V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – IRLANDIA

Pomoc państwa SA.29064 (2015/C) (ex 2011/NN) – Transport lotniczy – Zwolnienie z pogłównego podatku lotniskowego

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej

(Tekst mający znaczenie dla EOG)

(2016/C 220/03)

Pismem z dnia 28 września 2015 r., zamieszczonym w autentycznej wersji językowej na stronach następujących po niniejszym streszczeniu, Komisja powiadomiła Irlandię o swojej decyzji w sprawie wszczęcia postępowania określonego w art. 108 ust. 2 Traktatu o funkcjonowaniu Unii Europejskiej dotyczącego wyżej wspomnianego środka.

Zainteresowane strony mogą zgłaszać uwagi na temat środka pomocy, w odniesieniu do którego Komisja wszczyna postępowanie, w terminie jednego miesiąca od daty publikacji niniejszego streszczenia i następującego po nim pisma. Uwagi należy kierować do Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

European Commission
Directorate-General for Competition
Directorate Transport, Post and other services
1049 Brussels
Belgia
Nr faksu:

Otrzymane uwagi zostaną przekazane władzom irlandzkim. Zainteresowane strony zgłaszające uwagi mogą wystąpić z odpowiednio uzasadnionym pisemnym wnioskiem o objęcie ich tożsamości klauzulą poufności.

TEKST STRESZCZENIA

W dniu 30 marca 2009 r. władze irlandzkie wprowadziły podatek akcyzowy od pasażerskiego transportu lotniczego, który miał być pobierany od „każdego pasażera odlatującego z portu lotniczego na pokładzie statku powietrznego" („podatek od transportu lotniczego"). Podatek ten miał być przerzucony na pasażera poprzez cenę biletu lotniczego, ale to operatorzy linii lotniczych byli zobowiązani do pobierania tego podatku od pasażerów podróżujących ich samolotami i do jego odprowadzania. Definicja „pasażera" w tym kontekście wyłącza pasażerów transferowych i tranzytowych z tego podatku. Lot pasażera transferowego do danego portu lotniczego i jego dalszy lot z tegoż portu lotniczego muszą stanowić część tej samej rezerwacji. W momencie jego wprowadzenia podatek ten był obliczany na podstawie odległości pomiędzy portem lotniczym wylotu a docelowym portem lotniczym i wynosił (i) 2 EUR w przypadku podróży między portami lotniczymi oddalonymi maksymalnie o 300 km od portu lotniczego w Dublinie oraz (ii) 10 EUR we wszystkich innych przypadkach Od 1 marca 2011 r. stosowana jest jednolita stawka w wysokości 3 EUR w odniesieniu do wszystkich odległości.

Według skargi otrzymanej przez Komisję niestosowanie podatku do pasażerów transferowych i tranzytowych stanowiło nielegalną i niezgodną z rynkiem wewnętrznym pomoc państwa przyznaną w szczególności operatorowi portu lotniczego Dublin Airport Authority oraz przewoźnikowi lotniczemu Aer Lingus, który obsługuje znaczny odsetek lotów przewożących pasażerów transferowych i tranzytowych. Skarżący szacuje, że w wyniku wyłączenia pasażerów transferowych i tranzytowych z tego podatku ma miejsce pomoc państwa w wysokości co najmniej 8,6 mln EUR rocznie.

W opinii władz irlandzkich wyłączenie ruchu transferowego i tranzytowego z zakresu stosowania podatku miało na celu zapewnienie jasności stosowania tego podatku i uniknięcie jego nadużywania, tj. zapewnienie niedyskryminacji osób, które musiały mieć międzylądowanie w porcie lotniczym, który nie był ich miejscem docelowym, a międzylądowanie takie było konieczne, aby dotrzeć do docelowego miejsca podróży, lub gdy trasa przelotu przewoźnika lotniczego do miejsca docelowego obejmowała międzylądowanie. Z informacji przedstawionych przez Irlandię wynika, że pierwszy odcinek podróży z międzylądowaniem w Irlandii jest zwolniony z podatku. Władze irlandzkie poinformowały Komisję, że są gotowe do zbadania odpowiednich zmian swoich przepisów podatkowych w celu usunięcia warunku „tej samej rezerwacji".

