EUROPEAN
COMMISSION

Brussels, 14.7.2017
C(2017) 4932 final

COMMISSION DECISION

of 14.7.2017

ON STATE AID CASE
SA.29064 (2011/C) (ex 2011/NN)
Ireland - non-application of the Air Travel Tax to transit and transfer passengers

(Text with EEA relevance)

(Only the English version is authentic)

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PUBLIC VERSION

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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,

After giving notice to the parties concerned to submit their comments[1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 21 July 2009, registered with the Commission on 22 July 2009 under number CP 231/2009, the Commission received a complaint from the airline Ryanair Ltd (now Ryanair Designated Activity Company, hereafter: "Ryanair") that Ireland had granted unlawful and illegal State aid through the Air Travel Tax ("ATT"), an excise duty introduced by Ireland on the departure of passengers on flights from Irish airports.

(2) By letter dated 28 July 2009, the Commission forwarded the complaint to Ireland and asked for its position on the claims set out in the letter dated 21 July 2009.

(3) By letter dated 26 August 2009, Ireland asked for an extension of the deadline to reply, which the Commission accepted by way of a letter dated 3 September 2009.

(4) On 15 October 2009, Ireland responded to the Commission's letter and their reply was registered with the Commission on the same day.

(5) Since the alleged aid had been implemented without prior notification to the Commission, the case was registered as a non-notified measure. The Commission carried out a preliminary investigation pursuant to Article 108(3) TFEU.

(6) By decision of 13 July 2011 ("the 2011 Decision")[2], adopted at the end of the preliminary investigation stage, the Commission rejected most of Ryanair's complaints. In particular, it found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU. But the Commission also decided to initiate a formal investigation procedure concerning the differentiated tax rates applicable to flights to destinations located no more than 300 kilometres from Dublin Airport and all other flights.

(7) By application lodged at the Registry of the General Court on 24 September 2011, Ryanair brought an action for a partial annulment of the 2011 Decision, in so far as it found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU. The case was registered as Case T-512/11.

(8) On 25 July 2012, the Commission adopted its decision ("the 2012 Decision") on the application of differentiated ATT rates[3]. It found that Ireland had granted State aid in

[1] OJ C 220, 17.6.2016, p. 13–22.

[2] Commission Decision of 13 July 2011 in State aid case SA.29064 (2011/NN) Exemption from air passenger tax, Ireland (OJ, C 306, 18.10.2011, p. 10).

[3] Commission Decision of 25 July 2012 in State aid case SA.29064 (11/C ex 11/NN) Differentiated air travel tax rates implemented by Ireland (OJ L 119, 30.4.2013, p. 30).

the form of a lower ATT rate applicable to flights to destinations no more than 300 kilometres from Dublin Airport between 30 March 2009 and 28 February 2011. Moreover, the Commission found that State aid to be unlawful and incompatible with the internal market, and required Ireland to recover the incompatible aid from the beneficiaries.

(9) By applications lodged on 1 November 2012 and 15 November 2012, Ryanair and Aer Lingus appealed the 2012 Decision. Those cases were registered as Case T-473/17 and Case T-500/12.

(10) By judgment of 25 November 2014, the General Court annulled the 2011 Decision in so far as the 2011 Decision found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU[4]. The General Court held that the Commission should have initiated the formal investigation procedure laid down in Article 108(2) TFEU.

(11) By judgment of 5 February 2015, the General Court annulled the 2012 Decision concerning the differentiated tax rates applicable to flights to destinations located no more than 300 kilometres from Dublin Airport, in so far as the 2012 Decision ordered the recovery of aid from the beneficiaries for an amount which is set at EUR 8 per passenger[5]. The Commission lodged an appeal before the Court of Justice against that judgment.

(12) Following the annulment of the 2011 Decision, by letter dated 28 September 2015, the Commission informed Ireland that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the non-application of the ATT to transfer and transit passengers. This decision ("Opening Decision") was published in the *Official Journal of the European Union*[6]. The Commission invited interested parties to submit their comments on the measure.

(13) Ireland submitted its comments on the Opening Decision by letter dated 22 December 2015, registered with the Commission on 6 January 2016.

(14) The Commission received comments from two interested parties. By letter dated 23 August 2016, the Commission forwarded those to Ireland, which was given the opportunity to react. In the absence of a response from Ireland, the Commission reiterated its invitation to Ireland to provide its observations on the comments received from interested parties by way of a letter dated 17 October 2016.

(15) By letter dated 9 December 2016, the Commission asked Ireland to provide additional information. Ireland replied by letter dated 18 January 2017. In that letter, Ireland also submitted its observations on the comments received from interested parties.

(16) By judgment of 21 December 2016, the Court of Justice set aside the judgments of the General Court in so far as those judgments had annulled the 2012 Decision[7]. The

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4 Judgment of the General Court of 25 November 2014, *Ryanair* v *Commission*, T-512/11, ECLI:EU:T:2014:989.

5 Judgment of the General Court of 5 February 2015, *Aer Lingus Ltd* v *Commission*, T-473/12, ECLI:EU:T:2015:78.

6 OJ C 220, 17.6.2016, p.13.

7 Judgment of the Court of Justice of 21 December 2016, *Commission* v *Aer Lingus Ltd and Ryanair*, Joined Cases C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990.

Court of Justice thus confirmed that Ireland must recover the sum of EUR 8 per passenger from airlines benefiting from unlawful State aid.

2. DETAILED DESCRIPTION OF THE MEASURE AND THE PREVIOUS PROCEDURES

2.1. ATT

(17) The ATT was established by section 55(2) of the Finance (No. 2) Act 2008 ("the Finance Act")[8]. The Finance Act entered into force on 30 March 2009. Section 55(2) of the Finance Act provides that airlines shall pay the ATT in respect of *"every departure of a passenger on an aircraft from an airport located in Ireland"*,

(18) The terms used in the section 55(2) of the Finance Act are defined in section 55(1). The definition of the term "*passenger*" found in section 55(2) of the Finance Act explicitly excludes "*a transit or a transfer passenger"*, meaning that the departure of "*transit or transfer passenger*" does not constitute a "*departure of a passenger*" for which airlines are liable to pay ATT. A "*transit passenger*" is defined as "*a passenger who is on board an aircraft which lands at an airport in the course of its journey and who continues his or her journey on that aircraft*". Furthermore, a "*transfer passenger*" means *"a passenger who arrives on a flight to an airport and who departs from the airport on a further flight, other than to the airport where the passenger's journey originated, where both flights are part of a single booking and where the length of time between the scheduled time of arrival of the flight to the airport and the scheduled time of departure of the flight from that airport is not more than 6 hours"*. Finally, "*airport*" means an airport within the meaning of the Air Navigation and Transport (Amendment) Act 1998, but does not include an airport from which the number of departures of passengers in the previous calendar year was less than 10,000[9].

(19) When the ATT was introduced, section 55(2)(b) of the Finance Act provided that *"Air travel tax shall be charged, levied and paid by reference to the distance between the place of departure of the flight and the place where the flight ends, at the rate of: (i) €2 in the case of a flight from an airport to a destination located not more than 300 kilometres from Dublin Airport, (ii) €10 in any other case"*.

(20) Following an investigation by the Commission regarding a possible infringement of Regulation (EC) No 1008/2008 of the European Parliament and of the Council[10] and Article 56 TFEU on the freedom to provide services, the rates were changed with effect from 1 March 2011 so that a single tax rate of EUR 3 was applicable to all departures from that date onwards, regardless of the distance from Dublin Airport[11].

(21) The ATT was abolished with effect from 1 April 2014.

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[8] As amended by section 18 of the Finance Act 2009 and section 48 of the Finance Act 2011.

[9] Pursuant to section 2 of the Air Navigation and Transport (Amendment) Act 1998 "*airport*" means the aggregate of the lands comprised within an aerodrome and all land owned or occupied by an airport authority, including aircraft hangars, roads and car parks, used or intended to be used in whole or in part for the purposes of or in connection with the operation of such aerodrome.

[10] 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 (OJ L 293, 31.10.2008, p. 3).

[11] In the context of the infringement procedure, the Commission provided its formal notice by letter dated 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 TFEU. Following the letter of formal notice, the Irish authorities amended the tax system.

2.2. Functioning of the ATT

(22) In its letter dated 18 January 2017, Ireland explained that to determine the tax rate payable, as provided in the guidance issued by the Office of the Revenue Commissioners ("Revenue Commissioners") on 30 March 2009 (see recital (84)), the airline should, in the case of journeys consisting of several legs, look at the journey as a whole. Ireland gave an example of a flight with two legs, the first leg being Dublin – Shannon, and the second leg being Shannon – New York. Shannon is within 300 km of Dublin Airport, while New York is more than 300 km from Dublin Airport. The final destination (New York) is more than 300 km from Dublin airport. Thus, according to Ireland, as it is necessary to look at the journey as a whole (meaning Dublin to New York), the flight is subject to ATT at the rate of EUR 10. The departure from Shannon could be ignored, in the sense that no (additional) ATT is due, provided that the passenger meets the definition of "*transfer passenger*" or "*transit passenger*" at Shannon Airport in accordance with section 55(1) of the Finance Act. Therefore, the airline was to look at the overall journey and apply the relevant rate which was appropriate to the final destination[12].

(23) Also Air Lingus, which collected the ATT during the period 2009-2014 in accordance with the guidance issued by the Revenue Commissioners, in its comments on the Opening Decision, confirmed that the ATT did not apply to particular segments of a journey. Instead the taxable event was a journey that started in Ireland and the tax due depended on the final destination stated on the ticket, regardless of whether the passenger took one or more flights to get to the ultimate destination.

