V

(Ogłoszenia)

POSTĘPOWANIA ZWIĄZANE Z REALIZACJĄ POLITYKI KONKURENCJI

KOMISJA EUROPEJSKA

POMOC PAŃSTWA – IRLANDIA

Pomoc państwa SA.29064 (11/C) (ex 11/NN) – Transport lotniczy – Zwolnienia z pogłównego podatku lotniskowego

Zaproszenie do zgłaszania uwag zgodnie z art. 108 ust. 2 TFUE

(Tekst mający znaczenie dla EOG)

(2011/C 306/09)

Pismem z dnia 13 lipca 2011 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 TFUE dotyczącego wyżej wspomnianego środka pomocy.

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 Kancelarii ds. Pomocy Państwa w Dyrekcji Generalnej ds. Konkurencji Komisji Europejskiej na następujący adres lub numer faksu:

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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 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. 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. Na skutek przeprowadzonego postępowania w sprawie uchybienia zobowiązaniom państwa członkowskiego od dnia 1 marca 2011 r. stosuje się jednolitą stawkę w wysokości 3 EUR w stosunku do wszystkich odległości. Ponieważ zdarzeniem podlegającym opodatkowaniu jest wylot pasażera na pokładzie statku powietrznego, loty towarowe i inne rodzaje transportu nie wchodzą w zakres stosowania tego podatku.

Według skargi otrzymanej przez Komisję niestosowanie podatku w stosunku do pasażerów transferowych i tranzytowych oraz lotów towarowych stanowi niezgodną z prawem i ze wspólnym rynkiem pomoc państwa na korzyść linii lotniczych Aer Lingus i Aer Arann oraz operatora portu lotniczego Dublin Airport Authority (DAA), gdyż przedsiębiorstwa te wykazują względnie wysoki udział tego rodzaju

pasażerów i lotów. Ponadto niestosowanie tego podatku do usług morskich i transportu kolejowego stanowi domniemaną pomoc państwa na korzyść operatorów działających w tych sektorach. Skarżący wskazał poza tym na fakt, że z uwagi na to, iż kwota podatku jest stała, podatek ten w przypadku tanich przewoźników lotniczych ma większy udział w cenie biletu niż w przypadku tradycyjnych linii lotniczych. Oprócz tego skarżący twierdzi, że niższa stawka podatku przysparza korzyści Aer Arann, gdyż 50 % pasażerów tego przewoźnika podróżuje do docelowych portów lotniczych odległych maksymalnie o 300 km od portu lotniczego w Dublinie.

Według władz irlandzkich loty towarowe i inne rodzaje transportu niż transport lotniczy nie wchodzą w zakres stosowania tego podatku z uwagi na względnie proste jego zastosowanie. Polityka podatkowa nie jest w zamierzeniu ukierunkowana na to, by odpowiadać każdemu indywidualnemu modelowi działalności gospodarczej. Operatorzy towarowych usług przewozowych lub innych rodzajów transportu niż transport lotniczy nie wchodzą w zakres stosowania podatku za świadczenie takich usług. Wyłączenie ruchu transferowego i tranzytowego z zakresu stosowania podatku jest podyktowane neutralnością: ostatecznie to pasażerowie ponoszą koszty podatku, więc nie powinni oni być karani za to, że ich międzylądowanie ma miejsce w Irlandii. Ponadto władze irlandzkie sugerują, że to uregulowanie zapobiega ewentualnemu podwójnemu opodatkowaniu w przypadku, gdyby podobny podatek był pobierany w porcie lotniczym, w którym podróż się rozpoczyna. Jeśli chodzi o stosowanie stałej stawki podatku zamiast stawki proporcjonalnej do ceny biletu, uregulowanie to wynika z tego, że podatek ten jest podatkiem akcyzowym. Stosowanie stawki procentowej w stosunku do ceny biletu byłoby nie tylko obciążeniem administracyjnym, lecz także otwierałoby możliwość obejścia tego podatku, gdyż linie lotnicze próbowałyby wówczas obniżać swoje taryfy, a zwiększać jednocześnie przychody z opłat dodatkowych. W odniesieniu do niższej stawki podatku dla krótszych tras (obowiązującej do dnia 1 marca 2011 r.) władze irlandzkie wyjaśniły, że opierało się to na założeniu, że ceny biletów na loty do bliżej położonych miejsc docelowych są z reguły niższe. Władze irlandzkie podają także w wątpliwość, że niższa stawka stanowi korzyść dla Aer Arann, gdyż również skarżący obsługuje dużą część tras, w stosunku do których stosowana jest niższa stawka. Dlatego też władze irlandzkie nie podzielają opinii, że istnienie niższej stawki na krótsze trasy miałoby stanowić pomoc państwa na rzecz Aer Arann i Aer Lingus.

