JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

5 February 2015 (*)

(State aid — Irish tax on air passengers — Lower rate for destinations no more than 300 km from Dublin — Decision declaring the aid incompatible with the internal market and ordering its recovery — Advantage — Selective nature — Identification of the beneficiaries of the aid — Article 14 of Regulation (EC) No 659/1999 — Obligation to state reasons)

In Case T−500/12,

Ryanair Ltd, established in Dublin (Ireland), represented by B. Kennelly, Barrister, E. Vahida and I.-G. Metaxas-Maragkidis, lawyers,

applicant,

supported by

Aer Lingus Ltd, represented by K. Bacon, D. Scannell, D. Bailey, Barristers, and A. Burnside, Solicitor,

intervener,

v

European Commission, represented by L. Flynn, D. Grespan and T. Maxian Rusche, acting as Agents,

defendant,

supported by

Ireland, represented by E. Creedon, A. Joyce and J. Quaney, acting as Agents, assisted by E. Regan, SC, and B. Doherty, Barrister,

intervener,

APPLICATION for annulment of Commission Decision 2013/199/EU of 25 July 2012 on State aid Case SA.29064 (11/C, ex 11/NN) — Differentiated air travel tax rates implemented by Ireland (OJ 2013 L 119, p. 30),

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis (Rapporteur), President, O. Czúcz and A. Popescu, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 5 June 2014,

gives the following

Judgment

Background to the dispute

1 The applicant, Ryanair Ltd, is a low-fares airline established in Ireland that operates more than 1 300 direct routes between some 170 airports across 28 countries in Europe and North Africa. Ryanair operates predominantly 'short-haul' flights, of less than 3 200 km or of less than 3 hours in duration.

2 By Section 55 of the Finance Act (No. 2) 2008 ('the Finance Act'), Ireland introduced an excise duty, known as the air travel tax ('ATT'), payable as from 30 March 2009, the date on which the Finance Act came into force.

3 The Finance Act provides that the ATT is to be charged directly to airline operators in respect of every departure of a passenger on an aircraft from an airport situated in Ireland (with the exception of airports carrying fewer than 10 000 passengers a year, and subsequently, as from 3 June 2009, 50 000 passengers a year) and becomes due when a passenger departs from an airport on an aircraft capable of carrying more than 20 passengers and not used for State or military purposes. While the tax is intended ultimately to be passed on to passengers through the ticket price, it is the airline operators that are accountable for it and liable to pay it.

4 When it was introduced, the ATT was levied on the basis of the distance between the airport of departure and the airport of arrival, at the rate of EUR 2 in the case of a flight from an airport to a destination no more than 300 km from Dublin airport and EUR 10 in all other cases.

5 On 21 July 2009, the European Commission registered two separate complaints, lodged by the applicant, one pursuant to Article 20(2) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the other pursuant to Article 56 TFEU and 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 (Recast) (OJ 2008 L 293, p. 3), concerning several aspects of the ATT implemented by Ireland.

6 In response to the second complaint, the Commission first initiated an investigation regarding possible infringement of Article 56 TFEU on freedom to provide services, and of Regulation No 1008/2008. A letter of formal notice was issued by the Commission to the Irish authorities on that basis on 18 March 2010 ('the letter of formal notice'). Following that letter of formal notice, the tax rates were changed, so that, from 1 March 2011, a single tax rate of EUR 3 was applied to all departures regardless of the distance travelled. The Commission's investigation relating to Article 56 TFEU and to Regulation No 1008/2008 was therefore concluded.

7 The first complaint, concerning the application of the State aid rules, objected to, inter alia, the fact that the lower rate (EUR 2 instead of EUR 10) mainly benefited domestic airlines such as Aer Arann, which operated the majority of their flights to destinations no more than 300 km from Dublin airport. That complaint also stated that the flat-rate amount of the tax was discriminatory since it represented a significantly higher proportion of the ticket price for low-fare airlines than for traditional airlines. Lastly, it was alleged that the non-application of the ATT to transit and transfer passengers constituted unlawful State aid to the advantage of the airlines Aer Lingus Ltd and Aer Arann, because those companies had a relatively high proportion of passengers and flights in those categories.

8 By letter of 13 July 2011, the Commission notified Ireland of its decision to open the formal investigation procedure laid down in Article 108(2) TFEU in respect of the lower national

rate of ATT for the period between 30 March 2009 and 1 March 2011. The Commission asked the Irish authorities to forward a copy of the decision to the beneficiaries.

9 By a decision of 13 July 2011, a summary of which was published in the Official Journal of the European Union (OJ 2011 C 306, p.10), adopted at the end of the preliminary examination, the Commission found, inter alia, that non-application of the ATT to transfer and transit passengers and the use of a flat−rate tax did not constitute State aid within the meaning of Article 107(1) TFEU. However, it considered that the application of a lower national rate between 30 March 2009 and 1 March 2011 appeared to constitute State aid, raising questions as to compatibility with the internal market, inasmuch as it unlawfully benefited domestic flights as opposed to cross-border flights. It therefore opened the formal investigation procedure in respect of this latter measure, inviting the parties concerned to submit their observations on the measure at issue.

10 The Irish authorities submitted their observations on 15 September 2011. Of the parties concerned, only the applicant submitted observations to the Commission, on 17 November 2011.

11 On 25 July 2012, the Commission adopted Decision 2013/199/EU concerning State aid case SA.29064 (11/C, ex 11/NN) — Differentiated air travel tax rates implemented by Ireland (OJ 2013 L 119, p. 30) ('the contested decision'). That decision was also notified to the applicant by letter from the Irish Department of Finance, received by the applicant on 6 September 2012.

12 The Commission concluded, in Article 1 of that decision, that the State aid which, in accordance with the Finance Act, took in the present case the form of a lower air travel tax rate applicable to all flights operated by an aircraft capable of carrying more than 20 passengers and not used for State or military purposes, departing from an airport with more than 10 000 passengers per year to a destination no more than 300 km from Dublin airport, unlawfully put into effect by Ireland between 30 March 2009 and 1 March 2011 ('the period concerned'), in breach of Article 108(3) TFEU, was incompatible with the internal market.

13 Article 4 of that decision provides that Ireland is to recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries. Those beneficiaries are identified in recital 70 of the contested decision as being the applicant, Aer Lingus, Aer Arann and other air carriers to be identified by Ireland. Recital 70 also states that the amount of the State aid amounts to the difference between the lower rate of the air travel tax and the standard rate of EUR 10 — that is to say, EUR 8 — levied on each passenger.

Procedure and forms of order sought by the parties

14 By application lodged at the Court Registry on 15 November 2012, the applicant brought the present action.

15 By document lodged at the Court Registry on 6 March 2013, Ireland sought leave to intervene in support of the Commission. By order of 25 April 2013, the President of the Sixth Chamber of the General Court granted Ireland leave to intervene.

16 By document lodged at the Court Registry on 7 March 2013, Aer Lingus sought leave to intervene in support of the applicant. After hearing the parties, the President of the Sixth Chamber of the General Court granted Aer Lingus leave to intervene by order of 25 April 2013.