W niniejszym przypadku stwierdzenie, czy domniemane środki stanowią pomoc państwa, zależy od tego, czy dany środek ma charakter selektywny. Zakładając, że podatkowym systemem odniesienia jest podatek naliczany od każdego pasażera odlatującego na pokładzie statku powietrznego z portu lotniczego w Irlandii, konieczne jest określenie w odniesieniu do tego systemu podatkowego, czy korzyści przyznane przez sporny środek podatkowy mogą być selektywne, tj. wykazanie, że środek stanowi odstępstwo od powszechnego systemu, ponieważ wprowadza zróżnicowane traktowanie podmiotów gospodarczych, które w świetle celów systemu podatkowego danego państwa członkowskiego znajdują się w porównywalnej sytuacji faktycznej i prawnej. W szczególności konieczne może się okazać dokonanie rozróżnienia sytuacji prawnej i faktycznej przewoźników lotniczych obsługujących wyłącznie połączenia bezpośrednie oraz przewoźników, którzy świadczą również usługi obejmujące transfer lub tranzyt w portach lotniczych w Irlandii. Sytuacja prawna i faktyczna takich przedsiębiorstw jest jednak różna pod wieloma względami: na przykład podróż obejmująca dwa lub większą liczbę odcinków jest sprzedawana jako jedna rezerwacja i można ją odbyć z jednym biletem, pasażerowie zazwyczaj nie mają obowiązku odbierania bagażu podczas transferu, a kontrole pasażerów i bagażu odbywają się zwykle według innych zasad. Ponadto modele biznesowe przewoźników lotniczych obsługujących połączenia bezpośrednie oraz tych świadczących usługi, które mogą obejmować transfer lub tranzyt, także bardzo się od siebie różnią.

Podsumowując, wydaje się, że niestosowanie podatku do pasażerskiego ruchu transferowego i tranzytowego stanowi pomoc państwa, w stosunku do której istnieją wątpliwości co do zgodności z rynkiem wewnętrznym.

Zgodnie z art. 14 rozporządzenia Rady (WE) nr 659/1999 wszelka pomoc przyznana niezgodnie z prawem może podlegać odzyskaniu od beneficjenta.

TEKST PISMA

'The Commission wishes to inform Ireland that, following the partial annulment by judgment of the General Court ([1]), of the Commission decision of 13 July 2011 ([2]) on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU').

1. **PROCEDURE**

(1) By letter of 21 July 2009, registered at the Commission the following day under number CP 231/2009, the Commission received a complaint from airline operator Ryanair Ltd, regarding alleged unlawful and illegal State aid through five measures stemming from the air travel tax, which is an excise duty established by Ireland.

(2) By letter of 28 July 2009, the Commission forwarded the complaint to the Irish authorities and asked for their position on the claims brought forward therein.

(3) By letter of 26 August 2009, the Irish authorities asked for an extension of the deadline to reply, which the Commission accepted in letter of 3 September 2009.

(4) On 15 October 2009, the Irish authorities responded to the letter of the Commission. Their reply was registered at 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, 2011/NN. The Commission carried out a preliminary investigation of that measure, pursuant to Article 108(3) TFEU.

(6) By Decision of 13 July 2011, adopted at the end of the preliminary investigation stage, the Commission found that four of the alleged aid measures (including the non-application of the air travel tax to transfer and transit passengers) did not constitute State aid within the meaning of Article 107(1) TFEU. By the same decision, it initiated a formal investigation concerning the fifth alleged aid measure, which concerned the difference in rates for 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 Ltd brought an action for annulment in part of aforementioned Commission Decision in so far as it finds that the non-application of the Irish air travel tax to transfer and transit passengers does not constitute State aid within the meaning of Article 107(1) TFEU.