(24) As regards the rate of the ATT, during the period from 30 March 2009 to 1 March 2011, Ireland stated that the lower rate of EUR 2 per passenger applied only where the final destination of the overall journey, irrespective of the number of flights in the journey, was within 300 km of Dublin airport, while the higher rate applied "*in any other case*". According to Ireland, the lower rate (EUR 2) was an exception to the general rule.

(25) Table 1, information provided by Ireland, illustrates how the ATT was applied, before and after the introduction of a single ATT rate for all taxable departures in 2011.

Table 1: examples of journeys and the tax payable before and after the change of the ATT rate in 2011

	Period	**Departs**	**Stopover**	**Destination**	**Tax payable**
(a)	30/3/09 to 1/3/11	Dublin	Shannon	New York	€10

[12] Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1), provides that in the case of directly connecting flights, a final destination means the destination of the last flight, whereas in the case of separate flights, a final destination is defined as the destination on the ticket presented at the check-in counter.

	Period	Departs	Stopover	Destination	Tax payable
(b)	2/3/11 to 31/3/14	Dublin	Shannon	New York	€3
(c)	30/3/09 to 1/3/11	Dublin	None	New York	€10
(d)	2/3/11 to 31/3/14	Dublin	None	New York	€3
(e)	30/3/09 to 1/3/11	Dublin	Cork	Cardiff	€2
(f)	2/3/11 to 31/3/14	Dublin	Cork	Cardiff	€3
(g)	30/3/09 to 1/3/11	Dublin	None	Cardiff	€2
(h)	2/3/11 to 31/3/14	Dublin	None	Cardiff	€3
(i)	30/3/09 to 31/3/14	New York	Shannon	Dublin	Nil
(j)	30/3/09 to 31/3/14	New York	None	Dublin	Nil

(26) According to Ireland, the examples set out in Table 1 can be explained as follows:

(a) The final destination is New York (over 300 km from Dublin airport), so the flight is subject to the EUR 10 rate of ATT. The departure from the stopover in Shannon is exempt from ATT, as the passenger is a transit or transfer passenger at Shannon airport;

(b) As (a), except that the single rate of EUR 3 applies during this period;

(c) The final destination is New York (over 300 km from Dublin airport), so the flight is subject to the EUR 10 rate of ATT;

(d) As (c), except that the single rate of EUR 3 applies during this period;

(e) The final destination is Cardiff (under 300 km from Dublin airport), so the flight is subject to the EUR 2 rate of ATT. The departure from the stopover in Cork is exempt from ATT, as the passenger is a transit or transfer passenger at Cork airport;

(f) As (e), except that the single rate of EUR3 applies during this period;

(g) The destination is Cardiff (under 300 km from Dublin airport), so the flight is subject to the EUR 2 rate of ATT;

(h) As (g), except that the single rate of EUR 3 applies during this period;

(i) ATT is not payable on this journey. The departure airport (New York) is not in Ireland and the departure from the stopover in Shannon is exempt, as the passenger is a transit or transfer passenger at that airport. This position applied before and after the amendment of the rates in 2011;

(j) ATT is not payable on this journey. The departure airport is not in Ireland.

(27) Those examples do not include the situation of a journey that starts and ends outside Ireland but involves a stopover in Ireland, for instance London-New York with a

stopover at Dublin Airport. However, from all the explanations provided by Ireland, there is no doubt that no ATT would be due for such a journey. Indeed, the departure from London would not be subject to ATT, as London airports are not airports as defined in the Section 55(1) of the Finance Act given that they are outside Ireland, and the departure from Dublin would not taxed to the extent that the passenger qualifies as a transfer or transit passenger.

(28) According to information provided by Ireland, the ATT was introduced as a response to financial challenges in the wake of the global financial and economic crisis in order to raise revenues. Ireland mentioned no other objective such as environmental protection.

2.3. The 2011 Decision

(29) As indicated in recital (6), the 2011 Decision was adopted at the end of a preliminary investigation stage that had commenced on 21 July 2009.

(30) In order to assess whether the non-application of the ATT to transit and transfer passengers was selective, the Commission first identified the relevant tax system of reference. The Commission considered that the objective and structure of the ATT system was to tax passengers departing from an airport located in Ireland in order to raise revenue for the State budget. The Commission had understood from the information provided by Ireland that the first leg of a journey comprising several legs was always exempted from the ATT. Ireland also provided the examples of journeys from New York to Dublin and from Dublin to New York with and without a stopover in Shannon and applicable ATT rates. Thus, the reference system was understood as a tax that is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland. The Commission also considered that transfer and transit passengers were passengers departing from an Irish airport and thus would appear to be part of that reference system. Hence the exclusion of transfer and transit passengers departed from the normal application of that general tax framework.

(31) The Commission then examined whether the exclusion of transfer and transit passengers from the ATT was justified by the nature or the general principles of the tax system in the Member State. It found that the purpose of the ATT was to be neutral with regard to the route selected for reaching the final destination, whether there was a stopover or not, and to avoid double taxation. According to the 2011 Decision, if the ATT had been applied to transit and transfer passengers, the airline might have had to pay that tax twice for a journey with a stopover. Therefore, it was concluded that the ATT exemption for transit and transfer passengers, which resulted in passengers being taxed in the same way independently of the route travelled, fell within the nature and logic of the relevant tax system.

(32) The Commission inferred from those elements that the exclusion of transfer and transit passengers from the ATT was in the nature and logic of the identified tax system[13].

2.4. Judgment of the General Court in Case T-512/11

(33) As indicated in recital (10), by its the judgment in Case T-512/11 the General Court annulled the 2011 Decision in so far as the 2011 Decision found that the non-

[13] Reasoning in recitals (30)-(32), conclusion in recital (37) of the 2011 Decision.

application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU.

(34) The General Court found that a preliminary investigation of around two years considerably exceeded the period normally required for a preliminary investigation carried out pursuant to Article 108(3) TFEU.

(35) It also considered that the Commission's examination was incomplete and insufficient. In particular, the General Court found that there were inconsistencies between the content of the letter from Ireland dated 15 October 2009, referred to in recital (4), and the 2011 Decision.

(36) In that respect, the General Court considered that the Commission endorsed Ireland's view that the part of the journey exempted from payment of the ATT was the first leg, even though the examples reproduced in the table set out in recital 9 of the 2011 Decision were not capable of supporting such conclusion. According to the General Court, whilst this might be the case as regards the example relating to passengers going from Dublin to New York and making a stopover in Shannon, who were subject to payment of the ATT, by contrast, it was not clear, and the Commission did not explain, why passengers taking the opposite route, that is from New York to Dublin with the same stopover, were not subject to payment of the ATT for the departure from the stopover airport of Shannon.

(37) In addition, by referring to the fact that, according to the Irish authorities, reasons of neutrality also prompt the exemptions for the same categories of passengers granted by other systems of air travel taxation existing in other Member States, whereas explicit reference was made to the United Kingdom, the General Court found that the Air Passenger Duty in force in the United Kingdom could not constitute a relevant reference model in the present case because it provides that it is always the first leg of the journey that is subject to payment of the tax, which did not correspond to the view supported by the Irish authorities in their letter dated 15 October 2009 and confirmed by the Commission in the 2011 Decision.

(38) The General Court also stressed that the letter dated 15 October 2009 did not refer explicitly to the need to avoid double taxation. Additionally, the General Court noted that Ireland had offered to consider adjusting the law on transfer and transit passengers, by removing the requirement for a single booking as part of the definition of a transfer passenger and that the Commission did not take a position on that statement.

(39) Those inconsistencies gave grounds for concluding that, when the Commission adopted the 2011 Decision, it did not have the information with which to carry out a sufficiently complete analysis of the selectivity of the measure and to conclude that the rules for the application of the exemption did not raise doubts.

(40) The General Court concluded that, in the absence of any analysis of the possible compatibility of the disputed measure with the internal market, the Commission should have initiated the formal investigation procedure, in order to gather any relevant information for verifying that the disputed measure was not selective and to possibly conclude that that measure did not constitute State aid, and to allow the applicant and the other parties concerned to present their observations in connection with that procedure.

3. GROUNDS FOR INITIATING THE FORMAL PROCEDURE

(41) Following the judgment in Case T-512/11, the Commission initiated the formal investigation procedure in order to gather information to verify that the non-application of the ATT to transfer and transit passengers was not selective and to allow the applicant and the other parties concerned to present their observations in connection with that procedure.

(42) In the Opening Decision, the Commission noted that the non-application of the ATT to departures of transfer and transit passengers resulted in a loss of tax revenue for the State and was therefore financed from State resources and appeared to confer an advantage on the airlines benefitting from it. Furthermore, the Commission could not at the stage of initiating the formal investigation exclude that the non-application of the ATT to transfer and transit passengers was selective.

(43) The Commission thus preliminarily concluded that since all the criteria in Article 107(1) TFEU *a priori* could be fulfilled, the measure might constitute State aid to airline operators that have operated the routes benefitting from the exemption from the ATT for transfer and transit passengers.

(44) The Commission therefore invited Ireland to set out again its reasons for the adoption of the ATT and to explain why the ATT did not apply to transfer and transit passengers.

(45) The Commission also invited Ireland to set out in detail how section 55 of the Finance Act should be interpreted. The Commission requested that Ireland provide clear examples of how the ATT applies to all relevant categories of routes, clarify whether ATT specifically exempts the second leg of a journey or, more generally, exempts all transfer and transit passengers, and to provide all other information which Ireland considered useful in that respect. The Commission also invited Ireland to provide those examples in relation to the periods before and after the amendment modifying the ATT rates, introduced in 2011.

