to other destinations in the Union. The lower tax rate did thus not appear to be justified by the nature and logic of the air travel tax system and therefore seemed to be a selective measure.

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[7] See for example the judgments in Case C-88/2003 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 56, and in Case C-487/2006 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraphs 81-83.

(19) Since all other criteria in Article 107(1) of the Treaty also seemed to be fulfilled, the measure appeared to constitute State aid to the airline operators that had operated the routes benefitting from the reduced rate.

(20) The aid did not appear to fall within the scope of any guidelines for compatibility of State aid issued by the Commission. As it appeared to constitute an operating aid that discriminated between flights within the Union, it could not be considered to be compatible directly under Article 107(3)(c) of the Treaty. Furthermore, the aid did not fall within any other exemption specified in Article 107(2) or (3) of the Treaty.

(21) Consequently, the Commission had doubts as to the compatibility of the aid measure with the internal market and, in accordance with Article 4(4) of Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty[8], it decided to open the formal investigation procedure, thereby inviting Ireland and other interested parties to submit their comments.

4. COMMENTS FROM INTERESTED PARTIES

(22) In response to the notice in the *Official Journal*[9], the Commission received comments from the Irish authorities and from Ryanair.

4.1. Comments from the Irish authorities

4.1.1. The tax is a tax on consumers

(23) The Irish authorities state that the nature of the air travel tax is essentially a customer tax. For ease of application, the Irish authorities obliged each airline to pay to the Revenue service the relevant amount per passenger departing from an Irish airport and carried by that airline. The airline operators are, however, allowed to pass on the tax and collect it from their passengers.

(24) Moreover, the air travel tax is normally listed in the ticket price and/or in the general terms and conditions of operators as a tax or levy, in conjunction with other charges and taxes. Accordingly, the tax does not confer a benefit on any airline operators since it is merely another levy, tax or charge which is effectively charged to the consumer.

4.1.2. Absence of benefit to particular operators

(25) The Irish authorities state that the conferring of a benefit on particular operators is a prerequisite for the air travel tax to fall within the definition of Article 107(1) of the Treaty. According to the Irish authorities in a situation where the air travel tax is essentially a consumer tax, whether applied at EUR 10 or EUR 2, it might be difficult to see how the tax confers a benefit on particular operators.

[8] OJ L 83, 27.3.1999, p. 1.
[9] See footnote 1.

(26) There is no dispute that all operators, whether they are obliged to charge the EUR 10 or the EUR 2 tax rate, are placed on an equal footing. The question that arises is whether an advantage is conferred on the airline operators who only have to charge the EUR 2 tax rate collectively. According to the Irish authorities, the only realistic scenario in which the air travel tax could constitute aid is if the airlines operating routes to destinations no more than 300 km from Dublin airport were obliged to collect the air travel tax at EUR 10, but were allowed to retain the difference between the EUR 10 rate and the EUR 2 rate. It was, however, not the case. In that regard, it is important to point out that the Irish authorities, in designing the tax in question, did not have in mind any particular operator or business model.

4.1.3. There is no advantage to Irish airline operators

(27) First, it should be noted that Ireland no longer has national air carriers *per se*, given that the State divested its interest in Aer Lingus, which was originally the national State airline operator, into a minority shareholding.

(28) If the tax had any effect on Irish airline operators, that effect would have been very different for each of those airline operators. The Irish authorities point out that the intra-Union routes that were subject to the higher rate of EUR 10 were operated by predominantly the same Irish airlines. In the relevant period, the three airline operators held about [93-97]* % of the market for flights to which the lower rate applied, but they also predominated in the intra-Union air travel market, holding [82-87]* % of all such intra-Union flights.

(29) In particular, the Irish authorities argue that any disadvantage claimed by Ryanair is clearly unsustainable, since Ryanair accounts for approximately [56-63]* % of the passengers carried on the routes to which the lower rate was applicable (see Table 1).