(8) On 25 July 2012 the Commission adopted its decision on the fifth aid measure. It found that Ireland had granted State aid in the form of a lower air travel tax applicable to flights to destinations no more than 300 kilometres from Dublin Airport between 30 March 2009 and 2011. Since that State aid was unlawful and incompatible with the internal market, the decision ordered Ireland to recover the incompatible aid from the beneficiaries.

([1]) Judgment of 25.11.2014, *Ryanair* v *Commission*, T-512/11, EU:T:2014:989.
([2]) C (2011) 4932 final of 13.7.2011, in State aid SA.29064 (2011/NN) – Ireland, *Air Transport — Exemptions from air passenger tax*, OJ C 306, 18.10.2011, p. 10.

(9) By judgment of 25 November 2014 in Case T-512/11, the General Court annulled the Commission decision of 13 July 2011 in so far as it found that the non-application of the Irish air travel tax to transfer and transit passengers does not constitute State aid within the meaning of Article 107(1) TFEU. The General Court concluded that the Commission should have initiated the formal investigation procedure provided for in Article 108(2) TFEU.

(10) By judgment of 5 February 2015, the General Court annulled the decision of 25 July 2012 in so far as it ordered the recovery of aid from the beneficiaries for an amount which is set at EUR 8 per passenger ([3]). The Commission has appealed that judgment to the Court of Justice ([4]).

(11) The present decision is taken to comply with the judgment in Case T-512/11 and relates to the alleged aid stemming from the non-application of the tax to transfer and transit passengers. It does not concern the amount of the aid to be recovered from the beneficiaries under the decision of 25 July 2012.

2. **DETAILED DESCRIPTION OF THE MEASURE**

(12) As of 30 March 2009, the Irish authorities introduced an excise duty referred to as the '*air travel tax*' (hereinafter 'ATT') which airline operators are liable to pay in respect of '*every departure of a passenger on an aircraft from an airport*' located in Ireland. The tax is based on section 55(2) of the Finance (No 2) Act 2008 ('the Finance Act').

(13) It is apparent from section 55(1) of the Finance Act that the definition of 'passenger' exempts transfer and transit passengers from payment of the tax. Pursuant to that provision, a transfer passenger is '*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 hour*'. Likewise, a transit passenger is '*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.*'

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

(15) As of 1 March 2011, the rates were changed into one single rate of EUR 3 applicable to all departures, regardless of the distance travelled.

3. **STATE AID COMPLAINT**

(16) The complainant claimed that the ATT, through a number of measures, resulted in illegal and incompatible State aid. As set out above, the present decision only concerns the non-application of the ATT to transfer and transit passengers.

(17) According to the complainant, the non-application of the tax to transfer and transit passengers constituted illegal and incompatible State aid granted in particular to Dublin Airport Authority (DAA) and to Aer Lingus, which operates a high proportion of flights carrying transfer and transit passengers.

(18) The complainant estimates the exclusion of transfer and transit passengers from the tax to result in State aid amounting to at least EUR 8,6 million per year.

4. **OPINION OF THE IRISH AUTHORITIES AS COMMUNICATED TO THE COMMISSION IN THE PRELIMINARY ASSESSMENT PROCEDURE**

(19) In the preliminary assessment procedure, the Irish authorities informed the Commission, by letter of 15 October 2009, that in their opinion none of the alleged aid measures amount to aid within the meaning of Article 107(1) of the TFEU.

([3]) Judgment of 5 February 2015, *Aer Lingus Ltd* v *European Commission*, T-473/12, ECLI:EU:T:2015:78.
([4]) C-165/15 P *Commission* v *Ryanair*, pending.