(46) Under the preliminary assumption that the reference system is a tax which is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland, the Commission expressed doubts as to whether the non-application of the ATT to transfer and transit passengers derogated from the reference system of taxation by differentiating between economic operators which, in light of the objective assigned to the tax system of the Member State concerned, were in comparable factual and legal situations, and consequently conferred an advantage on certain airlines.

(47) The Commission also found, however, that the name, and indeed the wording, of the ATT may suggest that its guiding principle is to tax air journeys from an airport in Ireland, rather than each departure from an airport in Ireland. According to the Commission, under that assumption, the non-application of the ATT to transfer and transit passengers seems to directly follow from that principle, since an air journey may involve more than one departure from an airport in Ireland.

4. COMMENTS FROM IRELAND ON THE OPENING DECISION

(48) In its comments dated 22 December 2015 on the Opening Decision, Ireland rejected any suggestion that the exemption of transfer and transit passengers constitutes State aid.

4.1.1. On the interpretation and application of section 55 of the Finance Act

(49) Ireland stated that the liability to pay the ATT was defined in the Finance Act, which must be interpreted strictly. Relying on jurisprudence of the Irish Supreme Court, Ireland stressed that under Irish law, a taxpayer could only be liable to pay a tax or suffer a disadvantage if this is explicit in law and quoted from the judgment Texaco (Ireland) Ltd v. Murphy (Inspector of Taxes): *"It is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly imposes the obligation"*[14]. On that basis, Ireland stated that in order to determine whether a journey was subject to the ATT, it was necessary to look at the wording of the Finance Act. Any doubt over the application of the Finance Act would benefit the taxpayer.

(50) Pursuant to section 55(2)(c) of the Finance Act, the ATT becomes *"due when a passenger departs from an airport on an aircraft"*. In this respect, Ireland noted that:

– the definition of "*passenger*" excludes (subject to certain conditions) persons who are disabled, or under the age of two, or transfer or transit passengers.

– the definition of "*airport*" also excludes some journeys, as no tax is due in respect of a departure from an airport outside Ireland and from certain airports with small passenger numbers[15].

– the definition of "*aircraft*" excludes aircraft which cannot carry more than 20 passengers, and also excludes aircraft used for State or military purposes.

(51) In light of recital (50), Ireland considered that no ATT was due in respect of transfer and transit passengers, regardless of the leg of the journey concerned. Ireland confirmed that the second leg of a journey was not automatically exempt from the tax. According to Ireland, the second leg of a journey might have been or might not have been taxed, depending on the application of section 55 of the Finance Act to the facts, including whether the passenger was a transfer or transit passenger (the same applied to the first leg of a journey). The definition of "*airport*" might also exclude some journeys, as no ATT was due in respect of a departure from an airport outside Ireland.

(52) Ireland also pointed out that the transfer and transit passenger exclusions are normal in air travel taxes implemented by other countries, for example the United Kingdom, France and Germany. Ireland contended that the rules for each tax must be read in the context of the relevant national law.

4.1.2. On the interpretation of the exemption of transfer and transit passengers

(53) Ireland commented on paragraph 88 of the judgment in Case T-512/1,1 which relates to the following statement contained in recital 20 of the 2011 Decision: *"As to the non-application of the tax on transit and transfer passengers, the Irish authorities state that the fact that any first leg of an overall journey is not subject to the tax ensures that the passenger is not punished because a route includes a stopover in order to get to the final destination"*. In the above-mentioned paragraph of its judgment in case T-512/11, the General Court had indicated that whilst the

[14] Judgment of the Supreme Court of 15 May 1992, *Texaco (Ireland) Ltd v. Murphy (Inspector of Taxes),* Irish Tax Reports (IV) 1988-1993.

[15] In that respect, Ireland refers to the definition of "*airport*" in section 55(1) of the Finance Act, and the later amendment.

Commission had no reason to doubt the information contained in Ireland's letter dated 15 October 2009, on which paragraph 20 of the 2011 Decision is based, the fact remained that even following the Irish authorities' interpretation that any first leg of a journey including a stopover is exempt from the payment of the ATT, the examples produced in the table set out in paragraph 9 of the 2011 Decision were not capable of supporting that interpretation. The General Court pointed out that it was not clear, and the Commission did not explain, why passengers travelling from New York to Dublin with a stopover in Shannon are not subject to payment of the ATT for the departure from the stopover airport of Shannon. Ireland referred to paragraph 13 of its letter of 15 October 2009, which reads *"In respect of transfer passengers, the exemption merely ensures that the first leg of an overall journey isn't subject to ATT"*. Ireland pointed out that that paragraph follows on from a description of a Dublin-New York flight with a Shannon stopover and it was correct in the context of such a journey, but it was incorrect to characterise this as a general rule by which the first leg of any journey would never be taxed under the ATT.

(54) With respect to the example brought forward by the General Court in paragraph 88 of the judgment in Case T-512/11, involving a journey from New York to Dublin with a stopover in Shannon, Ireland explained that no ATT is due with respect to any of the legs constituting that journey because of the wording of the Finance Act, in particular:

– the first leg (New York to Shannon) is exempt because the tax is only levied on departures from Irish airports.

– the second leg (Shannon to Dublin) is exempt because at Shannon airport, the passenger qualifies as a transit or transfer passenger as defined in section 55(1) of the Finance Act.

(55) Ireland concluded that the overall journey from New York to Dublin with a stopover in Shannon would be exempted from ATT because of the wording of the Finance Act. According to Ireland, the explanations in its letter dated 15 October 2009 were intended to clarify the law but they are not binding.

4.1.3. On the rationale for the exemption for transit and transfer passengers and the reference system to use to assess it

(56) As regards the reasons for exempting transfer and transit passengers, Ireland explained that it was not appropriate to tax individual flights separately if in reality they were part of a single journey. In that respect, Ireland referred to:

– the text of the definition of "*transfer*" or "*transit passenger*" for the purposes of the ATT, pursuant to section 55(1) of the Finance Act (the provision is cited in recital (18));

– the text of Ireland’s letter to the Commission, dated 15 October 2009, by which Ireland explained that the ATT was intended to tax a single journey, even if the journey was divided into different segments.

(57) In particular, Ireland referred to the hypothetical scenario, provided in its letter dated 15 October 2009 to the Commission, of a flight from the United States which had a stopover in Shannon and then went on to Dublin. The text passage stated that *"the flight is clearly US-Dublin, and the fact of the stopover shouldn’t generate any ATT liability"*. In describing a flight going in the opposite direction, the text stated that *"for flights leaving the country with a stopover, the only aim of the exemption is to ensure that both legs of the journey don't have to be taxed separately"*. According to

Ireland, this underlined that the journey from Dublin to the United States was seen as a single journey and should thus only be subject to the ATT once, even if it involved several departures.

(58) Ireland declared that this was the reason why section 55(1) of the Finance Act explicitly excludes "*transfer*" and "*transit*" passengers, as defined in that section, from the scope of the ATT.

(59) Considering the reference system envisaged by the Commission in the Opening Decision either as (i) a tax charged on every *departure*, or else (ii) a tax charged on every *journey*, which might involve several segments, Ireland suggested that the aim of the ATT was to tax each journey only once. According to Ireland, it would be more accurate to see the ATT as a tax on journeys rather than a tax on departures. Section 55(2) of the Finance Act refers to "*departure*" as the trigger for the ATT. The definitions and sections of the Finance Act described in recitals (18) and (19) demonstrate, however, that the service which was taxed was the journey and that the real objective was to tax journeys, not departures.

4.1.4. On the distinction between point to point airlines and others

(60) Ireland held that assessing whether the airline operators providing only point-to-point services and those providing connecting flights are in a comparable factual and legal situation in light of the objective assigned to the tax system of the Member State concerned can be only a secondary reason for rejecting the complaint. Ireland's primary submission is that the ATT aimed to tax journeys, not individual departures. As a result, the exemption for transfer and transit passengers merely reflects the fact that a single journey can be comprised of several "legs". Ireland also pointed out that the ATT was not designed to favour or penalise any specific business model.

4.1.5. On the nature and general scheme of the tax

(61) Finally Ireland stated that if the exemption for transfer and transit passengers conferred advantages on certain airlines, it could result directly from the basic and guiding principles of the Irish tax system such as the avoidance of double taxation or tax neutrality.

(62) Recalling the terms of its letter of 15 October 2009, Ireland explained that the exemption was intended to avoid over-application of the ATT. In particular, it was intended to avoid discrimination against passengers whose journey involved a stopover. Necessarily, this reference to discrimination involved comparing (a) passengers whose journey involved a stopover and (b) passengers who flew directly. As the aim was to treat both in the same way, this supports the conclusion that the aim of the ATT was to tax each journey only once.

(63) Ireland also invoked the need to avoid double taxation. Although this principle may not have been cited in Ireland's letter dated 15 October 2009, that letter invoked issues of equity and equal treatment which cause States to refrain from double taxation. Similarly, Ireland invoked the principle of tax neutrality.

5. COMMENTS FROM INTERESTED PARTIES

5.1. Comments from Ryanair

(64) Ryanair is of the opinion that the measure is selective and therefore constitutes State aid pursuant to Article 107(1) TFEU, without falling under any of the exemptions set out in Article 107(2) and (3) TFEU.

(65) The airline pointed out that its observations should be read against the background of:

– its complaint to the Commission dated 21 July 2009 against the granting of unlawful aid through the ATT;

– its application dated 24 September 2011 to the General Court in Case T-512-11, together with its annexes;

– its other written and oral submissions dated 24 September 2011 submitted to the General Court in Case T-512/11 including, in particular, its reply dated 17 January 2012.