17 Ireland and Aer Lingus lodged their statements in intervention on 25 June 2013. The Commission submitted observations only on the statement in intervention of Aer Lingus by document lodged at the Court Registry on 26 July 2013. On 21 August 2013, the applicant submitted its observations on the statements in intervention of Ireland and Aer Lingus.

18 The composition of the chambers of the Court having been altered, the Judge-Rapporteur was assigned to the Ninth Chamber, to which this case was, consequently, assigned.

19 The applicant, supported by Aer Lingus, claims that the Court should:

– annul Articles 1, 4, 5 and 6 of the contested decision;

– order the Commission to pay the costs.

20 The Commission, supported by Ireland, contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

21 The applicant puts forward five pleas in law in support of its application, alleging that, first, the Commission erred in law in finding that the EUR 10 rate of the ATT was the 'normal' or legitimate standard rate, secondly, the Commission committed an error of law and manifest errors of assessment when evaluating the advantage granted under the ATT, thirdly, the Commission committed an error of law and manifest errors of assessment in relation to the recovery decision, fourthly, the Commission failed to give notice of its recovery decision as required by Article 6 of Regulation No 659/1999 and Article 41 of the Charter of Fundamental Rights, and fifthly, the statement of reasons for the contested decision was inadequate.

22 The Court considers it appropriate to begin by examining the fifth plea in law, then the fourth plea in law, the first plea in law, and lastly the second and third pleas in law together.

The fifth plea in law, alleging a failure to state reasons for the contested decision

23 By the fifth plea in law, the applicant submits that the Commission gave insufficient reasons in the contested decision to explain, first, how the rate of EUR 10 could constitute the normal reference rate when that rate is contrary to both Article 56 TFEU and Regulation No 1008/2008, and, secondly, why its arguments relating to the particular competitive advantage which the ATT granted to the applicant's competitors, Aer Arann and Aer Lingus, were rejected. According to the applicant, since the Commission's practice in the contested decision departed from its established practice in its decisions, it should have provided more detailed reasoning for the contested decision as regards those issues.

24 The Commission, supported by Ireland, contests those arguments and submits that it was not required to address those questions in the contested decision, since they had not been raised by any third party or by the Irish authorities during the procedure for adoption of that decision. In any event, the Commission asserts that it clearly explained why it considered that the advantage constituted the difference between the two rates, without it being necessary to take into account the relative size of the advantage granted to the various beneficiaries.

25 It is settled case-law that the scope of the duty to state reasons depends upon the nature of the measure at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure so as to enable the EU judicature to review the legality of the measure and allow the persons concerned to ascertain the reasons for the measure, so that they can defend their rights and ascertain whether or not the decision is well founded. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question (judgments of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C−367/95 P, ECR, EU:C:1998:154, paragraph 63, and 30 November 2011 in *Sniace* v *Commission*, T−238/09, EU:T:2011:705, paragraph 37).

26 In particular, the Commission is not obliged to adopt a position on all the arguments relied on before it by the parties concerned. It is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (judgments of 1 July 2008 in *Chronopost and La Poste* v *UFEX and Others*, C−341/06 P and C−342/06 P, ECR, EU:C:2008:375, paragraph 96, and 3 March 2010 in *Freistaat Sachsen and Others* v *Commission*, T−102/07 and T−120/07, ECR, EU:T:2010:62, paragraph 180).

27 Lastly, it is apparent from the case-law that, although a decision of the Commission which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions, if it goes appreciably further than the previous decisions, the Commission must be explicit in its reasoning (judgments of 26 November 1975 in *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, 73/74, ECR, EU:C:1975:160, paragraph 31; 11 December 2008 in *Commission* v *Département du Loiret*, C−295/07 P, ECR, EU:C:2008:707, paragraph 44; and 29 September 2011 in *Elf Aquitaine* v *Commission*, C−521/09 P, ECR, EU:C:2011:620, paragraph 155).

28 The plea alleging failure to state sufficient reasons for the contested decision must be examined in the light of those principles.

29 In the first place, it is necessary to examine the applicant's argument that the Commission did not give reasons, or in any event sufficient reasons, for the contested decision as regards the order for recovery of the aid, without taking into account the alleged right to reimbursement, under EU law, of the airlines which paid the ATT at the higher rate of EUR 10 during the period concerned.

30 It must be noted, in that regard, that, since the concept of State aid must be applied to an objective situation appraised on the date on which the Commission takes its decision, it is the appraisals carried out on that date which must be taken into account in conducting that review (judgment of 27 September 2012 *France* v *Commission*, T−139/09, ECR, EU:T:2012:496, paragraph 52).

31 In the present case, even though the Commission was aware of the letter of formal notice sent to Ireland on 18 March 2010, the content of which is set out, in essence, in recital 66 of the contested decision, it was in no way required to take it into account at the stage of quantifying the aid and of its recovery, since, in accordance with the case-law referred to in paragraph 26 above, the Commission considered that it was not a fact having decisive importance in the context of the decision.

32 In that respect, the Commission explained, in recital 45 of the contested decision, why it considered that the rate of EUR 10 should be regarded as the reference rate for the purpose

of establishing the selective nature of the measure. It also explained why it considered that, under Article 14 of Regulation No 659/1999, it was required to order the recovery of the aid as established and quantified in the contested decision. Those considerations are sufficient to enable the EU judicature to review the legality of the measure and to allow the persons concerned to ascertain the reasons for the measure so that they can defend their rights and ascertain whether or not the decision is well founded, in accordance with the case-law referred to in paragraph 25 above.

33 It must also be noted that, by that argument, the applicant actually contests the validity of the Commission's assessments regarding the existence of State aid and the need to order its recovery, assessments which are called into question in the first and second pleas in law.

34 It is settled case-law that the obligation to state reasons is an essential procedural requirement and distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (judgments of 22 March 2001 in *France* v *Commission*, C−17/99, ECR, EU:C:2001:178, paragraph 35, and 18 January 2005 in *Confédération Nationale du Crédit Mutuel* v *Commission*, T−93/02, ECR, EU:T:2005:11, paragraph 67).

35 It is therefore necessary to reject the applicant's argument alleging a failure to state reasons for the contested decision in that the Commission did not take into account the airlines' alleged right to reimbursement of taxes paid on the basis of the ATT.

36 In the second place, as regards the alleged failure to state reasons in relation to the quantification of the aid at EUR 8 per passenger, it must be held, contrary to what is claimed by the applicant, that the Commission dealt with that issue in recital 54 et seq. of the contested decision. As regards, in particular, the issue of the advantage being proportionally more significant for the applicant's competitors, the Commission found in recital 56 of the contested decision that, '[i]n applying the lower rate to certain flights, Ryanair has, like all other airlines operating flights to which that rate applied, enjoyed an advantage corresponding to the difference between the two rates'.

37 It must therefore be held that the Commission gave sufficient reasons for the contested decision in that respect, independently of whether or not that reasoning is well founded, which will be examined in the context of the second and third pleas in law, taken together.