(20) With respect to the non-application of the ATT to transfer and transit passengers, the Irish authorities declared that it is intended to ensure clarity of application and to avoid over-application of the ATT, i.e. to ensure that a person would not be discriminated against if they had to stopover in an airport that was not their final destination and such a stopover was required in order to get to the final destination *or* the airline journey to a final destination included a stopover. The Irish authorities illustrated their view with the example of the route Dublin-Shannon-New York:

— If there was no exemption for *transit passengers*, the view might be taken that there is a liability for the tax in respect of a passenger travelling from Shannon to Dublin where that passenger originally boarded the Dublin-bound plane in the United States. According to Ireland, that would not be appropriate as the flight is clearly US-Dublin, and the fact of the stopover should not generate any ATT liability. For flights leaving Ireland with a stopover, the only aim of the exemption would be to ensure that both legs of the journey do not have to be taxed separately. In the case of a Dublin-New York flight with a Shannon stop, the appropriate rate of ATT is EUR 10, and the exemption simply provides that the question of the Dublin-Shannon element of the journey being separately subject to the EUR 2 rate of ATT does not arise.

— According to the Irish authorities, *'In respect of transfer passengers, the exemption merely ensures that the first leg of an overall journey isn't subject to ATT'* ([5]).

— Based on information provided by the Irish authorities in the preliminary investigation stage, the detailed rules for the taxation of a flight from New York to Dublin and vice versa, with a stopover in Shannon can be summarised as follows:

Flight	**Tax payable (EUR)**
New York-Shannon-Dublin	Zero
New York-Dublin	Zero
Dublin-Shannon-New York	10
Dublin-New York	10

— Moreover, the Irish authorities pointed out that transfer and transit passengers exclusions are normal in air travel taxes operated by other countries, for example the United Kingdom.

5. **COMMISSION DECISION AFTER THE PRELIMINARY ASSESSMENT AND THE RULING BY THE GENERAL COURT**

(21) In order to determine whether the measure at issue constitutes State aid within the meaning of Article 107(1) TFEU, the Commission assessed the selective character of the measure in application of Article 107(1) TFEU, which stipulates that 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. That provision requires assessment of whether, under a particular legal regime, a national measure is such as to favour '*certain undertakings or the production of certain goods*' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation ([6]).

([5]) See point 13 of the letter from the Irish authorities dated 15 October 2009.
([6]) See e.g. Case C-143/99 Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke [2001] ECR I-8365, paragraph 41; Case C-308/01 GIL Insurance and Others [2004] ECR I-4777, paragraph 68; and C-172/03 Heiser [2005] ECR I-1627, paragraph 40.

(22) In order to assess whether the measures at issue are selective, the Commission first identified the relevant tax system of reference. It noted that the taxable event of the ATT is the departure of a passenger from an airport situated in Ireland and concluded that the relevant tax system of reference is the taxation of air passenger transport. It considered that transfer and transit passengers are passengers departing form an Irish airport and thus would appear to be part of that reference system and that the exclusion of transfer and transit passengers departed from the normal application of that general tax framework ([7]).

(23) In accordance with the selectivity analysis set out by the Court, the Commission then examined whether the exclusion of transfer and transit passengers from the tax is justified by the nature or the general principles of the tax system in the Member State ([8]). It noted that the objective of the Irish system for taxation of air passenger transport is to raise revenue for the State budget. It referred to the arguments by the Irish authorities regarding neutrality between passengers, who cannot always determine itself the route to its final destination, and avoidance of double taxation for journeys to countries with similar taxes. The Commission also recalled that it, in a staff working document in 2005, had drawn Member States' attention to treatment of passengers in transit and of connecting flights and recommended the exclusion of such passengers from such taxes due to tax neutrality reasons and avoidance of double taxation. It concluded that the exclusion of transfer and transit passengers from the ATT was in the nature and logic of the identified tax system, mainly because it resulted in passengers being taxed the same way independently of the route travelled, instead of subjecting transfer and transit passengers to the tax twice for the same journey ([9]).