5.1.1. On the precise scope of the ATT, the justification for the ATT, and the reasons for the non-application of the ATT in relation to transfer and transit passengers

(66) Ryanair agrees that the exclusion of transfer and transit passengers in the example of the Dublin-Shannon-New York flight would concern the second leg of the journey. Accordingly, Ryanair argues that the total tax due before the change in rates with effect from 1 March 2011 should have only been the lower rate of EUR 2 (for Dublin Shannon) instead of the EUR 10 shown in Table 1.

(67) Moreover, even if Ireland provides evidence that the application of this measure in practice was consistent with the interpretation that the first leg of a journey was exempt from the ATT, in Ryanair's views, this would not be sufficient to remedy the distortion reflected in the Finance Act.

5.1.2. On the "normal" or reference system of taxation

(68) Ryanair reserves its position on the definition and relevance of the "normal" or reference system of taxation, pending the outcome of the appeal before the Court of Justice in the judgment in Joined Cases C-164/15 P and C-165/15 P[16]. Ryanair contends that the Commission's definition of the "normal" or reference system of taxation is inconsistent with some of the conclusions it draws in the remainder of the Opening Decision.

5.1.3. On the question of whether the non-application of the ATT in relation to transfer and transit passengers derogates from the system of reference

(69) Referring to paragraph (44) of the Opening Decision and quoting from that text passage, Ryanair questions how the Commission, based on the previous conclusion on the reference system of taxation, argues in paragraph (44) that "*the objective of the ATT is to tax air journeys starting at an airport in Ireland*'' but then jumps, without further explanation or analysis, to the illogical conclusion that in light of this objective "*it may be appropriate to distinguish the legal and factual situation of airlines providing only point-to-point services from that of airlines that also provide services that involve a transfer or transit at such airports*".[17] The previous

16 As explained in recital (16), the Court of Justice pronounced judgment on 21 December 2016.

17 Paragraph (44) of the Opening Decision reads as follows: "*The non-application of the ATT in relation to transfer and transit passengers derogates from the common regime under which every departure of a passenger on an aircraft from an airport in Ireland is subject to the tax. It is open to question, however, whether that derogation involves differentiation between economic operators who are, in the light of the objective assigned to the ATT, in comparable factual and legal situations. If the objective of the ATT is to tax air journeys starting at an airport in Ireland, it may be appropriate to distinguish the legal and factual situation of airlines providing only point-to-point services from that of airlines that also provide services that involve a transfer or transit at such airports*".

conclusion Ryanair refers to is given in paragraph (42) of the Opening Decision, where the Commission takes the preliminary view that the reference system of taxation is a tax which is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland.

(70) Ryanair views the quotes in paragraph 44 of the Opening Decision as an attempt to justify a distinction between the legal and factual situation of airlines providing point-to-point services from that of airlines that also provide services that involve a transfer or transit. Ryanair regards such a distinction as flawed and regrettable, as it would evidently lay the ground for a final decision that the measure under investigation did not constitute State aid.

(71) In its comments, Ryanair refers to paragraph (45) of the Opening Decision, where the Commission, having regard to decisional practice in Union merger control, explains that services that involve a transfer or transit constitute, from the perspective of the customer, a journey from the airport of origin to the airport of destination, and not two separate journeys. In Ryanair's view, in doing so, the Commission confuses the very narrow technical exercise of defining relevant product markets in merger cases with the notion of "*comparable factual and legal situations*" in State aid cases. Referring to jurisprudence of the Court and the Opening Decision[18], Ryanair submits that the notion of "*comparable factual and legal situations*" are not determined through substitutability of demand and supply (which, according to Ryanair, are criteria typically used in merger reviews and other competition cases, and relied upon here by the Commission), but are a function of the objectives pursued by the scheme under consideration.

(72) The "*comparable factual and legal situations*" in State aid cases are according to Ryanair almost always much more broader in scope than the "*relevant product markets*" in merger cases, as the objectives pursued by the domestic scheme in this or other State aid cases had nothing to do with the relevant product market definition in merger control cases. In that respect, Ryanair again refers to Court jurisprudence pursuant to which the Court did not delimit the "*comparable factual and legal situations*" based on the perspective of the customers or the beneficiaries' business models, as the Commission would propose to do in this Decision.

(73) In its comments, Ryanair refers to the Commission's decisional practice, for example in the area of online and land-based gambling activities, where the Commission would accept that undertakings with different business models are in a comparable legal and factual situation in the sense referred to in recital (72)[19].

(74) Ryanair explains that if the reference system of the ATT is a tax which is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland, the only logical consequence can be that the scheme had to be agnostic as to the passengers' views about their journey or the business model of the airlines

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[18] Reference by way of example to judgment of the General Court of 22 January 2013, *Salzgitter* v *Commission*, T-308/00, ECLI:EU:T:2013:30, paragraph 81, by analogy with the judgment of the Court of Justice of 8 November 2011, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECLI:EU:C:2001:598. Ryanair also refers to paragraphs (21) and (28)-(30) of the Opening Decision.

[19] Commission Decision of 17 March 2015 in State aid case SA.34469 (2014/NN ex 2012/CP) Differential tax rates for online and land-based gambling in Spain (OJ C 136, 24.4.2015, p. 1), recital (56).

concerned. A different interpretation would reflect a selective approach, narrower than the ATT objective, and thus meet one of the key conditions of State aid.

(75) Specifically, selectivity in this Decision would stem from the fact that although traditional airlines, which offer transfer and transit flights, and those following only point-to-point flights (such as Ryanair) are in a comparable factual and legal situation for State aid purposes, only the former would benefit from the exemption of transfer and transit passengers for the ATT.

(76) Ryanair asserts that the beneficiaries of this exemption are easy to define *a priori*. Moreover, it could not be claimed that the exemption was open to all airlines, without discrimination. Firstly, it is virtually impossible for an airline to adapt its fundamental business model from a point-to-point to a hub-and-spoke model; to Ryanair's knowledge, there is no single precedent of such a change on the market. Secondly, such an adjustment would be further hindered through capacity constraints in most airports.

(77) To conclude with, the non-application of the ATT in relation to transfer and transit passengers was in Ryanair's opinion a clear derogation from the system of reference and the objectives pursued by the ATT in the sense that those terms are interpreted by Union case law. In this context, Ryanair refers to its previous submissions, according to which Ireland's undeclared but real objectives were to selectively support certain domestic airlines and promote Dublin airport as an international hub.

5.1.4. On the question of whether the non-application of the ATT to transfer and transit passengers results directly from its basic and guiding principles

(78) Ryanair rejects the idea that the exemption of transfer and transit passengers from the ATT results directly "*from its basic and guiding principles*". Ryanair regards the Opening Decision as an attempt to justify such a conclusion by a set of contorted arguments put together *ex post facto* by Ireland and the Commission in order to cancel out the clear implications of the ATT's "*reference system*" and "*objective*", as previously defined in the Opening Decision, through the hazy term of "*basic and guiding principles*".

(79) Having regard to Section 6.1.5 of the Opening Decision, Ryanair comments on a number of principles that it considers to be postulated by the Commission or Ireland or both:

– On "*clarity of application*"[20]: Ryanair raises the question of whether [one is supposed to accept that] such "clarity" would be achieved through the selective circumvention of the ATT's reference system and objective.

– On avoidance of "*over-application of the ATT*"[21]: Ryanair finds this term unclear. Ryanair refers to a Commission decision on State aid to reduce the costs of electricity-intensive companies resulting from the financing of support to energy from renewables[22], and more specifically to recital (32) of that Decision, which stipulates that "*The measure is also selective because only* [energy-intensive users] *within certain specific sectors can benefit from it*". On that basis, Ryanair concludes that fair and just application of the ATT only

20 With reference to paragraph (48) of the Opening Decision.

21 With reference to paragraph (48) of the Opening Decision.

22 Commission Decision of 31 August 2015 in State aid case SA.42424 Reduced contribution to financing of RES support for energy-intensive users, Denmark (OJ C 369, 6.11.2015, p.1), recital (32).

provides an additional argument against the exemption of transfer and transit passengers. By the same token, the Commission should find that an exemption for airlines that are intensive users of airport infrastructure due to their hub-and-spoke model constitutes State aid. Ryanair argues that if, as the Commission mentions in the Opening Decision, Ireland's alleged wish to shield passengers from the consequences of taking a flight with a stopover[23], then the measure in question constitutes aid of a social character, and its compatibility has to be reviewed under Article 107(2) TFEU.

– On the assumption that "*Transfer and transit passengers exclusions are normal in air travel taxes operated by other countries, for example the United Kingdom*": With reference to paragraphs 41 to 44 of its previous Application to the General Court in Case T-512/11, Ryanair dismisses the argument of "common international practice". Ryanair argues that the reference to the United Kingdom as a supposedly similar example is inconsistent with the Commission's belatedly corrected understanding of the ATT mechanism discussed in Section 6.1.2 of the Opening Decision.

– On the assumption "*The name and indeed the wording of the ATT may suggest that its guiding principle is to tax air journeys from an airport in Ireland, rather than each departure from an airport in Ireland*":[24] According to Ryanair, this position cannot be maintained as in the relevant legal provision defining the ATT, the word "*every*" is used only once and only in connection with the word "*departure*" rather than the word "*journey*". Ryanair stresses that a "departure" is not the same as a "journey". Therefore, the Commission's conjecture that the focus of this text of the Finance Act is on "*every journey*" rather than "*every departure*" was a simple negation of the text of the Finance Act clear letter and meaning, aiming to justify the unjustifiable. More generally, the name that a Member State puts on a measure is not a factor upon which Union law relies to determine whether that measure constitutes State aid.