38 In the third place, as regards the applicant's complaint that the contested decision failed to take into account the applicant's argument that the imposition of the ATT at fixed rates favoured Aer Lingus since it did not take into account the ticket price paid by each passenger, and that the Commission should have taken into account the proportionally more disadvantageous effects of the aid on the applicant's situation, it must be noted that, as the Commission points out, that argument was definitively rejected by the decision of 13 July 2011, in which the Commission considered that that aspect of the ATT did not constitute State aid within the meaning of Article 107(1) TFEU, and that the applicant has not brought an action against that decision on that point. The Commission therefore cannot be criticised for not re-examining that aspect of the ATT in its final decision, which exclusively concerned other aspects of the ATT, namely the issue of the differentiated rates.

39 In the fourth place, as regards, lastly, the applicant's argument alleging that the Commission departed from its previous practice in its decisions, it must be pointed out that, since State aid is an objective concept, it cannot depend on a subjective assessment by the Commission and must be determined independently of its previous practice (see, to that effect, judgment of 27 September 2012 in *Wam Industriale* v *Commission*, T−303/10, EU:T:2012:505, paragraph 82).

40 In the present case, it suffices to note that the Commission provided sufficient reasons in the contested decision to explain why it considered that the measure in question constituted State aid. In any event, the question of whether it departed from its established practice in the present case, and the relevance of the arguments raised in that respect concern rather the examination of the substance of the measure, which will be carried out below.

41 Accordingly, it is necessary to reject the applicant's argument alleging failure to state reasons for the contested decision, and to reject the fifth plea in law in its entirety.

The fourth plea in law, alleging that the Commission failed to give notice of its recovery decision as required by Article 6 of Regulation No 659/1999 and Article 41 of the Charter of Fundamental Rights

42 By the fourth plea in law, the applicant claims that it was deprived of an opportunity to comment on the order for recovery of the aid in question, contrary to the provisions of Article 6 of Regulation No 659/1999. In that regard, it considers that the decision to initiate the procedure, published on 18 October 2011, contains no mention of the Commission's intention as regards the sum to be recovered from each beneficiary or of the identification of the beneficiaries in precise terms, as it appears in the contested decision. The applicant submits, moreover, that the Commission therefore infringed Article 41 of the Charter on the right to good administration.

43 The Commission, supported by Ireland, disputes the applicant's arguments.

44 It is necessary to recall, as a preliminary point, the wording of Article 6(1) of Regulation No 659/1999, which provides that '[t]he decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market', that 'the decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month' and that, '[i]n duly justified cases, the Commission may extend the prescribed period'.

45 It should also be pointed out that under Article 6 of Regulation No 659/1999 the decision to initiate the procedure must give the interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments (judgments of 23 October 2002 in *Diputación Foral de Álava and Others* v *Commission*, T−346/99 to T−348/99, ECR, EU:T:2002:259, paragraph 100, and 1 July 2009 in *KG Holding and Others* v *Commission*, T−81/07 to T−83/07, ECR, EU:T:2009:237, paragraph 117).

46 In accordance with the case-law, however, Article 108(2) TFEU does not require individual notice to be given to particular persons. Its sole purpose is to oblige the Commission to take steps to ensure that all persons who may be concerned are made aware and given an opportunity to put forward their arguments. Under those circumstances, the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated (judgment of 14 November 1984 in *Intermills* v *Commission*, 323/82, ECR, EU:C:1984:345, paragraph 17). The sole aim of that communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (judgment of 12 July 1973 in *Commission* v *Germany*, 70/72, ECR, EU:C:1973:87, paragraph 19).

47 In addition, as regards State aid schemes, as in the present case, it must be recalled that the Commission may confine itself to examining the characteristics of the scheme in question in

order to determine, in the grounds of its decision, whether, by reason of the terms of the scheme, it gives an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States (judgment of 7 March 2002 in *Italy* v *Commission*, C−310/99, ECR, EU:C:2002:143, paragraph 89).

48 Lastly, whilst it is true that no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered (judgment of 18 October 2007 in *Commission* v *France*, C−441/06, ECR, EU:C:2007:616, paragraph 29) and that it may, if necessary, delegate that task to the Member State concerned, the applicant cannot infer from that case-law that the Commission may in no case determine the exact amount of the aid to be recovered in its decision, if that proves possible. In such a case, fixing the exact amount of the aid to be recovered is, as the Commission notes, indeed desirable in order to ensure legal certainty.

49 As regards observance of Article 6 of Regulation No 659/1999 in the present case, it must be found that the Commission, in its decision to open the formal investigation procedure provided for in Article 108(2) TFEU, asked the interested parties to submit observations on the State aid measure consisting in the application of a lower domestic rate for the ATT during the period concerned.

50 The interested parties could therefore reasonably expect, since the lower rate of the ATT was characterised as State aid, that the Commission would order the recovery of the aid from its beneficiaries, even though the amount of the aid to be recovered was not quantified precisely at that stage of the procedure. Moreover, since, as the Commission rightly observes, it is the applicant itself which suggested, in its initial complaint, that the amount of the aid to be recovered should consist of the difference between the two rates of ATT applied during the period concerned, it cannot claim that it was unable to put forward its observations on that point in the context of the formal investigation procedure.

51 Likewise, since the Commission drew attention to the fact that, in accordance with Article 14 of Regulation No 659/1999, any aid which is unlawful and incompatible may be recovered from its beneficiary, the beneficiaries of the aid could expect that that aid would be subject to a recovery order and were in a position to make comments in that regard, which, moreover, the applicant did.

52 In addition, as the Commission rightly notes, it is clear from the observations submitted by the applicant on 17 November 2011 in the context of the formal investigation procedure that it had understood that the measure in question could constitute State aid, and the consequences that this could have as regards recovery.

53 In accordance with the case-law, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market, and it is permissible for the decision merely to summarise the relevant issues of fact and law, to include a preliminary assessment as to the aid character of the State measure in question and to set out its doubts as to the measure's compatibility with the common market (see, to that effect, judgment of 22 October 2008 in *TV2/Danmark and Others* v *Commission*, T−309/04, T−317/04, T−329/04 and T−336/04, ECR, EU:T:2008:457, paragraphs 138 and 139).

54 Consequently, the applicant also cannot claim that the principle of good administration, which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (see, to that effect, judgment of 21 November

1991 in *Technische Universität München*, C−269/90, ECR, EU:C:1991:438, paragraph 14) was infringed in the present case.

55 It must be held, therefore, that the Commission did not fail to fulfil its obligations under Article 6 of Regulation No 659/1999 in the present case, or infringe the principle of good administration.

56 Accordingly, the applicant's fourth plea in law must be rejected.

The first plea in law, alleging that the Commission erred in law in finding that the EUR 10 rate of the ATT was the 'normal' or legitimate standard rate

57 By the first plea in law, the applicant maintains that the Commission could not conclude, without erring in law, that the EUR 10 rate was the normal rate, for the purpose of examining the selectivity of the measure, since that rate was unlawful under EU law during the whole of the relevant period. The contested decision therefore contradicts the Commission's conclusion that the ATT infringed the freedom to provide services and Regulation No 1008/2008.