(24) In the action for the annulment of the Commission decision, the General Court examined whether the length and circumstances of the preliminary investigation procedure constitute indicia that the Commission encountered serious difficulties which ought to have given rise to doubts on its part, by verifying whether the procedure conducted by the Commission considerably exceeded what is normally required for a preliminary investigation carried out pursuant to Article 108(3) TFEU ([10]).

(25) It concluded that the excessive length of the preliminary examination procedure and the partially incomplete and insufficient content of the investigation carried out by the Commission permitted the inference that the Commission was not able, at the date of adoption of the contested decision, to resolve all the serious difficulties identified concerning the question whether the disputed measure submitted for its appraisal was selective and therefore constituted State aid within the meaning of Article 107(1) TFEU. The General Court found that in those circumstances, and 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.

(26) The General Court concluded that, in so far as it relates to the ATT exemption for transfer and transit passengers, the contested decision was adopted in breach of the applicant's procedural rights and must therefore be annulled. ([11])

6. **PRELIMINARY ASSESSMENT OF THE MEASURE**

6.1. **Existence of aid within the meaning of Article 107(1) TFEU**

6.1.1. *Introduction*

(27) Pursuant to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

([7]) See e.g. Case C-487/06 P British Aggregates, [2008] ECR I-10505, paragraphs 81-83.
([8]) See e.g. Case 173/73 Italy v Commission [1974] ECR 709, as well as point 13 *et seq* of Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.
([9]) Reasoning in recitals (30)-(32), conclusion in recital (37) of the Commission decision C (2011) 4932 final of 13.7.2011.
([10]) Judgment of 25.11.2014, *Ryanair* v *Commission*, T-512/11, EU:T:2014:989, paragraph 67.
([11]) Judgment of 25.11.2014, *Ryanair* v *Commission*, T-512/11, EU:T:2014:989, paragraph 106.

(28) In order to be caught by Article 107(1) TFEU, a measure must be selective ([12]). The Court has held that that provision requires assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation ([13]).

(29) The selective advantage may derive from an exception to the tax provisions of a legislative, regulatory or administrative nature or from a discretionary practice on the part of the tax authorities. However, the selective nature of a measure may be justified by *'the nature or general scheme of the system'* ([14]). The Commission must therefore examine whether such exemptions are justified by the nature or the general principles of the tax system in the Member State. If that is the case, the measure is not considered to be aid within the meaning of Article 107(1) TFEU.

(30) In particular, and as the General Court recalled in its judgment of 25 November 2014, in order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' tax regime applicable in the Member State concerned. It is in relation to that common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in comparable factual and legal situations.

(31) However, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil the condition of selectivity. Thus, a measure which constitutes an exception to the application of the general tax system may be justified if it is shown that that measure results directly from the basic or guiding principles of the tax system of the Member State concerned.

(32) The question whether the non-application of the ATT to transfer and transit passengers constitutes State aid must be assessed in the light of those principles.

6.1.2. *The precise scope of the ATT, the reasons for the ATT, and the reasons for the non-application of the ATT in relation to transfer and transit passengers*

(33) Before determining whether the non-application of the ATT to transfer and transit passengers appears to constitute State aid, it is necessary to further investigate the ATT in the light of the judgment of the General Court in Case T-512/11.

(34) The General Court found that, by including in recital 9 of the decision of 13 July 2011 a table intended to summarize the detailed rules for the taxation of a flight from New York to Dublin and vice versa, with a stopover in Shannon, the Commission had endorsed the view of the Irish authorities that it is the first leg of the journey which is exempt from payment of the ATT ([15]).

(35) The table at hand (reproduced also in recital (20) above) suggests that such a conclusion may not be correct. In the example of passengers travelling from New York to Dublin with a stopover in Shannon, the exclusion of transfer and transit passengers would seem to affect the second leg (Shannon – Dublin), instead of the first leg (New York – Shannon).