Aby stwierdzić, czy domniemane środki stanowią pomoc państwa, należy w niniejszym przypadku zbadać, czy spełnione jest kryterium selektywności, tzn. czy środki sprzyjają niektórym przedsiębiorstwom znajdującym się w sytuacji prawnej i faktycznej, która jest porównywalna pod kątem celu, jakiemu miały służyć przedmiotowe środki.

Inne rodzaje transportu niż transport lotniczy objęte są odrębnymi systemami prawnymi, regulacyjnymi i podatkowymi. Również ich faktyczna sytuacja jest inna niż sytuacja operatorów transportu lotniczego. Dlatego też wyłączenie innych rodzajów transportu z tego podatku nie jest selektywne.

Ponieważ operatorzy transportu towarowego funkcjonują w innym obszarze działalności i świadczą usługi dla innego rodzaju klientów, a transport towarowy i transport pasażerski nie są usługami zamiennymi, operatorzy tacy nie znajdują się w takiej samej sytuacji faktycznej, co operatorzy pasażerskiego transportu lotniczego. Wyłączenia ruchu towarowego z zakresu stosowania podatku nie można zatem określić jako selektywne.

Niestosowanie podatku do pasażerów transferowych i tranzytowych odpowiada logice i istocie systemu podatkowego i w związku z tym nie jest selektywne. Celem jest pobieranie podatku na podstawie odległości pomiędzy miejscem rozpoczęcia podróży i miejscem jej zakończenia. Niestosowanie podatku do pasażerów transferowych i tranzytowych jest logiczne, gdyż dzięki temu wszyscy pasażerowie są poddawani opodatkowaniu w ten sam sposób, niezależnie od trasy ich podróży (nie są zaś opodatkowywani zarówno za pierwszy, jak i drugi odcinek podróży). Wyłączenie pasażerów transferowych i tranzytowych z podatku uzasadnione jest poza tym zasadą unikania podwójnego opodatkowania.

Jeśli chodzi o stosowanie stałej stawki podatku zamiast stawki procentowej, należy zauważyć, że państwa członkowskie mają prawo wyboru pomiędzy stawką stałą a procentową. Podatki akcyzowe, takie jak przedmiotowy podatek, pobiera się zwykle w określonej kwocie za jednostkę, a nie w proporcji do wartości, jak to jest w przypadku podatków od sprzedaży. Stałe stawki podatkowe charakteryzują się zatem z natury rzeczy większym udziałem w cenie w przypadku niskich cen łącznych. Różnica pomiędzy wyższymi i niższymi cenami pozostaje jednak nietknięta. Nie wydaje się więc, by tradycyjne linie lotnicze odnosiły korzyść w porównaniu z tanimi przewoźnikami. Ponadto podatek, który jest proporcjonalny do ceny biletu, mógłby zachęcać przewoźników do obniżania taryf i jednoczesnego podwyższania transakcji lub kosztów dodatkowych.

Jeśli chodzi o różne wysokości stawek podatku stosowane w okresie od dnia 30 marca 2009 r. do dnia 1 marca 2011 r., w dokumencie roboczym służb Komisji stwierdzono, że nie może być dyskryminacji pomiędzy lotami krajowymi i międzynarodowymi. Zgodnie z praktyką decyzyjną Komisji rozróżnienie takie należy traktować jako selektywne, jeżeli nie ma na to logicznego uzasadnienia. Zostało to jasno stwierdzone przez Sąd. Argument wysuwany przez władze irlandzkie, że loty na dalekich dystansach są droższe i dlatego można pobierać wyższą opłatę bez ryzyka nieproporcjonalności w stosunku do ceny, jest bezzasadny, gdyż ceny biletów na loty krajowe niekoniecznie muszą być (istotnie) niższe niż ceny w przypadku lotów do innych docelowych portów lotniczych w UE. Wydaje się zatem, że niższa stawka podatku stanowi selektywną korzyść dla przedsiębiorstw w ramach układu odniesienia. Ponieważ również inne kryteria określone w art. 107 ust. 1 TFUE są spełnione, środek ten stanowi pomoc państwa.