58 The applicant also considers that, in the present case, in contrast to typical State aid cases involving tax schemes, there was no pre-existing, general tax regime and a subsequently introduced rate to favour or discriminate against a specific category of tax-payers. Accordingly, since the ATT infringed Article 56 TFEU and Regulation No 1008/2008, neither the EUR 2 rate nor the EUR 10 rate could be regarded as the 'normal' rates of the reference system. In those circumstances, the appropriate reference rate as regards the ATT was the EUR 3 rate adopted by the Irish authorities in March 2011.

59 The applicant claims, lastly, that the Commission should have taken into account the fact that the higher EUR 10 rate was the subject of a vested right to reimbursement of that tax under EU law. That also means that the alleged advantage cannot be the difference between the two rates as a whole, but must be assessed in the light of that vested right of repayment enjoyed by operators which paid the EUR 10 rate during the relevant period.

60 Aer Lingus supports the applicant's arguments, except as regards the argument that the reference rate should have been that of EUR 3. The intervener submits, in that regard, that, if the EUR 10 rate was unlawful and could not serve as a frame of reference, the only lawful rate during the relevant period was the EUR 2 rate.

61 The Commission, supported by Ireland, disputes those arguments. At the hearing, the Commission also called into question the intervener's right to intervene, if not in support of the applicant's arguments, without formally raising a plea of inadmissibility in that respect.

62 It must be noted, in that regard, that the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union, which applies to the General Court by virtue of the first paragraph of Article 53 of that Statute, and Article 116(4) of the Rules of Procedure of the General Court give the intervener the right to set out arguments as well as pleas independently, in so far as they support the form of order sought by one of the main parties and are not entirely unconnected with the issues underlying the dispute, as established by the applicant and defendant, as that would otherwise change the subject-matter of the dispute (judgments of 15 June 2005 in *Regione autonoma della Sardegna* v *Commission*, T−171/02, ECR, EU:T:2005:219, paragraph 152, and 2 October 2009 in *Cyprus* v *Commission*, T−300/05 and T−316/05, EU:T:2009:380, paragraph 203; see also, to that effect, judgment of 23 February 1961 in *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, 30/59, ECR, EU:C:1961:2, p. 17).

63 In the present case, it must be considered that the intervener does support the form of order sought by the applicant, and that its arguments relating to the appropriate reference rate are not entirely unconnected with the issues underlying the dispute as established by the main parties.

64 It is necessary, therefore, to examine the substance of all the arguments raised by the intervener.

65 In that respect, and as a preliminary point, it must be noted that the concept of State aid is an objective one and that the question of whether there is an advantage within the meaning of Article 107(1) TFEU must be examined in the light of the anti-competitive effects caused by the aid measure in question, and not in the light of other factors such as the lawfulness of the measure by which the aid is granted (see, to that effect, judgments of 22 December 2008 in *British Aggregates* v *Commission*, C−487/06 P, ECR, EU:C:2008:757, paragraph 85 and the case-law cited, and 7 October 2010 in *DHL Aviation and DHL Hub Leipzig* v *Commission*, T−452/08, EU:T:2010:427, paragraph 40).

66 For that reason, the EU judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (see judgment in *British Aggregates* v *Commission*, paragraph 43 above, EU:C:2008:757, paragraph 111 and the case-law cited).

67 It is settled case-law that the concept of aid is more general than that of a subsidy. It embraces not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (see judgment of 8 November 2001 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C−143/99, ECR, EU:C:2001:598, paragraph 38 and the case-law cited).

68 For the purposes of applying Article 107(1) TFEU, the only question to be determined is whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' within the meaning of that article as compared with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure at issue (see, to that effect, judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 67 above, EU:C:2001:598, paragraph 41 and the case-law cited).

69 In accordance with the case-law of the Court of Justice, 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 that condition of selectivity (see, to that effect, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 67 above, EU:C:2001:598, paragraph 42 and the case-law cited).

70 In the present case, the Commission considered, in recital 52 of the contested decision, that the application of the ATT was liable to affect the revenues of airlines which had to pay that tax, by increasing the prices of tickets that they were capable of offering to their customers, or reducing the margin on each ticket sold, if the airlines decided not to pass the tax on to the customers.

71 Accordingly, the Commission found, in recital 53 of the contested decision, that the application of a reduced rate for a certain type of flights therefore had a smaller effect than the normal rate on the airlines offering that type of flights. Those airlines were relieved of a

cost they would normally have had to bear, and therefore had a smaller cost to pass on to their customers or bear themselves.

72 The Commission therefore concluded in recital 54 of the contested decision that the lower rate provided an advantage to airlines serving the routes to which that rate applied. The lower cost that they had to pass on to their customers or bear themselves represented a financial saving for those airlines and therefore improved their economic situation vis-à-vis other airlines competing in the air transport market. According to the Commission, that advantage corresponds to the difference between the lower rate of EUR 2 and the normal tax rate of EUR 10 during the period concerned.

73 It is not disputed that, in the present case, two different tax rates were applied to airlines' flights in Ireland during the period concerned, with the result that those which had to pay the lower tax rate of EUR 2 per passenger enjoyed an advantage by comparison with other airlines which had to pay an amount of EUR 10 per passenger during the same period.

74 Since the rate of EUR 3 was never actually applied during that period, the applicant cannot validly claim that the Commission should have taken into account that rate as the reference rate in order to establish the existence of a selective advantage.

75 It is necessary to recall the case-law cited in paragraph 65 above, according to which the existence of an advantage within the meaning of Article 107(1) TFEU must be examined in the light of the anti-competitive effects caused by the aid measure in question, and not in the light of other factors such as the lawfulness of the measure by which the aid is granted. Fixing a reference rate other than that actually applied during the period concerned would not allow all the effects of the measure in question to be fully apprehended.

76 In addition, the Commission already rejected that argument in recital 55 of the contested decision, where it considered that 'if an advantage is defined in a system with one lower tax rate and one high, applying a benchmark that is set somewhere in between those rates does not catch the entire advantage which has been granted', and the applicant has not called that finding into question.

77 The applicant contests however the selective nature of that advantage, more generally, since, in its view, the higher rate of EUR 10, which the Commission characterised as the normal reference rate in the contested decision, is unlawful under EU law and could not, therefore, serve as the reference rate.

78 According to the applicant, there is a right to reimbursement of taxes paid at the higher rate of EUR 10 before the national courts under Article 56 TFEU and Regulation No 1008/2008. The reference rate of EUR 10 used by the Commission in order to determine the selective nature of the measure is therefore incorrect.

79 As a preliminary point, it must be noted that the Commission considered that, in order to establish the selective nature of the measure, it was necessary, first of all, to determine the reference system. In recital 43 of the contested decision, the Commission defined the reference system as the taxation of air passengers departing on an aircraft from an airport in Ireland. The objective of that system is defined in the same recital as being to raise revenue for the State budget.