(36) The Commission therefore invites the Irish authorities to set out in detail how Section 55 must be interpreted, to illustrate with clear examples how it applies to all relevant categories of routes, to clarify whether it exempts specifically the second leg of a journey or more generally exempts all transfer and transit passengers, and to provide all other information which they consider useful in that respect. It also invites them to provide those examples in relation to the periods before and after the 2011 amendments.

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

([13]) See e.g. Case C-143/99 Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke [2001] ECR I-8365, paragraph 41; Case C-308/01 GIL Insurance and Others [2004] ECR I-4777, paragraph 68; and C-172/03 Heiser [2005] ECR I-1627, paragraph 40.

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

([15]) Paragraph 83 of the judgment.

(37) The General Court also found that there were inconsistencies between the content of the letter of the Irish authorities of 15 October 2009 and the Commission's decision of 13 July 2011 ([16]). Under those circumstances, the Commission invites the Irish authorities to set out again its reasons for the adoption of the ATT and to explain why the ATT is not charged in relation to transfer and transit passengers.

(38) In absence of the necessary further information, the following preliminary assessment of the measure is, at this stage, necessarily tentative.

6.1.3. *The 'normal' or reference system of taxation*

(39) First, it is necessary to identify the reference system of taxation.

(40) In its decision of 13 July 2011, the Commission found that the system of reference is the taxation of air passengers departing from an airport situated in Ireland ([17]). Thus, the reference system was understood as tax that is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland.

(41) 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.

(42) At this stage, however, 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.

6.1.4. *Does the non-application of the ATT in relation to transfer and transit passengers derogate from the system of reference?*

(43) Assuming 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, it is necessary to determine in relation to that tax regime whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in comparable factual and legal situations.

(44) 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.

(45) In that respect, the Commission notes 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 ([18]). The legal and factual situation differs in various respects; for instance, the entire journey involving two or more segments is sold as one and can be travelled with a single ticket, passengers typically do not have to reclaim their luggage when transferring, and checks on passengers and luggage are typically different. The business models of airlines focussing on point-to-point services and those operating services which may involve a transfer or transit are also very different.

([16]) Paragraph 83-102 of the judgment.
([17]) Recital (26), last clause of the Commission decision C (2011) 4932 final of 13.7.2011.
([18]) See Section 6 on relevant markets and in particular recital 63 in Commission Decision of 27.6.2007 declaring a concentration to be incompatible with the common market and the EEA Agreement in Case No COMP/M.4439 – Ryanair/Aer Lingus, OJ C 47, 20.2.2008, p. 9.The General Court of the European Union upheld that decision in its judgment of 6.7.2010, *Ryanair Holdings plc* v *European Commission*, T-342/07, [2010] ECR II-03457.

(46) The Commission therefore doubts whether the non-application of the ATT derogates from the reference system of taxation by differentiating between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in comparable factual and legal situations, and consequently confers an advantage on certain airlines.

6.1.5. *Does the non-application of the ATT to transfer and transit passengers result directly from its basic and guiding principles?*

(47) Assuming that the measure conferred an advantage on certain airlines, it would be necessary to determine whether the non-application of the ATT to transfer and transit passengers directly results from its basic and guiding principles.

(48) As noted in recitals 12 to 16 in their letter of 15 October 2009, the Irish authorities declared that it is intended to ensure clarity of application and to avoid over-application of the ATT, i.e. to ensure that a person would not be discriminated against if they had to stopover in an airport that was not their final destination and such a stopover was required in order to get to the final destination *or* the airline journey to a final destination included a stopover. They also pointed out that transfer and transit passengers exclusions are normal in air travel taxes operated by other countries, for example the United Kingdom.