Table 1: *Market shares of Irish airline operators on routes departing from Irish airports.*

Market shares		
	No more than 300 km	More than 300 km[10]
Ryanair	[56-63]* %	[42-47]* %
Aer Lingus	[16-23]* %	[35-40]* %
Aer Arann	[10-17]* %	[0.5-2.5]* %
TOTAL	[93-97]* %	[82-85]* %

Source: *Information provided by Ireland based on figures provided by the three Irish airline operators and data extracted from the Central Statistics Office.*

(30) Table 1 shows that the only operator which might conceivably be classified as a national operator by virtue of the State's minority interest (Aer Lingus) had a much greater share of flights to which the higher rate applied ([35-40]* %) than of flights to which the lower rate applied ([16-23]* %). Therefore, if the lower tax rate had had any effect on airlines, Aer Lingus would have been significantly disadvantaged.

[10] Exclusively within the Union.

* Due to a business secret, a range is used.

(31) As for Aer Arann, which the complainant also claims benefits from the alleged aid, the Irish authorities note that, between 2007 and 2010, it experienced a significant reduction in both turnover and passenger numbers. Following the introduction of the tax, Aer Arann reported losses of EUR 18 million. It therefore appears that the airline was at its most profitable before the introduction of the tax. The Irish authorities also point out that there was only one domestic route on which the complainant and Aer Arann competed and that, on that route, close to [37-42]* % of the flights were operated by the complainant. For flights to destinations abroad benefiting from the lower rate (western United Kingdom), the complainant operated more than [37-42]* % of the scheduled flights, while Aer Arann and Aer Lingus had smaller shares.

(32) Moreover, non-Irish airline operators have always been free to operate flights to which the lower tax rate applied. There was no discretion for the State in this context. The Irish authorities argue that, if there was an advantage in operating flights to which the lower tax rate applied, foreign (non-Irish) operators would have chosen to operate such flights. The absence of foreign airlines operating such flights suggests that there was no advantage stemming from the lower rate.

4.1.4. The lower rate was introduced in order to avoid applying a tax rate which was disproportionate in relation to the ticket price

(33) The Irish authorities stress that the purpose of the differentiation in rates was to introduce an element of proportionality in the level of the tax relating to distance, since prices are normally lower for closer destinations. While it is accepted that there is not a perfect correlation between distance and price, it was felt that the correlation was sufficient to justify splitting the tax into two tiers. The Irish authorities consider that a mechanism providing a more precise differentiation on the basis of distance would have rendered the system extraordinarily complicated and administratively burdensome.

4.1.5. No distortion of competition

(34) The Irish authorities argue that the lower tax rate did not result in any distortion of competition and had no effect on trade. First, since the tax was a consumer tax in nature, it had no perceptible effect on airline operators. Second, the differentiated tax rates did not distinguish the Irish market from that of other Member States. Of the flights to which the lower rate applied, the vast majority were non-domestic (68 % compared to 32 % for purely domestic flights). Third, the airline operators are active on a market which is open for competition, which means that the market was open for new entrants to which the lower tax rate applied on the same conditions as for other airline operators. If the lower tax rate had conferred a benefit on certain operators, non-Irish airlines would presumably have chosen to operate routes to which the lower rate applied. The absence of new entrants indicates that the lower rate did not confer an advantage on certain airline operators.

4.1.6. Any aid would be de minimis aid or have a negligible effect on the airline operators involved

(35) The Irish authorities claim that, even if the lower tax rate was to be regarded as State aid within the meaning of Article 107(1) of the Treaty, it should be declared

to be compatible with the internal market, since it would either be *de minimis* aid or would anyway have a negligible effect on the airline operators involved.

4.2. Comments from third parties

4.2.1. Ryanair

(36) With respect to the State aid nature of the lower tax rate, Ryanair agrees with the preliminary view which the Commission expressed in its decision of 13 May 2011 that the lower tax rate conferred an advantage on certain airline operators and constitutes State aid within the meaning of Article 107(1) of the Treaty. However, Ryanair disagrees with the Commission's view that (i) the higher rate of EUR 10 is to be considered as the "normal" rate, and that (ii) Ryanair obtained an advantage through the measure.

(37) With respect to the establishment of the "normal" or "standard" rate under the tax system, Ryanair claims that the Commission's view that the higher rate of EUR 10 is the normal rate and that all operators to which the lower rate of EUR 2 applied obtained an advantage, is arbitrary. According to Ryanair, there is no reason why the higher rate, and not the lower, should be seen as the normal rate. Moreover, since the two-tier rate has been replaced by a single rate, the new rate is likely to be a blend between the initial rates. Therefore, the new rate would be the reasonable benchmark to assess any potential harm or benefits arising from the two-tier system.