Podsumowując, należy stwierdzić, że ani wyłączenie transportu towarowego i rodzajów transportu innych niż transport lotniczy, ani niestosowanie podatku do pasażerów transferowych i tranzytowych nie stanowią pomocy państwa w rozumieniu art. 107 ust. 1 TFUE. Stosowanie stałej stawki podatku w odróżnieniu od stawki procentowej w stosunku do ceny biletu również nie stanowi pomocy państwa. Stosowanie niższej stawki na loty krajowe w okresie od dnia 30 marca 2009 r. do dnia 1 marca 2011 r. wydaje się jednak stanowić pomoc państwa, w stosunku do której istnieją wątpliwości co do jej zgodności z rynkiem wewnętrznym.

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

TEKST PISMA

„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 an airline operator regarding alleged unlawful and illegal State aid measures, which were in place in 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, 11/NN.

2. DESCRIPTION OF THE ALLEGED AID

2.1. The Irish Air Travel Tax

(6) As of 30 March 2009, the Irish authorities introduced an excise duty on air passenger transport. The national legal basis for the tax is Section 55 of the Finance (No 2) Act 2008, which introduces an excise duty referred to as the "air travel tax" which the airlines operators are liable to pay in respect of "every departure of a passenger on an aircraft from an airport" located in Ireland. While the tax *in fine* is intended to be passed on to the passengers via the ticket price, it is thus the airline operators that are liable to pay the tax.

(7) 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.

(8) Following an investigation by the Commission regarding a possible infringement of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [1] and the Treaty provisions on free provision of services, the rates were changed as of 1 March 2011 so that a single tax rate of EUR 3 is applicable to all departures, regardless of the distance travelled.

(9) In the legal basis, a passenger is defined as a person other than a member of the crew of the aircraft travelling on an aircraft, but the definition explicitly excludes transfer and transit passengers. A *transfer passenger* is defined as 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 maximum six hours. 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. This means effectively that transfer and transit passengers fall outside of the scope of the tax.

Examples:	New York–Shannon–Dublin	Tax payable: EUR 0
	New York–Dublin	Tax payable: EUR 0
	Dublin–Shannon–New York	Tax payable: EUR 10
	Dublin–New York	Tax payable: EUR 10

(10) Since the taxable event is the departure of a *passenger on an aircraft*, cargo flights and other modes of transport fall outside of the scope of the tax.

2.2. Alleged illegal and unlawful State aid

(11) First, the complainant argues that the non-application of the tax to cargo transport results in State aid to cargo operator Aer Lingus and to Dublin Airport Authority (DAA), which manages, operates and develops Dublin, Cork and Shannon airports, and manages domestic and international airport retail and airport investment.

(12) Second, the complainant claims that the non-application of the tax to maritime services and rail transport results in State aid to operators in these sectors.

(13) Third, it is claimed that the non-application of the tax to transfer and transit passengers and cargo flights constituted illegal and incompatible State aid granted to DAA and to Air Lingus and Air Arann, since these undertakings have a relatively high proportion of such passengers and flights.

(14) Fourth, according to the complaint, the use of fixed tax rates (as opposed to the use of a tax that is proportional to the ticket price) imposes a proportionally heavier charge on low fare passengers and discriminate against the business models used by low-cost carriers, which are based on small margins and high numbers of passengers in order to maximise revenues from ancillary services. Therefore, low-cost carriers cannot pass the full cost of the tax on to their passengers.

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

(15) Fifth, the complainant claims that the differentiated tax rates favour Aer Arann since 50 % of the passengers carried by that airline travel to destinations located at less than 300 km from Dublin airport.

(16) The complainant estimates that the aid provided to DAA, Aer Lingus and Aer Arann stemming from the exemptions of cargo traffic, transfer and transit passengers and the lower tax rate for shorter flights in total amounts to at least EUR 50 million per year.

2.3. **The opinion of the Irish authorities**

(17) According to the Irish authorities, the use of a fixed tax rate instead of a proportion of the ticket price stems from the fact that the tax is an excise duty and, as such, a fixed amount. Apart from being administratively burdensome, using a percentage of the ticket price would open up for circumvention since airlines would then strive to reduce fares while raising revenues via ancillary fees (credit card handling, online check-in, baggage handling, charging for sports equipment carried, etc.).