80 Next, in recitals 44 and 45 of the contested decision, the Commission examined whether the tax measure in question constituted a derogation from the reference system thus defined. It considered that, apart from certain destinations in the western United Kingdom, the lower rate only applied to domestic destinations and, according to the Irish authorities, only to

some 10 to 15% of all flights which were subject to the tax. That rate therefore could not, according to the Commission, be regarded as the normal tax rate. Accordingly, the higher rate of EUR 10 had to be considered the normal rate of the reference system, while the reduced rate of EUR 2, which was applicable to a well delimited category of flights, was an exception from that reference system.

81 The applicant's argument seeking to call into question the Commission's use of the higher rate of EUR 10 as the reference rate for the purpose of establishing the selective nature of the measure must be examined in the light of those considerations.

82 The applicant claims that a right to reimbursement of taxes paid at the higher rate of EUR 10 arises from the provisions of the Treaty concerning the freedom to provide services, and particularly Article 56 TFEU, which was allegedly infringed in the present case. That infringement was established by the Commission itself in the letter of formal notice. That rate therefore could not be used as the reference rate in order to establish the selective nature of the measure.

83 It must be pointed out in that respect — without it being necessary to rule on whether or not the Commission's finding in that letter is definitive — that the applicant's complaint is based on an erroneous premiss that the higher rate of EUR 10 is unlawful under Article 56 TFEU. In fact, as Ireland and the Commission rightly note, the latter merely found, in the letter of formal notice and subsequently in recital 66 of the contested decision, that the 'differentiated rates' of the ATT constituted a restriction on the freedom to provide services, since that differentiation imposed more onerous conditions on the operation of intra-Union flights than those imposed on domestic services, and not that the higher rate in itself constituted such a restriction.

84 In that regard, the case that gave rise to the judgment of 6 February 2003 in *Stylianakis* (C−92/01, ECR, EU:C:2003:72), on which the applicant relies, which concerned a similar situation where international flights were taxed more heavily than domestic flights, does not support the conclusion that the higher rate of EUR 10 is unlawful. In that judgment, the Court held that 'differences' in the taxes to be paid by passengers would automatically be reflected in the transport cost and would thus favour access to domestic flights over access to intra-Community flights (*Stylianakis*, EU:C:2003:72, paragraph 28), without indicating, however, that the higher rate was therefore unlawful and that it would have to be reimbursed before the national courts.

85 Furthermore, there are several means of remedying tax discrimination such as that found in the present case or in the case that gave rise to the judgment in *Stylianakis*, paragraph 84 above (EU:C:2003:72). The Member State concerned may decide to bring an end to that discrimination either by increasing the lower rate to the level of the higher rate, or, conversely, by reducing the higher rate to the level of the lower rate, or even by establishing a new single tax rate, as Ireland did in the present case by establishing a rate of EUR 3 per passenger as from 1 March 2011. It is therefore incorrect to claim, as the applicant does, that the higher rate is unlawful in itself, since it was the application of that rate in conjunction with a lower rate which gave rise to the restriction on the freedom to provide services.

86 Moreover, it must be noted that, as Ireland points out, such a right to reimbursement, even if it were proved, would not be automatic and would depend on a number of factors such as the applicable limitation periods for bringing such an action in national law, and the observance of general principles such as the absence of unjust enrichment.

87 In accordance with the case-law of the Court of Justice, although a tax levied in breach of EU law must normally be reimbursed where a request to that effect is made before the

national courts, that is not the case where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person and that reimbursement of the charge would constitute unjust enrichment of the latter (see judgment of 2 October 2003 in *Weber's Wine World and Others*, C−147/01, ECR, EU:C:2003:533, paragraph 94 and the case-law cited). That possibility cannot be ruled out automatically in the present case, since the ATT was intended to be passed on to the passengers, and that possibility was expressly acknowledged by the Commission in the contested decision (see paragraph 126 below).

88 In those circumstances, the Commission was not required to take into account the potential reimbursement claims before the national courts in order to be able to characterise the measure as State aid and, in particular, in order to consider that the higher tax rate of EUR 10 was the normal tax rate of the reference system. Since that rate was actually applied in the present case during the period concerned, the Commission was not required to base its analysis on such hypothetical reimbursement claims, which, moreover, were in no way certain to succeed, either under EU law or national law.

89 Lastly, as regards the applicant's argument that the Commission departed from its established decision-making practice since, in the present case, in contrast to typical State aid cases involving tax schemes, there was no pre-existing, general tax regime and a subsequently introduced rate to favour or discriminate against a specific category of tax-payers, it suffices to note that, as the Commission points out, Article 107(1) TFEU does not establish a distinction between measures of State intervention by reference to the techniques used by the national authorities (see, to that effect, judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C−106/09 P and C−107/09 P, ECR, EU:C:2011:732, paragraph 87 and the case-law cited). It is therefore irrelevant that the lower rate of EUR 2 was introduced by the same legislation as the EUR 10 rate, since the Commission has adequately established the reasons for which it considered that the rate of EUR 2 constituted a derogation from the higher rate of EUR 10, which was the 'normal' rate of the reference system in the present case, and those reasons have not been called into question by the applicant.

90 It must therefore be held, in view of all of those considerations, and in view of the factors mentioned by the Commission in recitals 44 and 45 of the contested decision as noted in paragraph 80 above, that the Commission did not err in law by characterising the higher rate of EUR 10 as the reference rate, for the purposes of determining the existence of a selective advantage in the contested decision and by concluding that the application of the different rates in the present case constituted State aid, within the meaning of Article 107(1) TFEU, in favour of airlines whose flights were subject to the lower rate of EUR 2 during the period concerned.

91 The applicant's first head of claim must therefore be rejected.

The second and third pleas in law, alleging that the Commission committed manifest errors of assessment when evaluating the advantage granted under the ATT and in relation to the recovery decision

92 By the second plea in law, the applicant considers that the Commission, when evaluating the advantage conferred by the ATT, should have taken into account the proportionate impact of the ATT on the different competing undertakings. Accordingly, the applicant alleges that the Commission failed to take into account the fact that the percentage of passengers carried by Aer Arann from Ireland to destinations less than 300 km from Dublin airport was approximately 50% in 2008, as compared to about 2% for the applicant.

93 Likewise, the applicant complains that the Commission took no account of the kind of flight to which the higher EUR 10 ATT applied (short-, medium- or long-haul), or of the total fare paid by passengers. In fact, Aer Lingus operates mainly business-class and long-haul flights, whereas Ryanair offers very low fares on short- or medium-haul routes. Therefore, the EUR 10 rate had a greater impact on it than on its competitors, because of its business model as a low-fare operator.

94 Lastly, the applicant argues that, since non-Irish carriers do not operate domestic flights, there is no competition between them and Ryanair in that market segment, so the Commission erred in law by finding, in recital 54 of the contested decision, that there was a competitive advantage.

95 Consequently, having regard to those differences between operators and to the different economic impact of the measure, the applicant contends that it could not have benefited from any advantage and, therefore, from any State aid granted under the ATT.