(38) Ryanair further claims that the two-tier air travel tax did not confer an advantage on Ryanair. When examining a measure that may constitute State aid, the Commission must take into consideration its overall effects on the potential beneficiary and, in particular, deduct any specific charges that burden the advantage conferred by the alleged aid. During the period when the two-tier tax system applied, Ryanair paid the taxes specified in Table 2.

Table 2*: Passengers carried and tax paid during the period 30 March 2009 until 1 March 2011.*

Destination category from Dublin airport	Passengers subject to tax	Tax paid	Share
No more than 300 km within the State (EUR 2 rate)	[…]*	EUR […]*	[0.5-2.5]* %
No more than 300 km outside the State (EUR 2 rate)	[…]*	EUR […]*	[1.5-4.5]* %
More than 300 km within the EU	[…]*	EUR […]*	[93-98]* %
More than 300 km outside the EU	[…]*	EUR […]*	[0.3-2.5]* %
TOTAL	[…]*	EUR […]*	100 %

(39) Since Ryanair considers that the new single rate of EUR 3 should be considered as the normal rate, Ryanair should, during the period from 30 March 2009 until 1 March 2011, have been liable to pay an amount of EUR […]* [11] in air travel tax. This is EUR […]* less than the amount actually paid (see Table 2). Ryanair thus argues that it did not enjoy any benefit from the lower tax, but rather suffered a disadvantage.

[11] EUR 3 multiplied by […]* passengers

4.3. Observations by Ireland on the third party comments

(40) On 13 January 2012, the Irish authorities provided their views on Ryanair's comments: *First*, they disagree with Ryanair's description of the tax, since the tax in their view is a consumer tax in essence and the lower tax rate did not confer an advantage on the airlines. *Second*, they fail to see how Ryanair could be the party most directly and negatively affected by the lower rate, in particular since it accounts for [56-63]* % of the passengers carried on flights subject to the lower rate. *Third*, there is no basis for the claim that the lower tax rate was designed to support Aer Arann. The Irish authorities did not have any particular operator in mind when designing the air travel tax. *Fourth*, there is no logic in Ryanair's argument that the higher rate of EUR 10 is not to be considered as the normal rate of the air travel tax. Under the two-tier tax system, the higher rate applied to between 85 and 90 % of all departures. The Irish authorities reiterated that they had allowed for a derogation from the standard rate of EUR 10 in order to introduce an element of proportionality in the level of the tax relating to the distance.

5. ASSESSMENT

5.1. Existence of State aid under Article 107(1) of the Treaty

(41) By virtue of Article 107(1) of the Treaty "*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*."

Selectivity

(42) In order to be caught by Article 107(1) of the Treaty, a measure must thus be selective[12]. In establishing whether a measure is selective, the Commission needs to assess whether the measure favours 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.[13] According to established case-law[14], a fiscal measure is prima facie selective if it constitutes a departure from the normal application of the general tax framework.

(43) First, the Commission therefore has to identify the relevant tax system of reference. As regards taxation, the Commission notes that, in principle, the definition of the system of taxation falls within the exclusive competence of the Member States. In designing their taxation system, the Irish authorities chose to define the taxable event of the air travel tax as the departure of a passenger on an aircraft from an airport situated in Ireland. The system of reference is therefore the taxation of air passengers departing on an aircraft from an airport in Ireland. The objective of that

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12 See Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 94.

13 See for example Cases C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41, C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68, and C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40, C-88/03 *Portugal* [2006] ECR I-7115, paragraph 54, and C-169/08 *Presidente del Consiglio dei Ministri* v *Regione Sardegna* [2009] ECR I10821, paragraph 61.

14 See for example the judgments in Case T-210/02 *RENV British Aggregates Association* v *Commission*, [2006] ECR II-2789, paragraph 107, and Cases C-88/03 *Portugal*, paragraph 56, and C-487/06 P *British Aggregates* [2008], paragraphs 81-83.

system is to raise revenue for the State budget. The conclusion that the system of reference is the taxation of air passengers departing from an airport situated in Ireland was confirmed by the Irish authorities in their reply to the observations of the third party.