(18) As to the lower tax rate for shorter routes, the Irish authorities explained that it was based on the fact that the prices are normally lower for closer destinations. They pointed out that there is only one domestic route on which the complainant and Aer Arann compete. On that route, close to 40 % of the flights are operated by the complainant. For routes abroad benefiting from the lower rate (western UK), the complainant operates more than 40 % of the scheduled flights, while Aer Arann and Aer Lingus have smaller shares. Therefore, the Irish authorities do not see how the fact that there is a lower rate for shorter routes would constitute State aid to Aer Arann and Aer Lingus.

(19) With respect to the non-imposition of the tax on cargo flights and other modes of transport than air transport, the Irish authorities argue that this is due to the relatively simple application of the tax. Taxation policy is not designed to fit with any particular individual business model. Any operator of cargo service or other modes of transport than air transport would fall outside of the scope of the tax for the provision of such services.

(20) As to the non-application of the tax on transfer and transit 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. The Irish authorities furthermore indicate that other countries with air passenger taxes, such as the United Kingdom, normally exclude transfer and transit passengers from the scope of the tax.

(21) Therefore, in the opinion of the Irish authorities, the tax and its non-applicability in respect of cargo transport and other means of transport than air transport and of certain categories of passengers does not amount to aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (hereinafter the "TFEU"). Neither do the use of a fixed tax rate and the differentiated tax rates in force between 30 March 2009 and 1 March 2011.

3. **ASSESSMENT**

3.1. **Existence of aid under Article 107(1) of the TFEU**

(22) By virtue of Article 107(1) of the 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".

(23) In order to be caught by Article 107(1) of the TFEU, a measure must thus be selective ([1]). The Court has held that that Article 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 ([2]).

(24) 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" ([3]). 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) of the TFEU.

(25) According to established case-law ([4]), a fiscal measure is selective if it constitutes a departure from the normal application of the general tax framework. First, the Commission therefore has to identify the relevant tax system of reference.

(26) As regards taxation, the Commission notes that, in principle, the definition of the system of taxation falls within the exclusive competence of the Member States.

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

([2]) See, for example, Cases C-143/99 (*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*) [2001] ECR I-8365, paragraph 41; C-308/01 (*GIL Insurance and Others*) [2004] ECR I-4777, paragraph 68; and C-172/03 (*Heiser*) [2005] ECR I-1627, paragraph 40; C-88/03 (*Portugal*) [2006] ECR I-7115, paragraph 54; C-172/03 (*Wolfgang Heiser* v *Finanzamt Innsbruck*) [2005] ECR I-1627, paragraph 40; and C-169/08 (*Presidente del Consiglio dei Ministri* v *Regione Sardegna*) [2009] ECR I-10821, paragraph 61.

([3]) See, for example, 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).

([4]) See, for example, the judgments in the mentioned Case C-88/2003 (*Portugal*), paragraph 56, and in Case C-487/08 P (*British Aggregates*) [2008] ECR I-10505, paragraphs 81-83.

In designing its taxation system, the Irish authorities chose, on the one hand, to define the taxable event of the air travel tax as the departure of a passenger from an airport situated in Ireland. The taxation legislation at hand aims at regulating the payment of duties on passengers departing on a plane from an airport located in Ireland. In the case at hand, the Commission considers the system of reference to be the taxation of air passengers departing from an airport situated in Ireland.

(27) The objective of the system of reference is to tax passengers departing on a plane from an airport located in Ireland in order to raise revenue for the State budget.

(28) First, *other modes of transport* than air transport fall outside of the reference system. Different legal, regulatory and taxation systems apply to different modes of transport. For example, aviation fuel is exempted from fuel taxation [1] and, as from 1 January 2012, the aviation sector will, contrary to some other modes of transport, be included in the EU Emission Trading Scheme [2]. It is therefore impossible to identify one single reference tax system that would apply to all modes of transport. Differences in the legal (regulatory) and factual situations of operators of various modes of transport can also justify the application of different tax systems (e.g. security and safety regulations are different, traffic management systems are different and the support for and need for infrastructure varies). Therefore, the Commission finds that other modes of transport than air transport are not to be included in the reference system for the air passenger taxes subject to assessment. The air travel tax can thus not be considered to provide the maritime and rail sectors with a selective advantage.