96 Aer Lingus does not support the applicant's claims under this second plea and considers that the relative extent of the advantage conferred on the various beneficiaries is irrelevant to the question of the existence of aid and may, at most, be relevant for determining the amount of aid to be recovered.

97 At the hearing, the Commission called into question the intervener's right to intervene, if not in support of the applicant's arguments, without formally raising a plea of inadmissibility in that respect.

98 However, for the same reasons as those set out in paragraphs 62 and 63 above, it must be considered that the intervener indeed supports the form of order sought by the applicant, seeking the annulment of the contested decision, and that its arguments relating to the quantification of the advantage are not entirely unconnected with the issues underlying the dispute as established by the main parties.

99 It is necessary, therefore, to examine the substance of all the arguments raised by the intervener.

100 In its third plea in law, the applicant argues, in the alternative, that, even if the Commission did not err in respect of quantification of the aid, its recovery order is unlawful under Article 14 of Regulation No 659/1999, in that it infringes several general principles of law, such as the principle of legal certainty, the principle of proportionality, and the right to good administration.

101 In the first place, the applicant claims that the recovery order failed to have regard to the extent to which the advantage concerned could be passed on to passengers. It maintains, in that regard, that, unlike its competitors, it could not pass on the whole of the EUR 10 tax to its customers, as its low fares would become disproportionately less attractive. The Commission should therefore have investigated the specific situation of each beneficiary and made separate recovery orders in respect of each of them. It maintains, moreover, that the Commission erred in law by finding, in recital 57 of the contested decision, that it could not pass on the cost of the tax to its passengers.

102 In the second place, the applicant alleges that the combination of the right to claim repayment in the national courts of the ATT paid under an unlawful measure and the obligation to recover the State aid will lead to serious competitive distortions between the alleged beneficiary airlines.

103 The Commission, supported by Ireland, disputes those arguments.

104 First, as regards the issue of the allegedly disproportionate impact of the ATT as a result of the application of fixed rates rather than a rate calculated on the basis of the ticket price, the Commission rightly noted that that aspect of the applicant's initial complaint was rejected and that the application of fixed rates was considered not to constitute State aid in the decision of 13 July 2011 not to raise objections against certain measures in the context of the ATT.

105 The applicant cannot therefore call into question that aspect of the ATT in its action against the contested decision, which concerns only the State aid arising from the application of differentiated rates.

106 This argument must therefore be rejected.

107 Secondly, as regards the allegedly more advantageous nature of the ATT for the applicant's competitors, it suffices to note, in accordance with the case-law referred to in paragraph 65 above, that the only relevant question is whether the applicant actually enjoyed an advantage within the meaning of Article 107(1) TFEU as a result of the application of the reduced rate of EUR 2 to some of its flights during the period concerned.

108 As noted in paragraph 73 above, it is not disputed that two different tax rates were actually applied in the present case to flights of airlines in Ireland during the period concerned, with the result that those which were required to pay the lower tax rate of EUR 2 per passenger enjoyed an advantage as compared with other airlines which were required to pay EUR 10 per passenger during the same period.

109 In response to those same arguments, the Commission considered, in recital 56 of the contested decision, that, in applying the lower rate of EUR 2 to certain flights, the applicant had, like all the other airlines operating flights to which that rate applied, enjoyed an advantage.

110 The applicant cannot validly rely on the fact that certain airlines could have benefited to a greater extent from the reduced rate of the ATT in order to prove that it did not itself obtain any advantage. The applicant does not dispute that it also was able to benefit from that reduced rate for some of its flights, but merely invokes the disproportionate impact of that tax on its business model as compared with its competitors.

111 As the intervener notes, such an argument is more relevant in order to determine whether the Commission was entitled to quantify the State aid at EUR 8 per passenger for all of the airlines, rather than considering that certain airlines whose flights were subject to the lower rate of EUR 2 obtained a proportionally greater advantage than others under the ATT, and that those which benefited less from the ATT therefore did not obtain any advantage.

112 Thirdly, as regards the applicant's arguments specifically intended to contest the quantification of the aid and the legality of the recovery order, as a preliminary point, it must be recalled that the objective of the obligation on a State to abolish aid found by the Commission to be incompatible with the internal market is to restore the previous situation. That objective is accomplished when the recipients have repaid the sum paid by way of unlawful aid, thereby forfeiting the advantage which they had enjoyed over their competitors on the market, and when the situation prior to payment of the aid is restored (see judgments of 17 June 1999 in *Belgium* v *Commission*, C−75/97, ECR, EU:C:1999:311, paragraphs 64 and 65 and the case-law cited, and 13 February 2012 in *Budapesti Erőmű* v *Commission*, T−80/06 and T−182/09, EU:T:2012:65, paragraph 107).

113 It must also be recalled that no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the internal market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient itself to work out that amount without overmuch difficulty (judgments of 12 October 2000 in *Spain* v *Commission*, C−480/98, ECR, EU:C:2000:559, paragraph 25, and 12 May 2005 in *Commission* v *Greece*, C−415/03, ECR, EU:C:2005:287, paragraph 39). Moreover, the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (judgments of 15 May 1997 in *TWD* v *Commission*, C−355/95 P, ECR, EU:C:1997:241, paragraph 21, and 29 April 2004 in *Italy* v *Commission*, C−298/00 P, ECR, EU:C:2004:240, paragraph 97).

114 However, if the Commission decides to order the recovery of a specific amount, it must — pursuant to its obligation to conduct a diligent and impartial examination of the case under Article 108 TFEU — assess, as accurately as the circumstances of the case will allow, the actual value of the benefit received from the aid by the beneficiary (see judgment of 29 March 2007 in *Scott* v *Commission*, T−366/00, ECR, EU:T:2007:99, paragraph 95 and the case-law cited).

115 In restoring the situation existing prior to the payment of the aid, the Commission is, on the one hand, obliged to ensure that the real advantage resulting from the aid is eliminated and thus to order recovery of the aid in full. The Commission may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, the Commission is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the aid received by the beneficiary (judgment in *Scott* v *Commission*, paragraph 114 above, EU:T:2007:99, paragraph 95).

116 The applicant disputes the Commission's finding in recital 57 of the contested decision, where it indicated that the applicant claimed not to have been able to pass the cost of the tax on to its passengers. The applicant submits that it informed the Commission of the difficulties and the competitive impact that passing on the tax of EUR 10 would have for a low-fare airline, but denies claiming that it could never pass on any of the ATT.

117 The Commission notes, in that respect, as it indicated in recital 57 of the contested decision, that each airline was free to decide on whether the tax should be entirely or partially passed on to the passengers. It then submits that, if an airline decides not to pass on entirely the costs of the tax, it does so because it considers that it is more advantageous to maintain lower prices in order to obtain a higher volume of sales than that which it would have obtained otherwise. That decision is freely decided upon by each beneficiary, but cannot have an impact on the amount of State aid to be recovered.