(44) Second, in line with established case-law[15], the Commission has to determine whether the tax measure in question constitutes a derogation from the identified reference system.

(45) Ryanair argues that the lower rate of EUR 2, or alternatively the single rate of EUR 3 which was introduced on 1 March 2011, should be regarded as the normal rate of the air travel tax system. However, apart from certain destinations in the western United Kingdom, the lower rate only applied to domestic destinations and, according to the Irish authorities, only to some 10-15 % of all flights which were subject to the tax. It can thus not be regarded as the normal tax rate. As for the rate of EUR 3, it was not in force at the time to which this Decision relates and can therefore not be regarded as the normal rate of the air travel tax system at that time. Therefore, the Commission finds that the higher rate of EUR 10 was the normal rate of the reference system, while the reduced rate of EUR 2, which was applicable to a well delimited category of flights, was an exception from the reference system.

(46) Third, the Commission must examine whether such exceptions are justified by "the nature or general scheme of the system"[16] in the Member State. If that is the case, the measure is not considered to confer a selective advantage and does thus not constitute State aid within the meaning of Article 107(1) of the Treaty. In that context, it should be noted that, according to case-law[17], it is the basic and guiding principles of the reference system which are relevant, not those of the particular measure in question.

(47) According to the Irish authorities the lower rate was introduced in order to add an element of proportionality in the level of the tax relating to the distance of the flight. The Commission finds that reasoning is not related to the basic and guiding principles of the tax system itself, but rather to those of the derogation itself. The structure and objective nature of the tax was not related to the distance of the flight, but to the fact of departing from an Irish airport. The connection with the fiscal authority, the taxable event (departure from an Irish airport) and the negative externalities for the Irish society of passengers departing from an Irish airport (for example, noise and pollution) was precisely the same regardless of the destination of the flight and the distance travelled. The concerned airline operators were therefore in the same as each other legal and factual situation with regard to that objective.

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15 See footnote 13 above.

16 See for example Case C-173/73 *Italy* v *Commission* [1974] ECR-709, as well as point 13 *et seq.* of Commission Notice on the application of the state aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p.3.

17 See for example judgements in joined Cases C-78/08 to C-80/08 *Amministrazione delle finanze Agenzia delle Entrate* v *Paint Graphos scarl Adige Carni scrl, in liquidation,* v *Ministero dell'Economia e delle Finanze, Agenzia delle Entrate and Ministero delle Finanze* v *Michele Franchetto,* not reported, in particular paragraph 69, as well as in Case T-210/02, paragraph 107.

(48) Furthermore, the tax system is not characterised by an articulated differentiation in the tax level in relation to the actual length of the flights. First, the tax rate was not applicable on the basis of the actual length of the flight, but on the basis of the distance between Dublin airport and the destination, regardless of where the actual departure took place. Second, the tax system fixes only two rates: one for very short distance flights from Dublin airport and the other for all other flights.

(49) Moreover, even if the reason for the derogation was in the nature and logic of the principles of the air travel tax system, the Court has stated that a benefit must be consistent not only with the inherent characteristics of the tax system in question but also as regards the manner in which it is implemented[18]. As mentioned in recital 47, the tax system did not de facto ensure proportionate rates in relation to the actual length of the flights, since the applicable rate was fixed on the basis of the distance between Dublin airport and the destination, regardless of where the actual departure took place and since only two rates were applicable: one for very short distance flights from Dublin airport and the other for all other flights. The price of tickets to domestic destinations is not necessarily lower than that of flights to other destinations in the Union. The measure could thus not achieve its objective of ensuring proportionality of taxation in relation to the flight distance. In this case, neither the Irish authorities nor any third party has argued that the effect of the derogation was that the tax level *de facto* was proportional to distance. On the contrary, the Irish authorities recognise that there was no perfect correlation between distance and rate of the tax.

(50) Therefore, the Commission sees no reason for changing its preliminary view that the lower rate was not in the logic and general scheme of the air travel tax system. Accordingly the Commission considers that the measure is selective and not justified by the nature and the logic of the system.