(80) With regard to the length of the preliminary investigation procedure, litigation and the formal investigation procedures, Ryanair states that the relevant facts should be clear enough by now. Ryanair worries that, under the circumstances, the Commission's comment in the Opening Decision that its current conclusion on the compliance of the contested exemption with the ATT's "basic and guiding principle" may need to be revised in light of the information gathered in the formal investigation offers very limited hope that the Commission will actually change its views. In that respect, Ryanair stresses that in any event, no information or *ex post facto* argument may be allowed to distort the clear letter and implications of the contested exemption of transfer and transit passengers or be used as an excuse for a no aid finding in this Decision.

5.1.5. On the existence of State aid

(81) Ryanair calls on the Commission to reconsider its preliminary findings in light of its submissions.

[23] With reference to paragraph (48) of the Opening Decision.

[24] With reference to paragraph (49) of the Opening Decision.

(82) In its comments, Ryanair agrees with the Commission's view that, insofar as the measure at issue constitutes State aid, it does not fall under any of the exemptions specified in Article 107(2) and (3) TFEU.

5.2. Comments from Aer Lingus

(83) Aer Lingus submits that the ATT's exemption for transfer and transit passengers does not constitute State aid within the meaning of Article 107(1) TFEU for the following two reasons:

– the ATT's reference system is that it taxes departures on an aircraft from an Irish airport by reference to the entire journey, such that a journey comprising two connecting flights is treated as a single journey and that journeys commencing outside of Ireland are not subject to the ATT. The ATT is levied only once, in relation to the overall itinerary. Based on that "journey reference system", the ATT cannot be considered selective and would thus not constitute State Aid.

– even if the Commission were to maintain its preliminary view that the ATT's reference system is based on every departure of a flight from an Irish airport, the exemption for transfer and transit passengers is not selective because it does not discriminate between economic operators: pure point-to-point carriers face objectively different circumstances compared to airlines that operate services for transfer and transit passengers. The exemption would, in any event, also be justified because the exemption addresses both double taxation concerns and is aligned with the ATT's guiding principle of referencing the tax to the journey.

5.2.1. On the purpose of the ATT

(84) Aer Lingus sought clarification from the Revenue Commissioners as to the interpretation of the Finance Act. On 30 March 2009, the Revenue Commissioners sent an email to Aer Lingus clarifying the interpretation of the Finance Act. Aer Lingus contends that on the basis of that email, it is clear from the interpretation of section 55(2) of the Finance Act that the tax is to be determined on the basis of the final destination, disregarding any intermediate stop-over locations. Aer Lingus concludes that regardless of the number of segments a journey includes, the tax is levied on the basis of the passenger's final destination and is assessed once, by reference to the overall journey, regardless of whether it comprises one or more flights. The relevant passage from the email dated 30 March 2009 reads as follows:

"The flight ends at the passenger's final destination as booked by them, regardless of the route planned for them to their destination by the airline operator. In your outlined scenario of the transatlantic flights [Shannon-Dublin-Chicago], if a person books a flight from Shannon to Chicago with Aer Lingus, the rate of tax that Aer Lingus should apply is EUR10, as the place where that flight ends is Chicago i.e. more than 300km from Dublin Airport. The fact that there is a stopover en route does not change the position" (emphasis added by Aer Lingus).

(85) Aer Lingus considers this interpretation as consistent with the definitions of transfer and transit passengers which refer to the passenger's "*journey*" rather than the passenger's flight. According to Aer Lingus, it follows that a "journey" can be non-stop or can include a stop-over of no more than six hours.

5.2.2. On the reasons to tax a passenger's journey from Ireland and not a transfer/transit flight

(86) According to Aer Lingus, the exemption in question gives effect to the basic principle that the tax is to be determined on the basis of the final destination, disregarding any intermediate stop-over locations.

(87) Aer Lingus argues that, in addition, the exemption would serve the purpose of avoiding double taxation not only in Ireland but also cross-border. In that respect, Aer Lingus refers to a passage from the e-mail referred to in recital (84) it had received from the Revenue Commissioners:

"The effect of the definition of "transfer passenger" is to avoid tax being charged separately on each leg of the journey (…), where the flights are within 6 hours of each other. If the flights were more than six hours apart, the "transfer passenger" exemption wouldn't apply and each element of the trip would fall to be taxed separately (that is, two departures, each subject to the appropriate rate of ATT)" (emphasis added by Aer Lingus).

(88) On the basis of the passage referred to in recital (87), Aer Lingus concludes that whether a passenger departing on a flight which is part of an itinerary with two (or more) segments from an Irish airport is subject to the ATT depends firstly on the place of departure of the first flight, and secondly on the place of arrival of the final destination. This would avoid:

– the ATT applying to more than one leg of a journey; and

– the ATT applying to one leg of the journey while another jurisdiction's equivalent tax already applies to the same journey.

(89) Aer Lingus explains that the exemption in question is not unique to Ireland's ATT but an inherent feature of other air travel tax regimes. In that respect, Aer Lingus points to the application of air passenger duty ("APD") in the United Kingdom which would treat connecting flights as a single journey rather than two separate journeys, provided that the connection satisfies certain specified requirements[25]. Aer Lingus further explains that while the definition of what constitutes a "connecting flight" depends on a number of factors, including the time gap between the relevant flights and whether the connection is to a domestic flight in the United Kingdom or an international flight, the overriding principle, in Aer Lingus' view, is that connecting flights are treated as a single journey and APD is only levied on journeys deemed to have commenced in the United Kingdom. By way of exception, flights arriving from and departing to the same country would not be regarded as being connected (for example, Paris-London-Marseille) and APD would be levied on journeys commencing in the United Kingdom. Aer Lingus further notes that to qualify for the connecting flights exemption, the connected flights must be detailed on the same ticket or conjunction tickets and self-connections would not therefore qualify for this exemption.

[25] With reference to the website of HM Revenue and Customs, Excise Notice 550: Air Passenger Duty, https://www.gov.uk/government/publications/excise-notice-550-air-passenger-duty/excise-notice-550-air-passenger-duty

(90) Aer Lingus mentions further examples of taxes[26]:

– France: The French *Aviation Civile Taxe* would exempt passengers connecting at a French airport (stop-over less than 24 hours) and direct transit passengers (same flight number and aircraft). The tax would be calculated by reference to the final point of the single-ticket journey.

– Austria: A tax calculated by reference to the furthest point shown in a single-ticket itinerary with a connecting flight if the transfer is within 24 hours.

– Germany: Tax on the basis of the furthest geographical point shown on the ticket; a 12 hour or 24 hour rule applies, depending on the transfer country.

5.2.3. On the application of the ATT before and after 2011

(91) Aer Lingus provided examples, reproduced in Table 2, to illustrate the application of the ATT, as well as the reasons for the exemption of transfer and transit passengers.

Table 2: examples of the application of the ATT before and 2011 provided by Air Lingus

Route		Pre 2011	Post 2011	Taxable event
1	Dublin-New York	€10	€3	• Departure from an Irish airport • Journey distance: more than 300 km
2	New York-Dublin	€0	€0	• No departure from an Irish airport • Possibly subject to US tax
3	Dublin-Manchester	€2	€3	• Departure from an Irish airport • Journey distance: less than 300km
4	Manchester-Dublin	€0	€0	• No departure from an Irish airport • Possibly subject to UK tax
5	London-Dublin-New York *Stopover: less than six hours*	€0	€0	• Departure from a UK airport not subject to Irish tax but subject to UK tax • Departure from an Irish airport exempted because it is a transfer as defined
6	London-Dublin-New York *Stopover: more than six hours*	€10	€3	• Departure from a UK airport not subject to Irish tax but subject to UK tax • Departure from an Irish airport subject to Irish tax as it is not a transfer as defined: journey distance more than 300km
7	New York-Shannon-Dublin *Stopover: less than six hours*	€0	€0	• Departure from US airport not subject to Irish tax but possibly subject to US tax • Departure from an Irish airport exempted from Irish tax because it is a transfer as defined
8	New York-Shannon-Dublin *Stopover: more than six hours*	€2	€3	• Departure from US airport not subject to Irish tax but possibly subject to US tax • Departure from an Irish airport subject to Irish tax as it is not a transfer as defined: journey distance more than 300km
9	Dublin-Shannon-New York *Stopover: less than six hours*	€10	€3	• Departure from an Irish airport (DUB): subject to Irish tax • Departure from an Irish airport (SNN) not subject to Irish tax because it is a transfer as defined

[26] Aer Lingus provided excerpts from the IATA List of Ticket and Airport Taxes and Fees, providing details on the Austrian, German and French taxes.

Route		Pre 2011	Post 2011	Taxable event
				• Journey distance: more than 300km
10	Dublin-Shannon-New York *Stopover: more than six hours*	€12	€6	• Departure from an Irish airport (DUB): subject to Irish tax and the journey distance less than 300 km • Departure from an Irish airport (SNN) subject to Irish tax as it is not a transfer as defined; journey distance more than 300km

(92) Aer Lingus provided comments on Table 2:

– Table 2 provides examples of the ATT collected in practice on various routes, in line with the contemporaneous guidance provided by the Revenue Commissioners (as mentioned in recitals (84) and (87));

– examples 1 to 4, which are all single flight journeys, illustrate that the flight must depart from an Irish airport for it to be a taxable event under the Irish ATT;

– examples 5 to 8, which involve journeys commencing outside of Ireland, illustrate how the exemption avoids a passenger having to pay air transport tax in different jurisdictions in respect of the same journey; and that a stop-over must be limited to six hours;

– examples 9 and 10, which involve journeys commencing in Ireland with a connecting flight in Ireland, illustrate how the exemption avoids a passenger being subject to the ATT more than once, provided that stopover is not more than 6 hours; and that the tax is calculated by reference to the entire journey.