118 Accordingly, the Commission quantified the amount of aid to be recovered, in recital 70 of the contested decision, as being 'the difference between the lower rate of the [ATT] and the standard rate of EUR 10 (that is to say, EUR 8 per passenger) levied on each passenger'.

119 In so doing, the Commission committed an error of assessment and an error of law.

120 First of all, it must be noted that Section 55 of the Finance Act refers to the ATT as an excise duty to be charged, levied and paid in respect of every departure of a passenger on an aircraft from an airport located in Ireland, which Ireland also confirmed at the hearing.

121 An excise duty is, by definition, an indirect tax levied on the consumption of a particular good or service, by contrast with direct taxes such as taxes on income or on profits, which are paid directly by the undertakings.

122 In the present case, it is undisputed that the airlines were required, under the Finance Act, to apply the ATT at the rate of EUR 2 in respect of all flights subject to that rate. It is also common ground between the parties that pursuant to Article 23 of Regulation No 1008/2008, airlines were required to indicate the amount of ATT separately in the price of each ticket sold to their passengers. Thus, the ATT was formally intended to be passed on through the price of the flight ticket bought by the passenger, as indicated in recital 8 of the contested decision.

123 As the intervener notes, it is therefore necessary to make a distinction between the formal or legal passing on, concerning the manner in which the tax is lawfully levied and applied, and the economic passing on, which consists in determining to what extent the airline bore the economic cost of the ATT by possibly adjusting the ticket price exclusive of the ATT according to the rate of the ATT actually applicable, or, in the case of application of the ATT at the reduced rate of EUR 2, to what extent they actually retained the economic advantage arising from the application of that lower rate.

124 The Commission explained, in recital 53 of the contested decision, that the airlines which paid the tax at the reduced rate of EUR 2 had a smaller cost to pass on to their customers or to bear themselves. It then stated that that smaller cost represented financial resources that the airlines were able to economise and therefore improve their financial situation vis-à-vis other airlines.

125 In recital 57 of the contested decision, the Commission responded to the arguments of the Irish authorities, according to which no advantage existed for the airlines, since the tax was essentially a tax on consumption intended to be passed on to the passengers. The Commission considered, relying on the judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, paragraph 67 above (EU:C:2001:598), that, even in situations where there is a legal requirement to pass the tax in question on to the customers, a reduction from the normal rate of tax can confer a selective advantage on the airlines which must pay that tax at the reduced rate.

126 The Commission acknowledged, in the same recital of the contested decision, that, in the present case, the cost of the tax could be passed on to the customers, even though there was no mechanism which ensured that the tax was actually passed on, and that it was a choice left to each airline.

127 In a similar situation, the Court of Justice has itself held 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 (*Stylianakis*, paragraph 84 above, EU:C:2003:72, paragraph 28).

128 The Commission nevertheless submits that, even if the ATT was passed on, the airlines also enjoyed an advantage, since they could offer more attractive prices to their customers, which would have resulted in a higher turnover.

129 It must be held that, in a situation such as that in the present case, where the ATT was intended to be passed on to the passengers and where the economic advantage arising from the application of the reduced tax could also have been passed on to the passengers, the Commission cannot presume that the advantage actually obtained and retained by the airlines amounted, in all cases, to EUR 8 per passenger.

130 In such a case, the advantage actually obtained by the airlines does not necessarily consist in the difference between the two rates, but rather in the possibility of offering more attractive prices to their customers and thereby increasing their turnover, as the Commission itself acknowledged in recital 57 of the contested decision.

131 Accordingly, for airlines such as the applicant which paid the ATT at the lower rate of EUR 2, the Commission should have determined the extent to which they had actually passed on to their passengers the economic benefit resulting from the application of the ATT at the lower rate, in order to be able to quantify precisely the advantage which the airlines actually enjoyed, unless it decided to confer that task to the national authorities and provided the necessary information in that respect.

132 Thus, it is only if the applicant had systematically increased the price of its tickets excluding tax by EUR 8 per ticket for flights subject to the ATT at the rate of EUR 2 that it would have been possible to consider that the economic advantage resulting from the application of the differentiated rates amounted to EUR 8 per passenger for the applicant, since that advantage could not have been passed on, even partially, to the passengers.

133 It must be found however that the Commission did not, at any point in the contested decision or in the present proceedings, explain why that situation would be the normal one, rather than a situation in which the airlines passed on the advantage to their passengers in accordance with the stated objective of the ATT, and despite having acknowledged that such passing on of the advantage was possible (see paragraph 126 above).

134 In addition, the Commission did not take sufficient account of the particular situation of the market in the present case and of its competitive constraints, in so far as all the airlines operating flights of less than 300 km (calculated from Dublin airport) departing from an airport located in Ireland were subject to the ATT at the rate of EUR 2 per passenger. Thus, the Commission has not established how, in those circumstances, the airlines whose flights were subject to the ATT at the reduced rate of EUR 2 per passenger enjoyed an advantage corresponding to the difference between the two rates of ATT, namely EUR 8 per passenger.

135 It is necessary to recall that the recovery of aid must be limited to the financial advantages actually arising from the placing of the aid at the disposal of the beneficiary, and be proportionate to them (see, to that effect, judgment of 22 January 2013 in *Salzgitter* v *Commission*, T−308/00 RENV, ECR, EU:T:2013:30, paragraph 138).

136 Accordingly, although the advantage resulting from the application of a lower rate could consist in the improvement of the competitive position of airlines, because they could offer more competitive prices, the Commission should have merely ordered the recovery of the amounts actually corresponding to that advantage or, if it proved impossible to determine those amounts accurately in the decision, to confer that task to the national authorities and provide the necessary information in that respect, in accordance with the case-law cited in paragraph 113 above.

137 According to the Commission, if the applicant's line of argument were accepted, it would lead to a situation in which the Commission or the national authorities would be required to evaluate, in each individual case, the effects of the aid on the beneficiaries on the basis of their individual choices, which would run counter to the case-law referred to in paragraph 65 above, and the judgment of 15 December 2005 in *Unicredito Italiano* (C−148/04, ECR, EU:C:2005:774).

138 In the case that gave rise to that judgment, the Court of Justice recalled that the withdrawal of unlawful aid through its recovery is the logical consequence of the finding that it is

unlawful. That recovery for the purpose of re-establishing the previously existing situation cannot, in principle, be regarded as disproportionate to the objectives of the Treaty provisions on State aid. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see the judgment in *Unicredito Italiano*, paragraph 137 above, EU:C:2005:774, paragraph 113 and the case-law cited).

139 The Court of Justice held, therefore, that it would not be right to determine the amounts to be repaid in the light of various operations which could have been implemented by the undertakings if they had not opted for the type of operation which was coupled with the aid. That choice was made in the knowledge of the risk of recovery of aid granted contrary to the procedure laid down in Article 108(3) TFEU. Those undertakings could have avoided that risk by opting immediately for operations structured in other ways. In addition, re-establishing the *status quo ante* means returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the tax reduction (see, to that effect, judgment in *Unicredito Italiano*, paragraph 137 above, EU:C:2005:774, paragraphs 114 to 117).