(29) With respect to *cargo operations*, the Commission notes that some legislative systems cover both air passenger and cargo transport [3], while other systems are separate for the two types of transport [4]. However, cargo traffic is a different business with a very different customer base. Also, from the view of the final consumer, the service provided by cargo operators is not substitutable to the one provided by operators in the passenger air transport market. Since cargo operators are not in the same factual situation as operators in the air passenger transport market, the fact that they are excluded from the scope of the reference system cannot be considered to provide them with a selective advantage.

(30) On the contrary, *transfer and transit passengers* are passengers departing from an Irish airport and thus would appear to be part of the reference system. The non-application of the taxes on such passengers constitutes a derogation from that system. In accordance with the selectivity analysis set out by the Court, it must however be determined whether the exemption derives directly from the basic or guiding principles of the tax system in the Member State. In this context, the Irish authorities referred to reasons of neutrality from the perspective of the passenger, who cannot always determine itself the route to its final destination. That would also be the reason why countries with similar taxes normally exclude such passengers.

(31) In this regard the Commission recalls that when it examined the possible establishment of a European flight tax in 2005, the Commission services provided some guidance about the feasibility of such taxes. In a 2005 staff working paper [5], the Commission pointed out the specific attention required by the issue of passengers in transit and of connecting flights. The Commission recommended the exclusion of transfer and transit passengers for tax neutrality reasons. Moreover, an exclusion of such passengers would avoid the risk of double taxation in the event that the airport of departure, situated in another Member State, levies a similar tax. The non-imposition of the tax on transfer and transit passengers allows different systems of air ticket taxes to coexist in the absence of tax harmonisation.

(32) The objective and structure of the travel tax system is to tax passengers departing on a plane from an airport located in Ireland in order to raise revenue for the State budget. If the tax was to be levied on transfer and transit passengers, the airline operator may have to pay the tax twice for a journey with a stopover. It therefore seems that the non-application of the tax on transfer and transit passengers, which results in passengers being taxed the same way independently of the route travelled, falls within the nature and logic of the relevant tax systems. In addition, the avoidance of double taxation justifies that transfer and transit passengers are not covered by the tax. Consequently, the Commission finds that the non-imposition of the tax on transport of transfer and transit passengers is in the nature and logic of the system and is, thus, not selective.

(33) With respect to the use of *fixed tax rates* instead of a percentage of the ticket price, it should be noted that the Member States, as part of their exclusive competence in designing their tax systems, are entitled to choose between fixed and proportional rates. By nature, fixed

[1] For example, Article 14(b) of Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283, 31.10.2003, p. 51) sets out that Member States shall exempt energy products supplied for use as fuel for air navigation other than private pleasure-flying from taxation.

[2] See Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ L 8, 13.1.2009, p. 3).

[3] For example, as mentioned, the EU Emission Trading Scheme will as from 2012 apply to the entire aviation industry.

[4] For example, while cargo transport is covered by VAT, this is not the case for passenger transport (see, for example, Article 371 (Annex X, Part B, point 10) of Council Directive 2006/112/EC of 28 November 2006 on the common system for value added tax (OJ L 347, 11.12.2006, p. 1), and Article 2(1)(c) of the same Directive according to which VAT should be levied on cargo transport).

[5] Commission staff working document, 1.9.2005, SEC(2005) 1067.

amounts represent a higher part of lower total prices. However, the difference between higher and lower prices is left untouched. The Commission therefore thinks that traditional airlines do not have an advantage in comparison with low-cost carriers. Moreover, as mentioned by the Irish authorities, proportional taxes could encourage companies to reduce fares and at the same time increase transaction or ancillary costs in order to circumvent the tax. Therefore, the Commission does not consider the use of fixed tax rates *per se* to be selective.