5.2.4. On Aer Lingus' application of the ATT and the transfer/transit exemption

(93) Aer Lingus refers to the Opening Decision where reference was made to a letter from Ireland dated 15 October 2009, in which it is explained that in the case of a journey including several segments, the ATT exempts the first leg of such a journey[27]. Aer Lingus stresses that it does not recognise this principle and is unable to shed light on why such a principle was suggested.

(94) According to Aer Lingus, such a principle is not in line with the Revenue Commissioner's guidance provided in the email dated 30 March 2009 referred to in recital (84), and is not the way in which ATT was calculated by Aer Lingus in practice. Nor would it be consistent with the examples in paragraph (20) of the Opening Decision, which do not illustrate the application of the transit passenger exemption to the first leg of a journey but rather demonstrate that a journey is not subject to the ATT if it commences outside of Ireland[28].

(95) Aer Lingus asserts that it collected the ATT in accordance with the Revenue Commissioner's guidance and reported the amount sent by way of self-declaration to the authorities[29].

27 Paragraphs (19) and (20) of the Opening Decision.

28 See the examples contained in recital (20) of the Opening Decision reproduced in recital (91) above.

29 Aer Lingus provided an example of such a report and explained that the calculation presented simply deducts a stated number of transfer/transit passengers.

5.2.5. On the presence of State aid

(96) Aer Lingus argues that there is no selectivity in exempting transfer and transit passengers from the ATT. According to Aer Lingus, it is inherent in the ATT scheme that a transfer or transit passenger is to be disregarded, as the ATT does not apply to particular segments of a journey. Instead, the taxable event is a journey that starts in Ireland and the tax due depends on the ultimate destination stated on the ticket, regardless of whether the passenger takes one or more flights to get to that ultimate destination.

(97) In that respect, Aer Lingus refers to paragraph (41) of the Opening Decision where the Commission took the preliminary view that the taxable event is a journey that starts in Ireland and that the tax due depends on the ultimate destination stated on the ticket, regardless of whether the passenger takes one or more flights to get to that ultimate destination:

> *"Another possible reference system may be a tax charged in respect of air travel from an airport in Ireland, the notion of "air travel" being understood as a journey from an airport in Ireland to a final destination that may consist of one or more segments. If this were the correct reference system, it seems obvious that the ATT should not apply to transfer or transit passengers. Hence the measure would not be selective" (emphasis provided by Aer Lingus).*

5.2.6. On other matters

(98) Under the assumption that if the Commission were still to maintain its preliminary view that the ATT's reference system is the taxation of every departure (individually), Aer Lingus submitted that:

– the exemption of transfer/transit passengers is not selective; and

– even if the exemption were to be considered selective, it would be justified.

5.2.6.1. On the first point "the exemption of transfer/transit passengers is not selective"

(99) Referring to case law[30], Aer Lingus submits that the non-application of the ATT to departures of transfer and transit passengers would only be selective if it differentiated between economic operators who, in light of the objective assigned to the ATT, are in comparable factual and legal situations. In that respect, Aer Lingus refers to the question whether the non-application to transfer and transit passengers favours carriers such as Aer Lingus (which offers single tickets for journeys comprising two or more flights) as against point-to-point carriers (which do not offer single tickets for such journeys and therefore had to levy the ATT for each flight for passengers whose journey included a self-connection).

(100) Aer Lingus concludes that given the differing factual and legal situation between pure point-to-point services and single-ticketed services - notably the different costs to the carrier and level of service to the passenger - the exemption for transfer and transit passengers was not selective, namely for the following reasons:

[30] Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Zementwerke*, C-143/99, ECLI:EU:C:2001:598.

– there is certainly a significant portion of Aer Lingus' passengers that chooses to self-connect[31], for whatever reason, regardless of Aer Lingus having the ability to offer single tickets for the overall journey. By definition, Aer Lingus is not in a position to identify or quantify the number of passengers preferring to travel on a self-connecting basis – any more than point-to-point carriers are able to clearly quantify such passengers (who may, for example, self-connect onto a different carrier). For those passengers who self-connect, Aer Lingus is in the same factual and legal position as pure point-to-point carriers.

– Aer Lingus' situation is however factually and legally different for those passengers who purchase single-ticketed transfer or transit journeys. In that respect, Aer Lingus refers to part of the last sentence of paragraph (45) [(44)][32] of the Opening Decision, where, according to Aer Lingus, the Commission itself recognises that "*it may be appropriate to distinguish the legal and factual situation of airlines providing only point-to-point services from that of airlines that also provide services that involve a transfer or transit at such airport"*.

(101) With reference to passages of the Opening Decision relating to the differences between journeys including several flights under a single booking and journeys involving several flights under separate bookings, Aer Lingus, in the context of selectivity, also makes the following observations:

– with respect to the passage "*The business models of airlines focusing on point-to-point services and those operating services which may involve a transfer or transit are very different.*"[33] Aer Lingus stresses that it implements specific procedures to accommodate transfer and transit passengers. This involves the operation of a seamless transfer such as transfer desks and through fares and assuming responsibility for missed connections (for example by providing care and assistance, accommodation). According to Aer Lingus, these are significant costs and responsibilities, none of which apply to self-connecting passengers.

– with respect to the passage "*Services that involve a transfer/transit constitute, from the perspective of the customer, a journey from the airport of origin to the airport of destination, and not two separate journeys*"[34]. Aer Lingus explains that, for the passengers, the service experience is also different, avoiding multiple check-ins, multiple tickets, potentially different baggage allowances etc.

– with respect to the passage "*The entire journey involving two or more segments is sold as one and can be travelled with a single ticket.*"[35] Aer Lingus explains that this is obviously not the case for a self-connecting journey. In fact, a self-connecting journey would involve at least two separate tickets (and two separate contracts) possibly with two different airlines. A single ticket would be based on a single contract with one airline.

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31 A passenger who makes several independent bookings for different flights forming his/her journey, as opposed to making a single booking covering several flights with one service provider.

32 Aer Lingus erroneously referred to paragraph (45) of the Opening Decision, which however does not contain the sentence quoted in the relevant passage of its comments on the Opening Decision.

33 Paragraph (45) last sentence of the Opening Decision.

34 Paragraph (45) first sentence of the Opening Decision.

35 Paragraph (45) second half of the sentence of the Opening Decision.

– with respect to the passage "*Passengers do typically not have to reclaim their luggage when transferring.*"[36] According to Aer Lingus, this is indeed the opposite for self-connecting passengers. There are no luggage transfer services for self-connecting passengers at any of the Irish airports.

– with respect to the passage "*Checks on passengers and luggage are typically different.*"[37] Aer Lingus explains that self-connecting passengers will have to check-in for each flight separately.

5.2.6.2. On the second point "even if the exemption were to be considered selective, it would be justified"

(102) Aer Lingus submits that the measure avoids double taxation and applies within Ireland as well as cross-border. Such exemption indeed would be commonly applied by other jurisdictions, such as the United Kingdom.

(103) Aer Lingus further submits that the guiding and basic principle of the ATT is that it is calculated by reference to the entire journey. In the case of a single-ticket, the single ticket would equate to a single journey (in so far as any stopover takes less than six hours). However, for a self-connecting service composed of two separate bookings, each booking would be considered as separate by the airlines' booking systems and not recognised as transferring passengers.

5.3. Comments from Ireland on observations from interested parties

(104) Overall, Ireland agreed with the points made by Aer Lingus, with the exception of those summarised in recitals (93) and (94). According to Ireland, Aer Lingus quoted a letter from Ireland dated 15 October 2009 saying that if a journey consisted of several segments, the first leg was always exempted from ATT. Ireland referred to its letter dated 22 December 2015 in which it explained that this was a misunderstanding. Ireland's letter dated 15 October 2009 had given a specific example in which the first leg of the journey was not subject to ATT. However, Ireland considers that this should not be interpreted as a general statement that the first leg was always exempted.

(105) As regards comments made by Ryanair on the tax payable (see recital (65)), Ireland pointed out that Ryanair did not itself carry transfer or transit passengers and therefore had no practical experience of applying the rules concerning ATT. Nor does Ryanair explain its reasoning, according to Ireland.

6. ASSESSMENT OF THE NON-APPLICATION OF THE AIR TRAVEL TAX TO TRANSIT AND TRANSFER PASSENGERS

6.1. Preliminary comments: the proper interpretation of the ATT with respect to the exemption for transit and transfer passengers

(106) In its letter dated 15 October 2009, Ireland stated that the exemption for transit and transfer passengers ensures that the "first leg" of an overall journey is not subject to the ATT. That statement led to confusion about the correct interpretation of the exemption, as is apparent from the General Court's judgment in Case T-512/11.

[36] Paragraph (45) last part of the second sentence of the Opening Decision.

[37] Paragraph (45) last part of the second sentence of the Opening Decision.

(107) In the light of the comments received from Ireland and third parties, it is now clear that the Irish legislation should be understood as set out in Section 2.2 above.

(108) As explained there, under Section 55(2) of the Finance Act airlines are liable to pay the ATT for every departure of a passenger on board an aircraft from an airport located in Ireland, whereas transit and transfer passengers are not considered to be passengers within the meaning of Section 55(2) the Finance Act and therefore the ATT does not apply to their departure. Consequently, it cannot be said in general terms that the ATT applies to a specific leg of an air journey.