140 According to the Court of Justice, that does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible. Re-establishing the *status quo ante* merely enables account to be taken, at the stage of recovery of the aid by the national authorities, of tax treatment which may be more favourable than the ordinary treatment which, in the absence of unlawful aid and in accordance with domestic rules which are compatible with EU law, would have been granted on the basis of the operation actually carried out (judgment in *Unicredito Italiano*, paragraph 137 above, EU:C:2005:774, paragraphs 118 to 119).

141 It must be pointed out however, that, in contrast to the case that gave rise to the judgment in *Unicredito Italiano*, paragraph 137 above (EU:C:2005:774), invoked by the Commission, the beneficiary undertakings in the present case could not have opted for an operation other than that which was coupled with the aid. They were required, under the national legislation applicable during the period concerned, to apply the ATT at the rate of EUR 2 per passenger for all flights of less than 300 km, calculated from Dublin airport, departing from an airport located in Ireland. For the same reasons, it was legally impossible to levy the ATT at the rate of EUR 10 from passengers on those flights.

142 It was indeed possible for them to increase the ticket price excluding tax in order to absorb the advantage resulting from the application of the ATT at the rate of EUR 2. However, the Commission could not determine the advantage actually obtained by the airlines without taking into account the circumstances of the particular case. Having regard to the operation of the ATT and the competitive constraints faced by airlines as regards the flights to which the ATT at the rate of EUR 2 was applicable (see paragraph 134 above), the Commission could not presume that the economic advantage resulting from the application of the reduced rate of ATT had not been passed on to the passengers at all.

143 Accordingly, the requirement — arising from the case-law referred to in paragraph 114 above — to assess, as accurately as the circumstances of the case will allow, the advantage actually enjoyed by the airlines in the present case because of the application of the reduced rate of ATT is not the same as reconstructing past events on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, as the Commission maintains; on the contrary, that requirement is intended to ensure that the beneficiary forfeits the advantage which it had over its competitors in the

market, nothing more and nothing less, and to restore the situation prior to payment of the aid.

144 In addition, the aid in the case that gave rise to the judgment in *Unicredito Italiano*, paragraph 137 above (EU:C:2005:774), consisted in a tax advantage in the form of a reduction to 12.5% of the rate of income tax for banks which merged or engaged in similar restructuring, for five consecutive tax years, subject to certain conditions. It is not disputed that income tax constitutes a charge which is actually and exclusively borne by the undertakings subject to it, unlike the ATT in the present case which, as an excise duty, was levied and collected by the airlines alone but which, ultimately, was actually paid and — at least partially if not totally — borne by the passengers.

145 Lastly, the Commission has not established to the requisite legal standard, in its decision, that the recovery of EUR 8 per passenger was necessary in order to ensure the re-establishment of the *status quo ante*, that is to say the restoration, as far as possible, of the situation which would have prevailed if the operations in question had been carried out without the tax reduction or, in other words, if the flights subject to the rate of EUR 2 per passenger had been subject to the rate of EUR 10 per passenger.

146 The recovery of an amount of EUR 8 per passenger from the airlines could not ensure the re-establishment of the situation which would have prevailed if the operations in question had been carried out without the grant of the aid concerned, since it is not possible, for the airlines, to recover retroactively from their customers the EUR 8 per passenger which should have been collected. The recovery of an amount of EUR 8 per passenger from the airlines is therefore not necessary in order to eliminate the distortion of competition caused by the competitive advantage which such aid affords (see, to that effect, judgment of 8 December 2011 in *Residex Capital IV*, C−275/10, ECR, EU:C:2011:814, paragraph 34 and the case-law cited). On the contrary, the recovery of such an amount would be liable to create additional distortions of competition, as the applicant rightly notes, since it could lead to the recovery of more from the airlines than the advantage they actually enjoyed.

147 The Commission should, therefore, have taken into account the particular features of the ATT as an excise duty intended to be passed on to passengers by the airlines as regards all flights subject to the rate of EUR 2 during the period concerned. Inasmuch as the economic advantage resulting from the application of that reduced rate could have been, even only partially, passed on to the passengers, the Commission was not entitled to consider that the advantage enjoyed by the airlines amounted automatically, in all cases, to EUR 8 per passenger.

148 That conclusion cannot be called into question by the fact, noted by the Commission, that the applicant had itself initially quantified the State aid in its complaint to the Commission as amounting to EUR 8 per passenger.

149 The Commission is obliged, where necessary, to extend its investigation of a complaint beyond a mere examination of the facts and points of law brought to its notice by the complainant and is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint, which may make it necessary for it to examine matters not expressly raised by the complainant or to depart from the matters raised by the complainant (see, to that effect, judgment in *Commission* v *Sytraval and Brink's France*, paragraph 25 above, EU:C:1998:154, paragraph 62).

150 Accordingly, it is necessary to uphold the applicant's second and third pleas in law, without it being necessary to examine the second part of the third plea in law and the additional

arguments raised by the intervener, and to annul the contested decision in so far as it quantifies the aid to be recovered from the airlines at EUR 8 per passenger.

151 In that respect, it must be noted that Article 4 of the contested decision provides for the recovery of the aid from the beneficiaries, which are identified in recital 70 of that decision, for an amount of EUR 8 per passenger, an amount which is also fixed in that recital.

152 According to settled case-law, the statement of reasons for a decision on State aid must be taken into account when interpreting the operative part of that decision (see judgment of 20 March 2014 in *Rousse Industry* v *Commission*, C−271/13 P, EU:C:2014:175, paragraph 69 and the case-law cited).

153 It is therefore necessary to annul Article 4 of the contested decision, read in the light of recital 70 of that decision, in so far as it orders the recovery of the aid, evaluated at EUR 8 per passenger, from the airlines which operated flights subject to the ATT at the lower rate of EUR 2 during the period concerned, and the action must be dismissed as to the remainder.

Costs

154 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

155 Since the contested decision must be annulled in part, the Commission must be ordered to pay its own costs, as well as half of the costs incurred by the applicant. The applicant must be ordered to pay half of its own costs.

156 Under Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. Accordingly, Ireland must be ordered to pay its own costs.

157 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener other than those mentioned in the paragraph 156 above to bear its own costs. Accordingly, the intervener must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. **Annuls Article 4 of Commission Decision 2013/199/EU of 25 July 2012 on State aid Case SA.29064 (11/C, ex 11/NN) — Differentiated air travel tax rates implemented by Ireland, in so far as it orders the recovery of the aid from the beneficiaries for an amount which is set at EUR 8 per passenger in recital 70 of that decision;**

2. **Dismisses the action as to the remainder;**

3. **Orders the European Commission to pay its own costs, as well as half of the costs incurred by Ryanair Ltd;**

4. **Orders Ryanair to pay half of its own costs;**

5. Orders Aer Lingus Ltd and Ireland to bear their own costs.

Berardis Czúcz Popescu

Delivered in open court in Luxembourg on 5 February 2015.

[Signatures]

Table of contents

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* Language of the case: English.