Advantage

(51) Expenditure for taxes constitutes costs which are normally borne by an undertaking.

(52) The application of the air travel tax can affect the revenues of the airlines which have to pay that tax, by increasing the prices of the tickets they are capable of offering to their customers or reducing the margin on each ticket they sell, where the airlines decide not to pass the tax on to the customers. In this respect, the Court has stated that "*since airport taxes directly and automatically influence the price of the journey, differences in the taxes to be paid by passengers will automatically be reflected in the transport costs, and thus, […], access to domestic flights will be favoured over access to intra-Community flights*"[19].

(53) A reduced rate for a certain type of flights therefore has a smaller effect than the normal rate on the airline operators offering that type of flights. Those airline operators are relieved from a cost they would normally have to bear, and therefore have a smaller cost to pass on to their customers or to assume themselves.

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[18] See for example judgment in Joined Cases C78-C-80/08, paragraph 73.

[19] See for example Case C-92/01 *Georgios Stylianakis* v *Elliniko Dimosio* [2003] ECR I-1291, paragraph 28, and Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, paragraph 20.

(54) Accordingly, the Commission finds that the lower tax rate provided an advantage to airline operators serving the routes to which that rate applied. The lower cost that they had to pass on to their customers or to assume directly represented financial resources that those airline operators could economise and therefore improved their economic situation vis-à-vis other airline operators competing in the air transport market. The advantage corresponds to the difference between the lower rate of EUR 2 and the normal tax rate of EUR 10 during the period between 30 March 2009 and 1 March 2011. The Commission notes that the flights to which the lower rate applied were mainly operated by airline operators with a strong connection with Ireland (Aer Lingus, Aer Arann and Ryanair were set up in Ireland and still have their headquarters there). Therefore, de facto the reduced rate provided an advantage to Irish airline operators compared to other Union operators.

(55) The Commission cannot accept Ryanair's argument that the advantage was limited to the difference between the lower rate and the rate of EUR 3 which was introduced on 1 March 2011. Such a rate did not apply at the same time as the lower rate and if an advantage is defined in a system with one lower tax rate and one high, applying a benchmark that is set somewhere in between those rates does not catch the entire advantage which has been granted.

(56) Ryanair furthermore argues that it has benefitted less from the lower tax rate than, for example, Aer Arann, since the majority of its flights are for destinations to which the higher rate applied. However, the advantage stemming from the application of the lower tax rate of EUR 2 is the difference between that rate and the standard rate of EUR 10. In applying the lower rate to certain flights, Ryanair has, like all other airlines operating flights to which that rate applied, enjoyed an advantage corresponding to the difference between the two rates.

(57) The Irish authorities argue that the tax was intended to be passed on to the passengers and, therefore, no advantage existed at the level of the airline operators. In that context, the Commission notes that a reduction from the normal rate of a given tax can confer a selective advantage on the airline operator which is liable to pay the reduced rate even in situations where there is a legal requirement to pass the tax in question on to the customers[20] The Commission further notes that, in the case at hand, there was no mechanism which ensured that the tax was actually passed on, but it was left to the airline operator to decide on whether and how the tax would be passed on to the passengers. In its complaint, the complainant actually argued the contrary, namely that it could not pass the cost of the tax on to its customers since doing that would have had a disproportionate effect on its ticket prices. The Commission therefore does not agree with the Irish authorities that there was no advantage at the level of the airline operators: those which could use the lower tax rate for certain flights had a lower cost to pass on to their customers than others. It is also in line with the Commission's practice with respect to aid measures stemming from an excise duty[21], according to which reliefs from such duties have been found to provide an advantage to the airline operator which is

[20] See for example Case C-143/99, in particular paragraphs 5, 54 and 55.

[21] See Commission Decision C(2007) 754 on State aid case N 892/2006 – FI – Amendment to differentiated energy tax scheme, OJ C 109, 15.5.2007, p. 1; Commission Decision C(2007) 2416/2 on case N 775/2006 – DE – Reduced tax rates for the manufacturing industry, agriculture and forestry, etc., OJ C 152, 6.7.2007, p. 3; Commission Decision C(2005) 1815/3 on case N 190/A/2005 – UK – Modification of the climate change levy, OJ C 146, 22.6.2006, p. 8; and Commission Decision C(2009) 8093/2 on case N 327/2008 – DK – NO_X tax reductions for large polluters and companies reducing pollution and tax reductions for biogas and biomass, OJ C 166, 25.6.2010, p. 1.

obliged to pay the tax, regardless of the fact that that entity may choose to pass the cost on to its customers.