(49) Moreover, 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. Since an air journey may involve more than one departure from an airport in Ireland, the non-application of the tax to transfer and transit passengers seems to directly follow from that principle.

(50) Thus, the Commission preliminary concludes that even if the ATT conferred an advantage on certain airlines, the non-application of the tax in relation to transfer and transit passenger may be justified by the nature and general scheme of that tax. That conclusion may, however, have to be revised in view of the information gathered in the formal investigation procedure.

6.1.6. *Conclusion on existence of aid*

(51) In light of the above, the Commission cannot at this stage exclude that the measure at issue is selective.

(52) The non-application of the ATT for transport of transfer and transit passengers results in a loss of tax revenue for the State and is therefore financed from State resources. Since such relief is decided upon by the national authorities, it is imputable to the State. The airline operators benefiting from the exclusion of transfer and transit passengers are undertakings that compete on markets that are open for competition and the reduced rate therefore distorts or threatens to distort competition on the internal market and is likely to affect trade between Member States.

(53) Since all criteria in Article 107(1) TFEU *a priori* could be fulfilled, the measure may constitute State aid to airline operators that have operated the routes benefitting from the exclusion of transport of transfer and transit passengers from the ATT.

6.2. **Compatibility of the aid with the TFEU**

(54) If the measure constitutes State aid, it is necessary to consider whether it can be declared compatible with the internal market.

(55) According to Article 107(3)(c) TFEU, aid may be considered to be compatible with the internal market if it aims at facilitating the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

(56) Any potential State aid stemming from the exclusion of transfer and transit passengers from the ATT does not appear to fall within the scope of any Commission Communication that was in force when such aid was granted and that sets out how it will exercise its discretion regarding the compatibility of State aid with the internal market pursuant to Article 107(3)(c) TFEU. The measure at issue is in force since 30 March 2009 (see recital (12) above). In particular, the alleged illegal aid does not seem to fall within the scope of either the Community guidelines on financing of airports and start-up aid to airlines departing from regional airports of 2005 ([19]), or the Guidelines on State aid to airports and airlines of 2014 ([20]).

(57) Equally, any aid stemming from the exclusion of transfer and transit passengers from the ATT does not appear to fall within any other exemption specified in paragraphs (2) or (3) of Article 107 TFEU.

(58) Consequently, the Commission has, at this stage, doubts as to the compatibility of the measure with the TFEU and in accordance with Article 4(4) of Regulation (EC) No 659/1999 the Commission has decided to initiate the formal investigation procedure, thereby inviting Ireland to submit its comments.

7. **DECISION**

(59) The Commission takes the preliminary view that the non-application of the ATT on transport of transfer and transit passengers may constitute State aid within the meaning of Article 107(1) TFEU.

(60) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) TFEU, requests Ireland to submit its comments and to provide all such information as may help to assess the measure, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

(61) The Commission wishes to remind Ireland that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

(62) The Commission warns Ireland that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.'

([19]) OJ C 312, 9.12.2005, p. 1. Those Guidelines entered into force on 9 January 2005 and expired on 3 April 2014. They provided for rules for the financing of airport infrastructure, for aid for the operation of airport infrastructure, for aid for airport services and for start-up aid to airlines.

([20]) OJ C 99, 4.4.2014, p. 3. Those Guidelines entered into force on 4 April 2014 and replaced the Guidelines of 2005. They provide for rules for investment aid for airports, operating aid for airports, start-up aid for airlines and aid of social character. They would apply to illegal operating aid for airports even if such aid was granted before 4 April 2014. Pursuant to point 172 of the Guidelines, '*the Commission will apply the principles set out in these guidelines to all cases concerning operating aid (pending notifications and unlawful non-notified aid) to airports even if the aid was granted before 4 April 2014 and the beginning of the transitional period.*' Consequently, the Guidelines of 2005 apply to all other forms of airport and airline aid that was granted between 9 January 2005 and 3 April 2014 and that falls within its scope.