(109) It should be noted that when the 2011 Decision was adopted, there were two different rates applicable to flights to destinations located no more than 300 kilometres from Dublin Airport and all other flights. It is now clear that the applicable tax rate depended on the distance to the final destination, irrespective of the location of transit or transfer. For instance, a journey from Dublin to New York with a stopover at Shannon would be taxed at the rate of EUR 10, not EUR 2. The departure from Dublin Airport would give rise to taxation at the rate of EUR 10 ATT, even though Shannon is within 300 kilometres of Dublin Airport, because the distance from Dublin Airport to New York exceeds that threshold. Furthermore, the departure from the stopover at Shannon Airport is not subject to ATT, since the passenger is a transit or transfer passenger at that airport.

(110) The qualification as a transit or transfer passenger at an Irish airport did not depend on the location of the airport from which the passenger came when landing at the Irish airport, which could be also outside Ireland, e.g. in the case of a journey from London to New York with a stopover of not more than six hours at Shannon. No ATT would be due for such a journey because the airport of departure in London is located outside of Ireland, while the passenger qualifies as a transfer or transit passenger when departing from Shannon Airport.

6.2. Existence of aid

6.2.1. Introduction

(111) According to Article 107(1) TFEU, save as otherwise provided in the Treaties, 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.

(112) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient, which must be an undertaking (namely carry out an economic activity); (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

(113) In this case, it is appropriate to first consider whether the non-application of the ATT to transfer and transit passengers is liable to confer a selective advantage to certain airlines.

6.2.2. Selectivity

6.2.2.1. Introduction

(114) A measure is selective, if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU.

(115) For measures applicable to all undertakings fulfilling certain criteria which mitigate the charges that those undertakings would normally have to bear, the selectivity of a measure should normally be assessed by means of a three step analysis[38]. First, the common or normal tax regime applicable in the Member State is identified: "the reference system". Second, it should be determined whether a given measure constitutes a derogation from that system, insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether a measure which derogates from the reference system is justified by the nature or the general scheme of the reference tax system. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) TFEU.

(116) In certain exceptional cases, the three-step approach cannot be applied, given the practical effects of the measures concerned. In such cases, it may also be necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise, instead of laying down general rules applying to all undertakings, from which a derogation is made for certain undertakings, the Member State could achieve the same result, circumventing the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings[39]. In this respect, it must be recalled that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them on the basis of their effects, and thus independently of the techniques used[40].

(117) Below, the three-step analysis will first be applied to the ATT's exemption for transit and transfer passengers (Section 6.2.2.2 and 6.2.2.3). Second, the Commission will then consider whether the ATT has been designed by the Member State in a clearly arbitrary or biased way, so as to favour certain undertakings over others (Section 6.2.2.4.).

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38 See, for example, judgment of the Court of Justice of 8 September 2011, *Paint Graphos and Others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 49; judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 62; judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline* v *Finanzlandesdirektion für Kärnten*, C-143/99, ECLI:EU:C:2001:598, paragraphs 42 – 54; judgment of the Court of Justice of 29 April 2004, *GIL Insurance v Commissioners of Customs & Excise*, C-308/01, ECLI:EU:C:2004:252, paragraph 72. See also points 127 and 128 of the Commission Notice on the notion of aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ("the Notice on the notion of aid"), OJ C 262, 19.7.2016, p. 29.

39 Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732. See also points 129 – 131 of the Notice on the notion of aid.

40 Judgment of the Court of Justice of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraphs 85 and 89 and the case law cited, and judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 51.

6.2.2.2. Determination of the system of reference

(118) The reference system is the benchmark against which the selectivity of a measure is assessed. The reference system is comprised of a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective. The identification of the reference system therefore depends on elements such as the taxable persons, the taxable base, the taxable events and the applicable tax rates.

6.2.2.3. *ATT*

(119) The ATT constitutes a distinct tax regime in its own right, which is not part of a wider fiscal system. Therefore, the reference system does not go beyond the limits of the ATT itself.

(120) The key question in this case is whether the non-application of the ATT to transit and transfer passengers is part of the reference system or whether that non-application constitutes a derogation from the reference system. In the first case, the ATT is considered as a tax that applies to all passengers departing from Ireland on an air journey, it being understood that an air journey may consist of more than one flight. In that approach, it is logical that the tax is not levied twice when the overall journey involves more than one departure from an Irish airport. Moreover, passengers who start their journey in a third country are not taxed, since their journey did not depart from an Irish airport ("journey system"). In the second case, the ATT is considered as a tax that applies to all passengers departing on an aircraft from an airport in Ireland, and the non-application of the ATT to transit and transfer passengers constitutes a derogation from that rule ("departure system").

(121) On a first analysis, the wording of section 55(2)(a) of the Finance Act ("*every departure of a passenger on an aircraft from an airport")* might suggest that the departure system constitutes the appropriate reference system. That is also the preliminary view the Commission took in the Opening Decision: the reference system is a tax that is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland.

(122) That preliminary conclusion was based on the fact that the Finance Act referred to the taxation of departures. However, having conducted the formal investigation and collected further information on the proper interpretation on section 55(2) of the Finance Act, and in light of Ireland's explanation that the ATT was intended to tax any single journey originating from an Irish airport, even if the journey was divided into different legs (see recital (59)), it can be concluded that the objective of the system was to tax air journeys starting in Ireland. On that basis, and for all the reasons set out below, the reference system is the taxation of journeys originating in Ireland.

(123) First, it should be observed that the definition of "*passenger*" does not include transfer or transit passengers. Therefore, the wording of the Finance Act allows the conclusion that the reference system is a "journey system" excluding transfer and transit passengers, since the departure of a transfer or transit passenger does not constitute a "departure of a passenger" within the meaning of 55(2) of the Finance Act and, as such, not a taxable event[41]. Considering that the reference system is a

[41] It therefore seems more appropriate to consider that the ATT does not apply to transit and transfer passengers, as opposed to considering such passengers as "exempted" from the tax.

"journey system" is also consistent with the underlying objective of the legislation, as presented by Ireland in its comments on the Opening Decision.

(124) Moreover, the way in which the ATT functioned confirms that the tax related to air journeys. Thus, during the period when differentiated rates applied, the tax rate was determined by reference to tax the final destination of the passenger as stated on the ticket, regardless of whether the passenger took one or more flights to get to that destination (see recitals (22) and (23) respectively and examples of the application of the ATT reproduced in table 2). For instance, the tax payable in relation to a passenger travelling from Dublin to New York with a stopover in Shannon was EUR 10, and not EUR 2 (see recital (91)).

(125) Furthermore, the Commission notes that, in principle, it is legitimate to tax air travel on the basis of a rate applied once to an air journey from a given airport in Ireland to a given final destination, sold under a single booking, instead of taxing separate legs of such a single journey separately. Such separate taxation would imply that the tax is paid twice for a passenger who transfers onto another aircraft at an Irish airport, which may indeed raise issues of equity and equal treatment (see recital (63)).

(126) Indeed, excise duties such as the ATT typically apply to the acquisition of a final product or service by a customer, and not to the separate components that may constitute this final product or service. For the reasons explained below, a journey comprising several legs, were the passenger qualifies as a transit or transfer passenger at each stopover airport, can be regarded as a single service.

(127) In this respect, it should be noted that airlines market their services as journeys from a given point of origin (A) to a final destination (B), even if such a journey involves a stop at an intermediary airport (C). Such a service fundamentally involves air transport from A to B, the existence and location of the intermediary airport C being a secondary, and, from the perspective of the passenger, ultimately irrelevant feature of that service (except for its possible impact on the overall travelling time of the passengers)[42]. In principle, it is therefore acceptable and non-discriminatory to tax an indirect journey, sold as a single service, from A to B via C in the same way as a direct journey from A to B (A being in Ireland in both situations), since both services satisfy the same customer need (namely travelling from A to B).

(128) It remains to be considered whether the definitions of transit and transfer passengers contained in the Finance Act reflect those principles. This is analysed in the following recitals.

(129) As mentioned in recital (18), transit passengers are defined as passengers who remain on the same aircraft for the incoming and outgoing flight. The Commission considers that in such a situation, it is clear that there is in effect a single journey, the only difference with a direct flight being that the aircraft stops briefly at a given airport on its way to the final destination.

(130) As regards transfer passengers, three conditions were used to define transfer passengers at airport C when travelling from airport A to airport B via airport C: (i) the maximum duration of the time spent at C should not exceed 6 hours; (ii) A and B, must not be identical; and (iii) the flights from A to C and C to B must be purchased under "a single booking". The Commission considers that all three conditions are

[42] This is consistent with the Commission's standard practice in antitrust and merger cases of defining the relevant markets for scheduled air services on the basis of the origin – destination approach.

adequate and proportionate. Point (i) ensures that C is a genuine stopover airport, where the passenger essentially prepares and waits for his or her connecting flight, and not a "disguised" final destination. In this respect, six hours is a reasonable time limit, ensuring that C is a real stopover airport[43]. Point (ii) ensures that the journey is not a disguised direct flight from A to C and back. As regards (iii), as explained in recitals (132)-(134) below, it ensures that the journey from A to B is sold as a single integrated service to the customer.

(131) The ATT's exemption for transfer passengers imposed the condition that all the flights making up the single journey must be booked under a single booking.

(132) When a passenger makes a single booking covering several flights (or "legs"), he or she enters into a single contract with the supplier covering the various flights. By contrast, when a passenger makes more than one booking covering different flights, he or she enters into separate independent contracts with one or more suppliers. This already shows that a single booking corresponds to the purchase of a single service containing different components, whereas multiple bookings correspond to several separate services purchased independently by the passenger.