(58) Accordingly, the Commission finds that the lower tax rate provided an advantage to certain airline operators. The advantage corresponds to the difference between the lower rate of EUR 2 and the normal tax rate of EUR 10 during the period between 30 March 2009 and 1 March 2011. The flights to which the lower rate applied were mainly operated by airlines with a strong connection with Ireland (Aer Lingus, Aer Arann and Ryanair). Therefore, the reduced rate provided an advantage to Irish airline operators compared to other Union operators.

State resources and imputability

(59) The fact that the Irish authorities allowed a lower tax rate than the normal one to be applied resulted in a loss of tax revenue for the State and was thus financed from State resources. Since the lower rate had been decided upon by the national authorities, the measure is imputable to the State.

Effect on competition and trade between Member States

(60) In comparison with their competitors, the airline operators benefiting from the lower rate were relieved from costs which they should otherwise have borne or passed on to their customers. Therefore, the lower rate of the air travel tax improved their economic situation vis-à-vis other undertakings competing in the air transport market thereby distorting or risking to distort competition.

(61) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid[22]. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition[23]. The air transport sector is characterised by intense competition between operators from different Member States, in particular since the entry into force of the third stage of liberalisation of air transport ("third package") on 1 January 1993, namely Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers[24], Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes[25] and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services[26]. The reduced rate was therefore capable of affecting trade between Member States since it strengthened the position of some airline operators competing in a market which is fully liberalised at Union level.

(62) Since all the criteria in Article 107(1) of the Treaty are fulfilled, the measure constitutes State aid to all airline operators that operated flights benefitting from the reduced rate.

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[22] See in particular, Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11, Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21, and Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44 .

[23] Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.

[24] OJ L 240, 24.8.1992, p. 1.

[25] OJ L 240, 24.8.1992, p. 8.

[26] OJ L 240, 24.8.1992, p. 15.

5.2. Legality

(63) By failing to notify the measure before its implementation, the Irish authorities did not fulfil their obligations under Article 108(3) of the Treaty. The aid measure thus constitutes unlawful State aid.

5.3. Compatibility of the aid with the Treaty

(64) According to Article 107(3)(c) of the Treaty, aid may be considered to be compatible with the internal market if it aims at facilitating the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. As the aid constituted operating aid, reducing certain airline operators' current expenditure, it is, according to the case-law of the Court, in principle incompatible with the internal market[27]. The aid does not fall within the scope of any guidelines for compatibility of State aid issued by the Commission in this context. In particular, it is not covered by the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports[28], since it is not linked to the start-up of certain routes. The Irish authorities have not argued or provided any information to show that the aid could be considered to be compatible pursuant to the Community guidelines on State aid for environmental protection[29]. On the contrary, they have made clear that the objective of the tax is to raise revenue and not to protect the environment. The fact that the tax in question lacks any clear or proportional link to the reduction of energy use, of pollution or gas emissions, of noise levels, etc., supports that reasoning. Therefore, the Commission does not find the aid compatible with the internal market under Article 107(3)(c) of the Treaty.

(65) The aid in question does not fall within any other exemption specified in Article 107(2) or (3) of the Treaty.

(66) Furthermore, even if the aid was compatible with any of the exceptions specified in under Article 107(2) or (3) of the Treaty, which is not the case, the Court has stated that the procedure under Articles 107 and 108 of the Treaty must never produce a result which is contrary to specific provisions of the Treaty. The Court has also held that those aspects of aid which contravene specific provisions of the Treaty other than Articles 107 and 108 may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately.[30] In this particular case, as described in recital 10, the differentiated rates were subject to an investigation by the Commission, which found that they were in breach of Regulation (EC) No 1008/2008 and Article 56 of the Treaty on the freedom to provide services, since the differentiation imposed more onerous conditions on the operation of intra-Union air services than those imposed on domestic services. The Court has explicitly stated in cases concerning airport taxes that the Treaty provisions on

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[27] Case T-459/93 *Siemens SA* v *Commission*, ECR [1995] II-1675, paragraph 48. See also judgment in Case T-396/08 *Freistaat Sachsen et Land Sachsen-Anhalt* v *Commission* [2010] ECR (appealed), paragraphs 46-48, Case C-156/98 *Germany* v *Commission* [1980] ECR I-6857, paragraph 30 and case-law cited therein.

[28] OJ C 312, 9.12.2005, p. 1.

[29] OJ C 82, 1.4.2008, p. 1.

[30] See for example judgments in Cases C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 41, and T-156/98 *RJB Mining* v *Commission* [2001] ECR II-337, paragraph 112, and case-law cited therein.

freedom to provide services are also applicable to the transport sector[31]. In this case, the State aid stems from the differentiation in tax rates itself. As the tax and the aid constitute two elements of the one and same fiscal measure, they are inseparable[32] and therefore the State aid cannot be granted without being in breach of the principle of the freedom to provide services. Consequently, the aid cannot be declared compatible with the Treaty in any case because it would inevitably infringe the provisions of Regulation (EC) No 1008/2008 and Article 56 of the Treaty.

(67) Consequently, the Commission concludes that the aid cannot be considered as compatible with the Treaty.

6. CONCLUSION

(68) The Commission finds that the lower rate of the air travel tax for flights to a destination located no more than 300 km from Dublin airport provided for by Section 55(2) of the Finance (No. 2) Act, and in particular Article 2(b) thereof, for the period from 30 March 2009 until 1 March 2011 constitutes State aid within the meaning of Article 107(1) of the Treaty. Ireland unlawfully implemented that State aid in breach of Article 108(3) of the Treaty.

(69) The State aid is not in compliance with any derogation as provided for by Article 107(2) and (3) of the Treaty. Since no other reasons for compatibility can be envisaged for the measure at hand, it is incompatible with the internal market.

(70) The State aid amounts to the difference between the lower rate of the air travel tax and the standard rate of EUR 10 (that is to say, EUR 8 per passenger) levied on each passenger. This concerns all flights operated by aircraft capable of carrying more than 20 passengers and not used for State or military purposes, departing from an airport with more than 10,000 passengers per year to a destination located no more than 300 km from Dublin airport. The beneficiaries are Ryanair, Aer Lingus, Aer Arann and other air carriers to be identified by Ireland.

(71) In accordance with Article 14(1) of Regulation (EC) No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission must require that the Member State concerned to take all necessary measures to recover the aid from the beneficiaries. Ireland should therefore be required to recover the incompatible aid,

[31] See Cases C-92/01 *Georgios Stylianakis* v *Elliniko Dimosio*, paragraph 23, and C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, paragraph 27 and 28, as well as Case C-49/89 *Corsica Ferries France* v *Direction Générale des Douanes Françaises* [1989] ECR 4441, paragraph 10.

[32] Case C-526/04, *Laboratoires Boiron v ACOSS* [2006] ECR I-7529, paragraph 45.

HAS ADOPTED THIS DECISION:

Article 1

The State aid in the form of a lower air travel tax rate applicable to all flights operated by aircraft capable of carrying more than 20 passengers and not used for State or military purposes, departing from an airport with more than 10,000 passengers per year to a destination located no more than 300 km from Dublin airport between 30 March 2009 and 1 March 2011, in application of section 55 of the Finance (No. 2) Act 2008, unlawfully put into effect by Ireland in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if it fulfils the conditions laid down by a regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98[33].

Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by a Commission decision approving an aid scheme is compatible with the internal market, up to the maximum aid intensities applicable to that type of aid.

Article 4

1. Ireland shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004[34].

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. Ireland shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following the notification of this Decision, Ireland shall submit the following information:

[33] OJ L 142, 14.5.1998, p. 1.
[34] OJ L 140, 30.4.2004, p. 1

(a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Ireland shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to Ireland.

Done at Brussels, 25.7.2012

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State Aid Registry
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For the Commission

Joaquín ALMUNIA
Vice-President