(34) As regards the period between 30 March 2009 and 1 March 2011, the Commission observes that the air travel tax system provided for two *different rates*: one general or normal rate applicable to nearly all flights and a reduced rate for journeys from an airport to a destination located no more than 300 km from Dublin airport. The Commission finds the normal rate to constitute part of the reference system, while the reduced rate, that is applicable to a well delimited category of flights, appears to be an exception from the reference system. The reduced rate does not seem to be justified on the basis of the distance between the beginning and the final destination of the journey. First, it is not applicable on the basis of the actual length of the journey, but on the basis of the distance between Dublin airport and the destination. Second, the structure and objective nature of the tax does not appear to be related to the distance of the journey, but with the fact of departing from an Irish airport. The connection with the fiscal authority, the taxable event and the externalities for the Irish society of passengers departing from an Irish airport is precisely the same regardless of the destination of the flight. Airline operators are also in the same legal and factual situation with regard to this objective. Moreover, the tax system is not characterised by an articulated differentiation in the tax level in relation to the flights distance, but it fixes only two rates: one for very short distance flights from Dublin airport and the other for all other flights. This criterion favours flights within Ireland and to certain western parts of the United Kingdom and, consequently, it discriminates between national and intra-Community flights. As pointed out in the mentioned Staff working paper, that several rates could be introduced, but that no discrimination could be made between national and intra-Community flights [1]. Such differentiation should be considered as selective if it is not within the nature or general scheme of the system. This has also been set out by the Court [2], which has stated that "since airport taxes directly and automatically influence the price of the journey, differences in the taxes to be paid by passengers will automatically be reflected in the transport cost, and thus, […], access to domestic flights will be favoured over access to intra-Community flights". In the case at hand, the Irish authorities argued that longer distance flights are more expensive and a higher charge could thus be raised without being disproportional in relation to the price. The Commission finds that the price of tickets to domestic destinations is not necessarily lower than the ones of flights to other EU destinations. The lower tax rate does therefore not appear to be justified by the nature or the general scheme of the air travel tax and is therefore a selective measure.

(35) The fact that the Irish authorities allowed a lower tax rate than the normal one to be applied 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 lower rate 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.

(36) Since all criteria in Article 107(1) of the TFEU seem to be fulfilled, the measure appears to constitute State aid to airline operators that have operated the routes benefiting from the reduced rate. It seems moreover that those routes are essentially operated by Irish air carriers (Air Lingus, Air Arann and Ryanair). Therefore, the Commission has to verify whether the reduced rate has been a means for the Irish authorities to provide an advantage to national air carriers compared to other EU operators.

(37) Consequently, the Commission does not consider that the exclusion of cargo traffic and of transport of transfer and transit passengers from the scope of the tax results in State aid within the meaning of Article 107(1) of the TFEU. Neither is the use of fixed tax rates caught by that Article.

(38) On the contrary, it appears that the lower tax rates applied in the case of a journey from an Irish airport to a destination located no more than 300 km from Dublin airport between 30 March 2009 and 1 March 2011 constitute State aid to air carriers operating the routes that have benefited from that lower rate.

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

(39) According to Article 107(3)(c) of the 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. The aid does not appear to fall within the scope of any guidelines for compatibility of State aid issued by the Commission in this context. As it appears to constitute an operating aid that discriminates between flights within the EU, it cannot be considered to be compatible directly under Article 107(3)(c) of the TFEU. Therefore, the Commission has doubts as to the compatibility of the aid under that Article.

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

[1] Commission staff working paper, 1.9.2005, SEC(2005) 1067, p. 5.
[2] See, for example, Cases C-92/01 (*Georgios Stylianakis* v *Elliniko Dimosio*) [2003] ECR I-1291, paragraph 28; and C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, paragraph 20.

(41) Consequently, the Commission has, at this stage, doubts as to the compatibility of the aid measure with the TFEU and in accordance with Article 4(4) of Regulation (EC) No 659/1999 [1] the Commission has decided to open the formal investigation procedure, thereby inviting Ireland to submit its comments.

4. **DECISION**

(42) The Commission has decided that the non-application of the air travel tax on cargo flights and other means of transport than air transport, as well as on transfer and transit passengers does not constitute State aid within the meaning of Article 107(1) of the TFEU. The Commission find that the use of a fixed rate as opposed to a proportion of the ticket price does not fall within the scope of that Article. However, the Commission finds that the use of a lower rate over the period 30 March 2009 to 1 March 2011 for flights within 300 km from Dublin airport seems to constitute State aid to the air carriers that have operated the routes benefiting from it and, at this stage, it finds no basis for compatibility thereof.

(43) In light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the TFEU, requests Ireland to submit its comments and to provide all information that 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 all recipients of the aid immediately.

(44) 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."

[1] OJ L 83, 27.3.1999, p. 1.