(133) Under a single booking, the entire journey involving two or more flights is sold as one booking and a passenger has a single ticket and one reservation reference for the entire journey. Moreover, as pointed out both by Ireland and Aer Lingus in their comments on the Opening Decision (see recital (101)), there are a number of important differences between a journey comprising several flights sold under a single booking and a journey comprising several flights sold under separate bookings. In particular, under a single booking, the passenger does not need to comply with several different check-in, baggage and travel documentation requirements for each of the flights making up the journey, but rather with only one set of requirements covering the entire journey to the final destination. In addition, if the first flight is cancelled or delayed to such an extent that the passenger misses the connecting flight, the provider of a single-booking journey has to assume responsibility for the missed connection (such as providing care and assistance, accommodation, and re-booking the passenger on the next available flight or offering compensation).

(134) A journey made up of multiple legs that are booked separately involves the purchase of independent services. That implies, for instance, that when the passenger misses his second flight due to a delay in the arrival of the first flight, he cannot claim assistance from the provider of the second flight. The passenger would simply appear as a "no show" for the second flight. Furthermore, when multiple flights are purchased under separate bookings, the passenger has to reclaim his luggage at each airport and check-in again for the subsequent flights. Aer Lingus stressed that there were no luggage transfer services for self-connecting passengers at any of the Irish airports (see recital (101)).

(135) In light of this, the main difference between the two situations is that, in one case, the passenger purchases an integrated service (journey from A to B) with two components that are combined by the supplier of the service, whereas in the other situation, the passenger combines the two components him/herself at his/her own risk, and thus effectively purchases two separate services. Therefore, a passenger

[43] Like Ireland, the United Kingdom also applies a six hour criterion for defining passengers on connecting flights (at least for those situations where the first flight arrives before 5 p.m.).

flying from airport A to airport B via airport C under a single booking buys a service which is fundamentally different from the services bought by a passenger who separately books a flight from airport A to airport C and a flight from airport C to airport B.

(136) The fact that a single booking covering several flights differs materially from several flights covered by separate bookings is exemplified by the notice addressed by easyJet, one of the main point-to-point carriers operating in the Union, to passengers on its website:

"easyJet is a point to point carrier (only flies from departure and arrival airports) and does not operate a connecting flights service for onward travel using our flights or the flights of other airlines. If you have booked an onward flight with us this represents a separate contract and we consider each flight as a separate journey"[44].

(137) It is thus proportional and non-discriminatory to tax each of those two services separately whilst taxing an indirect journey purchased under a single booking only once.

(138) In light of the above assessment (see recitals (131)-(137)), the Commission considers that the definitions of transfer and transit passengers under the Finance Act are thus consistent with the objective of taxing single air journeys from a given origin in Ireland to a given destination, purchased as a single integrated service by a customer.

(139) It can be concluded that the system of reference is the ATT as set out in the Finance Act, hence including the non-application of the tax to transit and transfer passengers (journey system).

6.2.2.4. Derogation from the system of reference

(140) Given that the non-application of the ATT to transfer and transit passengers is part of the system of reference, there is no derogation from the reference system.

(141) Consequently, the assessment of the ATT using the three-step approach shows no selectivity.

6.2.2.5. The ATT has not been designed in a clearly arbitrary or biased way so as to favour certain undertakings over others

(142) In order to draw a final conclusion on selectivity it still needs to be determined whether the ATT has been designed by Ireland in a clearly arbitrary or biased way, so as to favour certain undertakings over others.

(143) In its comments on the Opening Decision, Ryanair argued in essence that the ATT exemption for transit and transfer passengers induces unjustified discriminations between two business models, namely the business model of hub-and-spoke carriers, which offer single bookings covering several flights, and the business model of point-to-point carriers such as Ryanair, which do not, and that it could not be claimed that the exemption was open to all airlines, without discrimination.

(144) It should be noted first that there is no evidence on the file that Ireland designed the non-application of the ATT of transit and transfer passengers in such a way so as to favour certain undertakings over others. In this respect, it can be observed that

[44] See http://www.easyjet.com/en/help/at-the-airport/connect-and-transit (visited on 28 March 2017).

various Member States operate similar taxes that also contain exemptions for transit and transfer passengers.

(145) The argument of Ryanair that it is virtually impossible for an airline to adapt its fundamental business model from a point-to-point to a hub-and-spoke model and that to its knowledge, there is not a single precedent for such a change on the market, should be nuanced, since it Ryanair has now started to offer connecting flights[45]. In May 2017, Ryanair announced that it was launching its first connecting flights through Rome Fiumicino Airport, providing its customers with the opportunity to book and transfer directly onto connecting Ryanair flights for the first time. In this respect, Ryanair's Chief Commercial Officer stated: "*Ryanair is pleased to launch our first connecting flights service via Rome Fiumicino Airport, allowing customers to book connecting Ryanair flights on the lowest fares in Europe. Starting with an initial 10 Rome routes, customers will be able to transfer onto their next flight without having to go landside, and have their bags checked through to their final destination. This new service under Year 4 of our "Always Getting Better" programme, will be rolled out across the entire Ryanair network, (with further Rome routes to be added in the coming weeks and months) as long as the Rome Fiumicino trial proves to be a success"*[46]. Customers will also receive one booking reference for both flights. This demonstrates that Ryanair started to provide a new service which it views itself as novel and fundamentally different from the point-to-point flights it has operated so far.

(146) Second, it can be observed that the ATT leads to separate services being taxed separately, namely, multiple flights purchased under multiple bookings, and single integrated services being taxed only once, namely the component flights of a single journey purchased under a single booking. In light of the reasons stated above (see section 6.2.2.3 of this Decision), this differentiation flows from the fundamental differences between the services purchased by the customer in each situation, which translate into important practical consequences, in particular in terms of check-in, luggage management, and the responsibility of the airline in the event of a missed connection. The fact that some airlines have adopted a business model focussing on point-to-point services whereas others focus on network services does not imply that it would be discriminatory to tax differently what are objectively different services. As explained in Section 6.2.2.3 above, it can be considered legitimate to tax air journeys starting in Ireland, as opposed to taxing every single departure of passenger on aircraft out of Ireland.

(147) The Commission notes that the claims made by Ryanair as regards alleged discrimination seem to be implicitly based on the premise that some passengers construct an air journey by buying multiple flights from Ryanair, with a view to travelling from a given airport to another airport "via" other airports, and that such multiple flights should be treated in the same way as a single booking[47]. Otherwise,

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45 See https://corporate.ryanair.com/news/news/170517-connecting-flights-launched-at-rome-fiumicino/?market=en (visited on 1 June 2017).

46 See https://corporate.ryanair.com/news/news/170517-connecting-flights-launched-at-rome-fiumicino/?market=en (visited on 1 June 2017).

47 This would be the case for instance for a passenger buying a ticket for a flight from Shannon to Dublin and a separate ticket for a flight from Dublin to Barcelona, with a difference of less than six hours between the arrival of the passenger at Dublin Airport and his/her departure from that airport to Barcelona. Under the ATT, the departures from Shannon and from Dublin would each be taxable events. However, had the definition of transfer passengers not referred to the notion of single booking, the departure from Dublin

Ryanair would have no reason to consider itself discriminated against vis-à-vis airlines which offer single bookings for multiple flights. However, Ryanair has not indicated that it carried any such passengers in the period during which the ATT applied, let alone provided any data as regards the number of such passengers[48]. More importantly, nothing in Ryanair's submissions is capable of calling into question considerations set out in recitals (132) to (134) which justify treating a multiple flights purchased under a single booking as a fundamentally different service from multiple flights linking the same airports but purchased under separate bookings, the latter being in reality several independent services.

(148)

(149) As mentioned in recital (38), in its judgment in Case T-512/11, the General Court noted that Ireland was open to considering adjusting the ATT, by removing the requirement for a single booking as part of the definition of a transfer passenger, if necessary.

(150) The formal investigation showed (see recitals (131)-(148)) that the single booking condition was not discriminatory, as it ensured that only air journeys originating from an Irish airport and sold as a single integrated service to the customer, regardless of the number of flights included in the journey, were subject to the ATT. Therefore, the Commission concludes that it was not needed for Ireland to remove the single booking condition from the definition of a transfer passenger in order to ensure that State aid was not involved.

(151) It can be concluded that the Ireland has not designed the ATT in a clearly biased and arbitrary manner so as to favour certain undertakings over others. On the contrary, the non-application of the ATT to transit and transfer passengers appears justified and reasonable.

6.2.3. Conclusion on the existence of aid

(152) In light of the above assessment, the measure under investigation fails to meet at least one of the conditions laid down by Article 107(1) TFEU, as it is not selective. As the various conditions of the notion of State aid within the meaning of Article 107(1) TFEU are cumulative, it follows that the measure does not constitute State aid. It is therefore not necessary to assess whether the other conditions for a measure to constitute State aid are fulfilled.

7. CONCLUSION

(153) The non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

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would not have been a taxable event under the ATT; only the departure from Shannon would have been a taxable event.

[48] In the past, Ryanair actively discouraged passengers from connecting onto further Ryanair flights. See Commission Decision of 27 June 2007 in merger case COMP.M.4439 Ryanair/Aer Lingus (OJ C 47, 20.2.2008, p 14), recital 48.

Article 1

The non-application to transfer and transit passengers of the Air Travel Tax, introduced by the Republic of Ireland through the Finance (No. 2) Act 2008, did not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Republic of Ireland.

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Fax: +32 2 296 12 42

Stateaidgreffe@ec.europa.eu

Done at Brussels, 14.7.2017

For the Commission

Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION