Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 December 2016[1]

(Appeal — State aid — National tax on air transport– Application of differentiated rates — Lower rate for flights to destinations no more than 300 km from the national airport — Advantage — Selective nature — Assessment where the fiscal measure is likely to constitute a restriction on the freedom to provide services — Recovery — Excise duty)

In Joined Cases C-164/15 P and C-165/15 P,

APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, lodged on 9 April 2015,

European Commission, represented by L. Flynn, D. Grespan, T. Maxian Rusche and B. Stromsky, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Aer Lingus Ltd, established in Dublin (Ireland), represented by K. Bacon and A. Robertson QC, and by D. Bailey, Barrister, instructed by A. Burnside, Solicitor,

applicant at first instance (C-164/15 P) and intervener at first instance (C-165/15 P),

Ryanair Designated Activity Company, formerly Ryanair Ltd, established in Dublin (Ireland), represented by B. Kennelly QC, I.-G. Metaxas-Maragkidis, dikigoros, and E. Vahida, avocat,

applicant at first instance (C-165/15 P),

Ireland, represented by E. Creedon, J. Quaney, and A. Joyce, acting as Agents, and by E. Regan, Senior Counsel, and B. Doherty, Barrister-at-Law

intervener at first instance (C-164/15 P and C-165/15 P),

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Vilaras (Rapporteur), J. Malenovský, M. Safjan and D. Šváby, Judges,

Advocate General: P. Mengozzi,

Registrar: L. Hewlett, Principal Administrator,

1 — Language of the case: English.

having regard to the written procedure and further to the hearing on 7 April 2016,

after hearing the Opinion of the Advocate General at the sitting on 5 July 2016,

gives the following

Judgment

1 By its appeals, the European Commission seeks to have set aside, first, in Case C-164/15 P, the judgment of the General Court of the European Union of 5 February 2015, *Aer Lingus* v *Commission* (T-473/12, not published, 'the Aer Lingus judgment', EU:T:2015:78) and, second, in Case C-165/15 P, the judgment of the General Court of the European Union of 5 February 2015, *Ryanair* v *Commission* (T-500/12, not published, 'the Ryanair judgment', EU:T:2015:73) (together, 'the judgments under appeal'), by which that court allowed in part the actions brought by Aer Lingus Ltd and Ryanair Designated Activity Company, formerly Ryanair Ltd ('Ryanair'), respectively, and annulled 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 rates implemented by Ireland (OJ 2013 L 119, p. 30) ('the decision at issue'), in so far as that article ordered that the aid be recovered from the beneficiaries in an amount which was set at EUR 8 per passenger in recital 70 of that decision.

2 By their cross-appeals, Aer Lingus and Ryanair also seek, respectively, the setting aside of the Aer Lingus judgment and the Ryanair judgment.

Legal context

Regulation (EC) No 659/1999

3 Article 14 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), entitled 'Recovery of aid', is worded as follows:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of [EU] law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court of Justice [of the European Union] pursuant to Article [278 TFEU], recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to [EU] law.'

Regulation (EC) No 1008/2008

4 Article 15(1) 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 [European Union] (OJ 2008 L 293, p. 3) provides as follows:

'[EU] air carriers shall be entitled to operate intra-Community air services.'

5 Article 23 of Regulation No 1008/2008, headed 'Information and non-discrimination', provides in paragraph 1 thereof as follows:

'Air fares and air rates available to the general public shall include the applicable conditions when offered or published in any form, including on the internet, for air services from an airport located in the territory of a Member State to which the Treaty applies. The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication. In addition to the indication of the final price, at least the following shall be specified:

(a) air fare or air rate;

(b) taxes;

(c) airport charges; and

(d) other charges, surcharges or fees, such as those related to security or fuel;

where the items listed under (b), (c) and (d) have been added to the air fare or air rate. Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an "opt-in" basis.'

Directive 2010/104/EU

6 Recitals 3 and 4 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) are worded as follows:

'(3) … The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. …

(4) The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. …'

7 Article 13 of Directive 2014/104, headed 'Passing-on defence', provides as follows:

'Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.'

Background to the dispute

8 The background to the dispute, as set out in paragraphs 1 to 13 of the judgments under appeal, may be summarised as follows.

9 As of 30 March 2009, Ireland introduced an excise duty, known as the air travel tax ('ATT'), payable by every passenger embarking on an aircraft departing from an airport situated in Ireland, with a few exceptions that are irrelevant to the present proceedings, and collected directly from the airline operators. The airline operators were accountable for ATT and liable to pay it, although they were free to pass the tax on to passengers by including it in the ticket price.

10 At the time of its introduction, ATT was calculated on the basis of the distance between the departure and the arrival airports and imposed two separate rates on airline operators, namely EUR 2 per passenger in the case of a flight to an airport located no more than 300 km from Dublin airport ('the lower rate of ATT') and EUR 10 per passenger in all other cases ('the higher rate of ATT').

11 On 21 July 2009, Ryanair lodged two separate complaints with the Commission regarding ATT, one alleging a breach of the State aid rules and the other based on Article 56 TFEU and on Regulation No 1008/2008. In response to the second complaint, the Commission launched an investigation regarding possible infringement of the provisions on freedom to provide services and, on 18 March 2010, sent the Irish authorities a letter of formal notice. Ireland then amended, as of 1 March 2011, the rules on calculating ATT and introduced a single rate of EUR 3 per passenger, applicable to all flights regardless of the distance travelled. The Commission then concluded its investigation.

12 In response to Ryanair's first complaint, on 13 July 2011 the Commission opened a formal investigation procedure, pursuant to Article 108(2) TFEU, in respect of the lower rate of ATT. The Commission adopted the decision at issue at the conclusion of that procedure.

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

14 Article 4(1) of the decision at issue required Ireland to recover the unlawful aid. Recital 70 of that decision stated that the amount of aid to be recovered was the difference between the lower rate of ATT and the higher rate, namely EUR 8 per passenger carried. That recital also identified Aer Lingus and Ryanair among the aid beneficiaries.

The proceedings before the General Court and the judgments under appeal

15 By applications lodged with the Registry of the General Court on 1 November 2012 (Case T-473/12) and 15 November 2012 (Case T-500/12), respectively, both Aer Lingus and Ryanair brought actions for the annulment of the decision at issue.

16 In Case T-473/12, Aer Lingus relied, in support of its action, on five pleas in law, alleging: (i) that the Commission erred in law in so far as, in the decision at issue, it classified the lower rate of ATT as 'State aid'; (ii) breach of the principles of legal certainty, effectiveness and sound administration, due to the fact that the decision at issue ordered that the aid be recovered; (iii) an error of law and a manifest error of assessment on the part of the Commission, as it failed to take account of the fact that ATT was passed on to passengers in classifying the measure as aid and quantifying the

advantage; (iv) breach of Article 14 of Regulation No 659/1999 and of the principles of proportionality and equal treatment, as a result of the order for recovery in the decision at issue; and (v) breach of the duty to state reasons.

17 In Case T-500/12, Ryanair relied on five pleas in law in support of its action, alleging: (i) an error in law vitiating the Commission's decision that the higher rate of ATT was the 'normal' or 'legitimate standard' rate; (ii) an error in law and manifest errors of assessment on the part of the Commission when evaluating the advantage granted by ATT; (iii) an error in law and manifest errors of assessment on the part of the Commission in relation to the recovery decision; (iv) failure to give notice of the Commission's recovery decision; and (v) that the statement of reasons for the decision at issue was inadequate.

18 In the judgments under appeal, the General Court, first, examined and rejected the fifth pleas in both applications, alleging breach of the duty to state reasons. Neither the appeal nor the cross-appeal are concerned with those aspects of the judgments under appeal.

19 Second, with regard in particular to the action brought by Ryanair, the General Court examined and rejected, in paragraphs 42 to 56 of the Ryanair judgment, that company's fourth plea in law. Neither the Commission's appeal in Case C-165/15 P nor Ryanair's cross-appeal in that case is concerned with that aspect of that judgment.

20 Third, the General Court examined and rejected the first pleas in law in the actions brought by Aer Lingus and Ryanair. In essence, that court concluded that the Commission had not erred in law in classifying the higher rate of ATT as the 'reference rate' for the purpose of establishing whether there was a selective advantage and in concluding that the application of differentiated rates in the present cases constituted State aid benefiting the airlines whose flights were subject to the lower rate of ATT during the relevant period.

21 Fourth, the General Court examined in detail Aer Lingus' third and fourth pleas and Ryanair's second and third pleas and upheld them in part.

22 In carrying out that examination, the General Court concluded that the Commission had committed 'an error of assessment and an error of law' in so far as it set the amount of aid to be recovered from the beneficiaries, including Aer Lingus and Ryanair, at EUR 8 for each passenger having taken flights benefiting from the lower rate of ATT, namely the difference between that rate and the higher rate. According to the General Court, as it was possible for the economic advantage obtained from the application of the lower rate of ATT to be passed on, be it only in part, to passengers, the Commission was not justified in taking the view that the advantage enjoyed by the airlines concerned was automatically, in all cases, EUR 8 per passenger.

23 In paragraph 124 of the Aer Lingus judgment, the General Court therefore concluded that, 'without it being necessary to rule on any infringement of the principles of proportionality and of equal treatment invoked' by Aer Lingus, the third and fourth pleas in its application had to be upheld.

24 Similarly, in paragraph 150 of the Ryanair judgment, the General Court considered that it was necessary to uphold Ryanair'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 Aer Lingus, intervener in that case in support of Ryanair.

25 Accordingly, in paragraph 1 of the operative part of the judgments under appeal, the General Court annulled Article 4 of the decision at issue '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'. In paragraph 2 of the operative part of those judgments, the General Court dismissed the actions as to the remainder.

Forms of order sought by the parties before the Court of Justice

26 The Commission claims that the Court should:

— set aside paragraph 1 of the operative part of the judgments under appeal;

— dismiss the actions before the General Court in their entirety or, in the alternative, refer the cases back to the General Court;

— dismiss the cross-appeals; and

— order the applicants at first instance to pay the costs or, in the alternative, reserve the costs of the two sets of proceedings.

27 Aer Lingus and Ryanair contend that the Court should:

— set aside paragraph 2 of the operative part of the judgments under appeal;

— annul the contested decision;

— dismiss the appeals; and

— order the Commission to pay the costs.

28 Ireland claims that the Court should:

— grant the Commission's appeals and dismiss the actions before the General Court; and

— dismiss the cross-appeals.

The requests seeking the reopening of the oral part of the procedure

29 By letter lodged at the Court Registry on 19 July 2016, Aer Lingus requested the Court to order that the oral procedure be reopened, pursuant to Article 83 of the Court's Rules of Procedure. In support of its request, Aer Lingus claims that it is necessary to define its position on the Advocate General's Opinion, in particular the arguments set out and the case-law cited in points 79, 80, 83 and 88 to 89 of the Opinion. Aer Lingus is also of the view that it should be given the opportunity to submit its observations on the pleas and arguments that were not considered before the General Court, in the event that the Court of Justice should set aside the Aer Lingus judgment and consider that the state of the proceedings permits it to give final judgment.

30 By letter lodged at the Court Registry on 18 August 2016, Ryanair indicated that it supported Aer Lingus' request that the oral procedure be reopened and also submitted a request that the oral procedure be reopened, essentially on the same grounds as those put forward by Aer Lingus.

31 It must be borne in mind that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for parties to submit observations in response to the Advocate General's Opinion (judgment of 4 September 2014, *Vnuk*, C-162/13, EU:C:2014:2146, paragraph 30 and the case-law cited).

32 Under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require the Advocate General's

involvement. The Court is not bound either by the conclusion reached by the Advocate General or by the reasoning which led to that conclusion. As a consequence, the fact that a party disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraphs 27 and 28 and the case-law cited).

33 However, the Court may, under Article 83 of its Rules of Procedure, at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where, after the close of that part of the procedure, a party has submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court.

34 That is not the position in the present cases. The Court, after hearing the Advocate General, considers that it has all the information necessary to give a ruling and that the case does not have to be examined in the light of a new fact which is of such a nature as to be a decisive factor for its decision or of an argument which has not been debated before it.

35 With regard, in particular, to the requests made by Aer Lingus and Ryanair to submit their observations on the pleas and arguments that were not examined by the General Court, in the event that this Court should set aside the judgments under appeal and consider that the state of the proceedings permits it to give final judgment, it follows from a reading of Article 168(1)(d), in conjunction with Article 173(1)(c) and Article 170(1) of the Court's Rules of Procedure, that the parties to an appeal are invited, in their appeal and in their reply, to submit any relevant plea in law or argument, in particular in the event that the Court, pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, decides to dispose of the case where the appeal is upheld. Accordingly, the parties have been given the opportunity, during both the written and the oral procedure, to submit their observations on all aspects of the case which they consider relevant. Therefore, the claim made by Aer Lingus and Ryanair that it is necessary to submit observations on the pleas in law and arguments that were not examined by the General Court cannot justify the reopening of the oral procedure.

36 In the light of the foregoing, the Court considers that there is no need to reopen the oral part of the procedure.

The cross-appeals

37 In support of their respective cross-appeals, which must be examined first as they dispute the very existence of State aid in the present cases, Aer Lingus and Ryanair both put forward a single ground of appeal, alleging that the General Court erred in law in rejecting the first pleas in their respective actions for annulment, by which they disputed the classification of the lower rate of ATT as State aid.

38 Each of those grounds of appeal may be divided into four parts, by which Aer Lingus and Ryanair dispute the legality of the Commission's decision, endorsed by the General Court, to take the higher rate of ATT, namely EUR 10 per passenger, as the 'normal' or reference rate in its assessment of the selective nature of the advantage deriving from the fact that certain flights were taxed at the lower rate of EUR 2 per passenger.

Preliminary observations

39 It should be recalled that, according to Article 107(1) TFEU, save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

40 According to settled case-law, the definition of 'aid' is more general than that of a 'subsidy', because it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 71 and the case-law cited).

41 Consequently, a measure whereby public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU. On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators, which is not therefore selective, do not constitute State aid within the meaning of Article 107 TFEU (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 72 and 73 and the case-law cited).

42 In the present cases, it is apparent from paragraphs 54 and 55 of the Aer Lingus judgment and paragraphs 79 and 80 of the Ryanair judgment that the Commission took the view, in the decision at issue, that in order to establish whether ATT was selective, it had to identify a 'reference' system and to determine whether that measure constituted a derogation from that system. Having established that the lower rate of ATT applied, essentially, only to domestic destinations and only to approximately 10% to 15% of all flights subject to ATT, the Commission concluded that the higher rate of ATT had to be considered the normal rate of the reference system, while the lower rate constituted an exception.

43 With regard to those considerations, before the General Court Aer Lingus and Ryanair merely criticised the use of the higher rate as the reference rate for the purpose of determining whether ATT was selective.

44 After examining and rejecting the arguments put forward in that regard by Aer Lingus and Ryanair, the General Court concluded, in paragraphs 76 and 90, respectively, of the Aer Lingus and Ryanair judgments, that the Commission did not err in law by characterising the higher rate of ATT as the 'reference rate' and, as a consequence, considering that the application of the different rates constituted State aid, within the meaning of Article 107(1) TFEU, in favour of airlines whose flights were subject to the lower rate of ATT during the period covered by the decision at issue.

45 It is that finding by the General Court which, according to Aer Lingus and Ryanair, is vitiated by an error of law on the grounds put forward in the various parts of their respective single grounds of appeal.

46 That is the context in which the Court is required to analyse the various parts of the single grounds of appeal of Ryanair and Aer Lingus, which seek to show that the General Court's reasoning is vitiated by an error of law, in that it endorsed the use of the higher rate of ATT as the reference rate and did not take into account the possibility that operators subject to the higher rate might be reimbursed in respect of part of that tax. The first part of Ryanair's single ground of appeal will be examined first, followed by the fourth part of that ground and, lastly, together, all the parts of Aer Lingus' single ground of appeal and the second and third parts of Ryanair's single ground of appeal.

The first part of Ryanair's single ground of appeal

Arguments of the parties

47 Ryanair takes issue with the General Court's rejection, in paragraphs 74 to 76 of the Ryanair judgment, of its argument that, for the purpose of determining whether ATT at the reduced rate constituted State aid, the appropriate reference rate was EUR 3, which was adopted by the Irish authorities in March 2011. According to Ryanair, the fact that the EUR 3 rate was not applied during the period covered by the decision at issue does not preclude its adoption as the reference rate. The EUR 10 rate never existed independently of the lower rate and the two rates were introduced and abolished at the same time. As a consequence, Ryanair submits that there was never a 'normal' or 'reference' rate in the present cases.

48 The Commission and the Irish Government maintain, as their principal argument, that the first part of the single ground of appeal under consideration is ineffective, as Ryanair simply takes issue with paragraph 74 of the Ryanair judgment and does not criticise the reasoning elaborated by the General Court in paragraphs 75 and 76 of that judgment, which are sufficient in themselves to justify the dismissal of Ryanair's argument before the General Court. In the alternative, the Commission and the Irish Government contend that Ryanair's arguments are unfounded.

Findings of the Court

49 Contrary to what the Commission and the Irish Government claim, the first part of Ryanair's single ground of appeal is not ineffective. Ryanair stated, in its appeal, that that part concerns not only paragraph 74 but also paragraphs 75 and 76 of the Ryanair judgment. Moreover, those three paragraphs develop, essentially, one and the same line of reasoning, based on the fact that, during the period covered by the decision at issue, the EUR 3 rate did not apply and could not therefore be used as the reference rate.

50 However, as regards the substance, Ryanair's arguments cannot succeed.

51 It is the Court's established case-law that, when appraising the requirement of selectivity, Article 107(1) TFEU 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 (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 75 and the case-law cited).

52 As the Advocate General observed, in essence, in point 41 of his Opinion, that assessment cannot be carried out by comparing the amount which the airlines subject to the lower rate of ATT were required to pay with a hypothetical tax amount, calculated on the basis or a rate which, as Ryanair itself accepts, did not apply to any flight or any airline during the period covered by the decision at issue. Thus, the General Court was correct to state, in paragraph 75 of the Ryanair judgment, that fixing a reference rate other than that actually applied during the period in question would not allow all the effects of ATT to be fully apprehended.

53 It follows that paragraphs 74 to 76 of the Ryanair judgment are not vitiated by the error of law alleged by Ryanair and that the first part of its single ground of appeal must be rejected.

The fourth part of Ryanair's single ground of appeal

Arguments of the parties

54 By the fourth part of its single ground of appeal, Ryanair submits that, contrary to the view taken by the General Court in paragraph 89 of the Ryanair judgment, the fact that both rates of ATT were introduced at the same time was relevant for the purpose of determining whether the lower rate of ATT constituted 'State aid'. The simultaneous introduction of the two rates is not a question of a 'technique of intervention', as suggested by the General Court. Indeed, Ireland could not have envisaged a single rate of EUR 10 per passenger and it is for that reason that it subsequently chose to replace the two rates of ATT by a single rate of EUR 3 per passenger. Ryanair adds that the fact that the lower rate of ATT was applied less frequently is not sufficient for it to be possible to rule out the use of that rate as the reference rate, the frequency of taxable events subject to a given rate of tax being but one factor among others to be taken into consideration.

55 The Commission maintains that the fourth part of the single ground of appeal is unfounded, while the Irish Government submits that it is inadmissible because it is not sufficiently developed and, in the alternative, that it is unfounded.

Findings of the Court

56 Contrary to what is submitted by the Irish Government, Ryanair has set out to the requisite legal standard the reasons why it considers that paragraph 89 of the Ryanair judgment is vitiated by an error of law.

57 The fact nonetheless remains that those reasons are not such as to call into question the grounds of the General Court's rejection of Ryanair's argument, so that this part of Ryanair's single ground of appeal must also be discounted.

58 As the General Court observed, in essence, in paragraph 89 of the Ryanair judgment, if the Court were to find that the lower rate of ATT did not procure a selective advantage for the undertakings liable to pay that rate on the sole ground that that rate was introduced at the same time as the rate of EUR 10 per passenger, that would be tantamount to a finding that the decision whether a State intervention measure constituted State aid depended on the technique used. As is apparent from the Court's established case-law, Article 107(1) TFEU does not draw a distinction between measures of State intervention on the basis of the techniques used by the national authorities (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87 and the case-law cited).

59 Accordingly, the fourth part of Ryanair's single ground of appeal must also be rejected.

The single ground of appeal of Aer Lingus and the second and third parts of Ryanair's single ground of appeal

Arguments of the parties

60 Aer Lingus' single ground of appeal may be divided into four parts. In the first part, Aer Lingus submits that, if paragraph 43 of the Aer Lingus judgment is to be interpreted as meaning that the examination of whether a particular measure constitutes State aid should always disregard the fact that the measure may be at odds with the provisions of EU law other than Articles 107 and 108 TFEU, then it is vitiated by an error of law. According to Aer Lingus, the pertinence of that question was recognised by the Court in paragraphs 31 and 32 of its judgment of 27 March 1980, *Denkavit*

italiana (61/79, EU:C:1980:100), and paragraphs 14 to 16 of its judgment of 10 July 1980, *Ariete* (811/79, EU:C:1980:195). Moreover, it is apparent from paragraphs 23 and 24 of the judgment of 27 September 1988, *Asteris and Others* (106/87 to 120/87, EU:C:1988:457), and paragraph 60 of the judgment of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni* v *Commission* (T-62/08, EU:T:2010:268) that a payment made by the State as compensation for damage caused by it does not constitute State aid.

61 In that context, Aer Lingus recalls that it argued before the General Court that the levying of ATT at the rate of EUR 10 per passenger was unlawful, as it was contrary to Article 56 TFEU and Regulation No 1008/2008, and that ATT collected at that rate was liable to be repaid to the companies concerned. The fact that ATT at that rate was unlawful means that the lower rate of ATT cannot be characterised as State aid.

62 By the second part of its single ground of appeal, Aer Lingus submits that the General Court erred in law by concluding, in paragraph 63 of the Aer Lingus judgment, that the Commission was entitled to classify the rate of EUR 10 per passenger as the 'normal' rate of taxation, even though it was unlawful. Paragraph 58 of that judgment, according to which Aer Lingus' argument was based on an erroneous premiss, is contradictory and vitiated by an error, as the Commission simply found in the decision at issue that it was the existence of different rates of ATT which constituted a restriction on freedom to provide services, not the higher rate per se.

63 In the third part of its single plea in law, Aer Lingus takes issue with paragraph 60 of the Aer Lingus judgment, which asserts that, as it would be possible to remedy tax discrimination, such as that arising from the existence of two different rates of ATT, by raising 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 by introducing a new single rate, it is incorrect to claim that the higher rate of ATT is unlawful. According to Aer Lingus, that paragraph confuses the question of the action that the Member State must take to bring the discrimination to an end in the future with the question of the action that the Member State must take to remedy the 'historic' unlawfulness of the discriminatory tax rates.

64 Lastly, in the fourth part of its single plea in law, Aer Lingus takes issue with paragraph 61 of the Aer Lingus judgment, which states that 'a right to reimbursement [of ATT paid at the rate of EUR 10 per passenger], 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'. Aer Lingus claims that the inherent unlawfulness of the higher rate of ATT or the differentiated rates, and the fact that Ireland was in principle liable to repay to the companies that had paid ATT at the higher rate the difference between that rate and the lower rate meant that the higher rate could not be described as the 'normal' tax rate.

65 By the second part of its single ground of appeal, Ryanair argues that the ATT rate of EUR 10 per passenger cannot constitute the 'reference' rate for the purpose of determining whether the lower rate of ATT may be characterised as State aid because, by analogy with the Court's finding in its judgment of 6 February 2003, *Stylianakis* (C-92/01, EU:C:2003:72), the rate of EUR 10 per passenger was at odds with Article 56 TFEU and Regulation No 1008/2008. To take the higher rate as the reference rate would undermine the consistency of EU law.

66 In the third part of its single ground of appeal, Ryanair submits that the General Court was incorrect to refer, in paragraph 88 of the Ryanair judgment, to 'hypothetical reimbursement claims' of ATT paid at the higher rate. In its view, the imposition of ATT at that rate was contrary to EU law and the excess tax charged should be repaid to the undertakings concerned.

67 The Commission and the Irish Government contest the arguments put forward by Aer Lingus and Ryanair and contend that they should be rejected as unfounded.

Findings of the Court

68 As regards, first, the first part of Aer Lingus' single ground of appeal, it should be noted that the only decisive factor for determining whether a tax measure is to be classified as State aid and, in particular, for ascertaining whether that measure gives rise to more favourable tax treatment for its beneficiaries by comparison with other taxpayers, is the effects produced by the measure (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87 and the case-law cited).

69 Accordingly, the fact that a tax measure is contrary to provisions of EU law other than Articles 107 and 108 TFEU does not mean that the exemption from that measure enjoyed by certain taxpayers cannot be classified as State aid, as long as the measure in question produces effects vis-à-vis other taxpayers and has not been either repealed or declared unlawful and, therefore, inapplicable (see, to that effect, judgment of 30 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 38).

70 That is, in essence, what the General Court stated in paragraph 43 of the Aer Lingus judgment and in paragraph 65 of the Ryanair judgment. Accordingly, contrary to what is claimed by Aer Lingus in the first part of its single ground of appeal, paragraph 43 of the Aer Lingus judgment is not vitiated by any error of law.

71 That conclusion is not called into question by the case-law relied on by Aer Lingus and cited in paragraph 60 above.

72 The effect of that case-law is simply that the reimbursement to an undertaking of an amount of tax which it was required to pay in breach of EU law or the damages which national authorities are ordered to pay to undertakings to compensate for the damage they have caused them does not constitute State aid.

73 The State aid with which the decision at issue is concerned derives neither from the reimbursement of a tax contrary to the provisions of EU law other than Articles 107 and 108 TFEU that was paid by Aer Lingus and Ryanair, nor from the payment of compensation to those two undertakings. That case-law is therefore irrelevant for the purposes of the present cases.

74 It follows that the first part of the Aer Lingus' single ground of appeal must be rejected.

75 Next, the second to fourth parts of Aer Lingus' single ground of appeal and the second and third parts of Ryanair's single ground of appeal are based on the premiss that the fact that ATT is totally or partially at odds with provisions of EU law other than Articles 107 and 108 TFEU is likely to have a bearing on whether the total or partial exemption from that tax enjoyed by certain operators may be described as State aid within the meaning of Article 107(1) TFEU, in so far as, in particular, the unlawfulness of that measure could give rise, in proceedings before the national courts, to the repayment of all or part of the tax in question to other operators who were not entitled to the exemption in question.

76 It is common ground that, when the Commission carried out its assessment and adopted the decision at issue, the tax measure in question was producing its effects, in the sense that certain airlines were paying ATT at the reduced rate, whereas others — which, according to the Commission's assessment that went unchallenged by Aer Lingus and Ryanair, were in a comparable legal and factual situation in the light of the objectives of the tax measure at issue — were paying the same tax at the higher rate.

77 It follows from the considerations set out in paragraphs 68 and 69 above that the Commission was obliged to take account of those effects and could not ignore them simply on the basis that the airlines subject to less favourable tax treatment might obtain reimbursement of the excess tax which they had paid by commencing proceedings before the national courts, where appropriate on the basis of provisions of EU law other than Articles 107 and 108 TFEU.

78 It should be noted that it is not for the Commission but for the national courts to give a definitive decision on any claim for reimbursement of a tax alleged to be unlawful in the light of the law of the Member State concerned or contrary to the provisions of EU law other than Articles 107 and 108 TFEU, if necessary after those court have obtained from the Court of Justice, by way of a reference for a preliminary ruling, such clarification as may be necessary on the scope and interpretation of EU law. The effectiveness of Article 107 TFEU would be substantially diminished if the Commission were required, before classifying a measure as State aid within the meaning of that provision, to wait for the decision of the courts with jurisdiction regarding any reimbursement of excess tax or tax paid by certain taxpayers.

79 In the light of all the foregoing considerations, the second, third and fourth parts of Aer Lingus's single ground of appeal and the second and third parts of Ryanair's single ground of appeal must be rejected and, accordingly, the cross-appeals dismissed in their entirety as unfounded.

The main appeals

80 In support of each of its appeals, the Commission, on the basis of identical arguments, relies on a single ground of appeal, alleging breach of Article 108(3) TFEU and Article 14 of Regulation No 659/1999. The appeals are directed against paragraphs 88 to 127 of the Aer Lingus judgment and paragraphs 119 to 152 of the Ryanair judgment.

Arguments of the parties

81 The Commission claims that the General Court erred in law and infringed Article 108(3) TFEU and Article 14 of Regulation No 659/1999 in so far as, by finding that the Commission should have taken account of the extent to which the beneficiary airlines had passed on to passengers the advantage gained from the application of ATT at the lower rate, it created a new economic test for determining the amounts of State aid to be recovered, such as the aid at issue in the present cases.

82 Aer Lingus disputes the Commission's arguments, which, it claims, are based on a misreading of the Aer Lingus judgment. It observes that the General Court found that ATT is an excise duty, that is, in other words, an indirect tax levied on passengers, who are the beneficiaries of the lower rate of ATT. The tax measure at issue cannot, therefore, be compared with a State subsidy or a measure enabling undertakings to make cost savings. Aer Lingus adds that it was not allowed to charge passengers on flights subject to the lower rate an amount in excess of that rate and that, if it was required to repay the EUR 8 per ticket demanded by the Commission, it would not be able to recover that sum retroactively from passengers who purchased the relevant ticket at the reduced rate.

83 Ryanair submits that the Commission's single ground of appeal is ineffective. It contends that the General Court justified the annulment of Article 4 of the decision at issue on the basis of three distinct grounds, in paragraphs 120 to 133, 134 to 144 and 145 to 149, respectively, of the Ryanair judgment. The Commission's appeal addresses only the first of those grounds, concerning the extent to which ATT was passed on to passengers, whereas the other two grounds, relating, respectively, to (i) the particular situation and competitive constraints of the market in question and (ii) the lack of any justification for the alleged need to recover the difference between the higher and lower rates of ATT in order to re-establish the status quo ante, are not contested by the Commission.

84 In the alternative, Ryanair maintains that the Commission's single ground of appeal is unfounded. In its view, the General Court simply applied the principle that it is necessary to determine the actual value of the advantage gained as a result of the aid. Moreover, the Commission exaggerated the difficulties entailed in establishing a precise amount for that purpose if the solution advocated by the General Court were to be followed. Lastly, Ryanair observes that it would be illogical not to take account of the effect on customers of the advantage obtained by the aid beneficiary, bearing in mind that Article 13 of Directive 2014/104 allows the party responsible for an infringement of the competition rules to avoid payment, in a claim for damages, of the overcharge resulting from the infringement if it was passed on to the claimant's customers.

Findings of the Court

85 As a preliminary point, it should be noted that, contrary to what is claimed by Ryanair, the Commission's single ground of appeal is not ineffective.

86 According to the Court's well-established case-law, in an appeal, complaints directed against a ground included in a judgment of the General Court purely for the sake of completeness must be immediately dismissed as ineffective, since they cannot lead to the judgment under appeal being set aside (see, to that effect, judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 75 and the case-law cited).

87 However, in the present cases, contrary to Ryanair's assertions, paragraphs 120 to 149 of the Ryanair judgment do not put forward three distinct grounds, each of which would be sufficient in itself to justify the annulment of Article 4 of the decision at issue. Those paragraphs, in the same way as paragraphs 104 to 123 of the Aer Lingus judgment, which are worded in very similar terms, develop different aspects of the General Court's single line of reasoning justifying its decision — given in paragraph 123 of the Aer Lingus judgment and paragraph 119 of the Ryanair judgment — that the Commission had committed 'an error of assessment and an error of law' by setting the amount of aid to be recovered from the airlines at EUR 8 per passenger. Those different aspects of the reasoning are interlinked and Ryanair's separation of them into three allegedly separate grounds is artificial and fails to have regard to their internal cohesion.

88 Furthermore, the arguments relied on by the Commission call into question the General Court's entire line of reasoning, not simply a part of that reasoning, as claimed by Ryanair.

89 That said, as regards the analysis of the substance of the Commission's single ground of appeal, it should be noted, first, that the obligation on the Member State concerned to abolish, through recovery, aid considered by the Commission to be incompatible with the single market has as its purpose, according to the Court's established case-law, to restore the situation as it was before the aid was granted (see, to that effect, judgment of 4 April 1995, *Commission* v *Italy*, C-350/93, EU:C:1995:96, paragraph 21 and the case-law cited).

90 That objective is attained once the aid in question, together, where appropriate, with default interest, has been repaid by the recipient, or, in other words, by the undertakings which actually enjoyed the benefit of it. 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 (judgment of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 75 and the case-law cited).

91 Second, the recovery of unlawful aid with a view to re-establishing the status quo ante 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 (judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 118).

92 It follows, as the Advocate General observed, in essence, in point 62 of his Opinion, that recovery of such aid entails the restitution of the advantage procured by the aid for the recipient, not the restitution of any economic benefit the recipient may have enjoyed as a result of exploiting the advantage. That benefit may not be the same as the advantage constituting the aid and there may indeed be no such benefit, but that cannot justify any failure to recover that aid or the recovery of a different sum from that constituting the advantage procured by the unlawful aid in question.

93 With regard, in particular, to unlawful aid granted in the form of a tax advantage, it is also the Court's settled case-law that recovery of aid means that the transactions actually carried out by the recipients of the aid in question must be subject to the tax treatment which the recipients would have received in the absence of the unlawful aid (see, to that effect, judgment of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraph 119).

94 In the present cases, the tax advantage conferred by ATT consisted, according to the decision at issue, in the application during the period in question of different tax rates, which had the effect of conferring a benefit on airlines in Ireland that had to pay the EUR 2 tax rate by comparison with other airlines that had to pay EUR 10 per passenger during the same period. Aer Lingus and Ryanair have failed to demonstrate that, in so far as it establishes the existence of State aid within the meaning of Article 107(1) TFEU, that decision is vitiated by unlawfulness.

95 In those circumstances, in the light of the considerations set out in paragraphs 89 to 93 above, it must be concluded that restitution of the advantage procured by the aid measure, as identified by the decision at issue, required the Irish tax authorities to recover from the beneficiaries of the lower rate of ATT the difference between the amount of ATT which, in the absence of unlawful aid, should have been paid in respect of each of the flights in question, namely the amount of ATT at the higher rate, and the amount of ATT actually paid — in other words, the amount calculated on the basis of the lower rate of ATT.

96 Accordingly, it must be found that, in the present cases, repayment of the aid called for the recovery of a sum of EUR 8 per passenger for each of the flights concerned, as the Commission stated in Article 4 of the decision at issue.

97 The considerations set out in paragraphs 104 to 123 of the Aer Lingus judgment and paragraphs 120 to 149 of the Ryanair judgment cannot justify, contrary to the view reached by the General Court, any different conclusion.

98 In so far as, under the applicable Irish legislation, airlines were directly liable for ATT, it is of little consequence, in the circumstances of the present cases, that that tax was classified under Irish law as 'excise duty'. For the same reason, the question whether, from a technical point of view, ATT is to be classified as a direct or indirect tax is irrelevant.

99 Equally irrelevant, as regards the question of the recovery of the aid, is the notion of 'economic passing on' referred to in paragraph 91 of the Aer Lingus judgment and paragraph 123 of the Ryanair judgment, respectively. The General Court stated in that connection, as regards flights subject to the lower rate of EUR 2 per passenger, that for the purpose of assessing the 'economic passing on', it was necessary to determine to what extent the airlines concerned actually retained the economic advantage arising from the application of the lower rate.

100 As is apparent from paragraphs 92 and 93 above, the recovery of aid entails the restitution of the advantage procured by the aid for the beneficiary, not the restitution of the economic benefit that may have been conferred by the aid as a result of the exploitation of the advantage. There is therefore no need to examine whether and to what extent those airlines actually utilised the economic advantage arising from the application of the lower rate.

101 The considerations of the General Court set out in paragraphs 92 to 105 of the Aer Lingus judgment and paragraphs 124 to 136 of the Ryanair judgment disclose the same confusion between the advantage obtained as a result of the effect of the lower rate of ATT and the benefit which the aid recipients derived or could have derived from that advantage.

102 Indeed, contrary to the view expressed by the General Court in paragraph 105 of the Aer Lingus judgment and paragraph 136 of the Ryanair judgment, the advantage, as identified by the Commission in the decision at issue, did not consist in the fact that the airlines subject to the lower rate were able to 'offer more competitive prices'. It consisted, quite simply, in the fact that those companies had to pay a lower rate of ATT than they would have had to pay if their flights had been subject to the higher rate of ATT. The question whether that advantage enabled them to offer more competitive ticket prices, or whether they exploited that advantage differently, relates to the assessment of any benefit they were able to accrue from the exploitation of the advantage granted; that assessment is irrelevant to the recovery of the aid.

103 The General Court was also incorrect in stating, in paragraph 110 of the Aer Lingus judgment and paragraph 141 of the Ryanair judgment, respectively, that the circumstances of the cases before it were different from those of the case giving rise to the judgment of 15 December 2005, *Unicredito Italiano* (C-148/04, EU:C:2005:774) as the airlines benefiting from the lower rate of ATT 'could not have opted for an operation other than that which was coupled with the aid'.

104 As the General Court acknowledged, in essence, in paragraph 111 of the Aer Lingus judgment and paragraph 142 of the Ryanair judgment, there was nothing to prevent those airlines from increasing by EUR 8 the ticket price, excluding tax, of flights subject to the lower rate of ATT. The fact that, pursuant to Article 23(1) of Regulation No 1008/2008, they could add to the ticket price, excluding tax, only EUR 2, corresponding to ATT calculated at the reduced rate, does not lead to any different conclusion, as the amount corresponding to the difference between the two rates of ATT, namely EUR 8, could have been included previously in the price of the ticket, excluding tax.

105 The considerations set out above are not called into question by Ryanair's argument based on Article 13 of Directive 2014/104. As is apparent from the Court's case-law cited in paragraphs 89 and 90 above, the recovery of unlawful aid had a different purpose from that of Directive 2014/104. In particular, that directive, as is made clear in recitals 3 and 4 thereof, seeks to ensure that any person who considers that he has been adversely affected by an infringement of the competition rules laid down in Articles 101 and 102 TFEU may effectively exercise his right to claim compensation for the harm which he believes he has suffered. On the other hand, the purpose of aid recovery is not to seek compensation for individual harm of any kind, but to re-establish, on the market in question, the situation as it was before the aid was granted.

106 It is apparent from all the foregoing considerations that, by finding, in paragraph 123 of the Aer Lingus judgment and paragraph 119 of the Ryanair judgment, respectively, that the Commission had committed 'an error of assessment and an error of law', by setting the amount of aid to be recovered from the beneficiaries of the lower rate of ATT at EUR 8 per passenger in respect of the flights to which that rate applied, the General Court's decision was vitiated by an error of law.

107 As a consequence, the Commission's appeals must be upheld and paragraph 1 of the operative part of the Aer Lingus judgment and of the Ryanair judgment must be set aside.

The action before the General Court

108 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is so in the present cases.

109 As the judgments under appeal are to be set aside only in so far as concerns paragraph 1 of their respective operative parts and not in so far as concerns paragraph 2 thereof, the Court is not setting aside the General Court's rejection of Aer Lingus' first and fifth pleas in law or the first, fourth and fifth pleas in law put forward by Ryanair. Accordingly, it is necessary to examine only the second to fourth pleas in law relied on by Aer Lingus in its action before the General Court and the second and third pleas relied on by Ryanair.

The third and fourth pleas in law relied on by Aer Lingus in its action before the General Court and the first part of the third plea in law relied on by Ryanair before that court

110 Aer Lingus and Ryanair maintain, in essence, that the Commission committed an error in law and an error of assessment by setting the amount of aid to be recovered at EUR 8 per passenger in respect of each flight subject to the lower rate of ATT.

111 Those arguments must be rejected for the reasons set out in paragraphs 85 to 106 above.

112 Aer Lingus and Ryanair also contend that, as the airlines no longer have the option of recovering the EUR 8 they have to repay from each of the passengers on flights subject to the lower rate of ATT, the obligation to pay that sum, imposed by Article 4 of the decision at issue, is equivalent to the imposition of an additional tax or a penalty, in breach of the principles of proportionality and equal treatment, and fails to have due regard for the Court's case-law that repayment of aid cannot be regarded as a penalty.

113 Those arguments must also be rejected.

114 As the Advocate General observed in point 83 of his Opinion, the recovery of an amount equal to the difference between the tax that would have been payable in the absence of an unlawful aid measure and the lesser amount paid pursuant to that measure does not constitute a new tax imposed retroactively (see, to that effect, judgment of 10 June 1993, *Commission* v *Greece*, C-183/91, EU:C:1999:233, paragraph 17). What is at issue is the recovery of the part of the original tax which was not paid due to the availability of an unlawful exemption. The recovery of such an amount does not constitute a penalty (judgment of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraph 65).

115 Similarly, with regard to the argument that the airlines affected by the recovery requirement are not in a position to recover from their own customers the additional tax which they are required repay, it is sufficient to point out that, as the unlawful aid identified by the Commission in the decision at issue consisted in the application of the lower rate of ATT, that is, a partial exemption from a tax borne not by the customers of those airlines but by those airlines themselves, the recovery of that aid necessarily entails the repayment of the difference between the two rates applicable. As is apparent from paragraphs 99 and 100 above, that is also the case even where the recipients of the aid have derived no benefit from the advantage in question, either because they have passed that advantage on to their customers, or for some other reason.

116 Lastly, the imposition of the obligation to recover that aid infringes neither the principle of proportionality nor the principle of equal treatment. First, it is the Court's settled case-law that abolishing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. Accordingly, the recovery of such aid, for the purpose of restoring the previously existing

situation, cannot in principle be regarded as disproportionate to the objectives of the provisions of the FEU Treaty relating to State aid (judgments of 11 March 2010, *CELF and Ministre de la Culture et de la Communication*, C-1/09, EU:C:2010:136, paragraph 54, and of 28 July 2011, *Diputación Foral de Vizcaya and Others* v *Commission*, C-471/09 P to C-473/09 P, not published, EU:C:2011:521, paragraph 100).

117 On the other hand, the aid recipients, which are required to repay the aid, are obviously not in the same situation as airlines which did not receive the aid and are not affected by the recovery, so that there can be no question of different treatment of similar situations, in breach of the principle of equal treatment.

118 It follows from the foregoing considerations that the third and fourth pleas in law relied on by Aer Lingus and the first part of the third plea in law relied on by Ryanair before the General Court must be rejected.

The second plea relied on by Aer Lingus and the second part of the third plea relied on by Ryanair before the General Court

119 Aer Lingus and Ryanair submit that the airlines subject to the higher rate of ATT are entitled to reimbursement of the excess tax paid, both on the ground that the introduction of two different rates constitutes a breach of freedom to provide services enshrined in Article 56 TFEU and on the basis of the case-law deriving from the judgment of 7 September 2006, *Laboratoires Boiron* (C-526/04, EU:C:2006:528). As a consequence, the recovery, from the recipients that enjoyed the benefit of the lower rate of ATT, of the difference between that rate and the higher rate would amount to a breach of Article 14(1) of Regulation No 659/1999 and of the principles of legal certainty, effectiveness and sound administration. Moreover, such recovery would give rise to serious distortion of competition. As a result of such recovery, it is the airlines on which the recovery measure was imposed that would be placed in a disadvantageous position, as they would then have to pay a total sum of EUR 10 per passenger, whereas the other airlines, which were reimbursed EUR 8 out of the EUR 10 per passenger originally paid, would have to pay tax at the rate of only EUR 2 per passenger.

120 It should be noted in that regard that the nature of the measure concerned by the decision at issue is in no way analogous to that which was the subject of the judgment of 7 September 2006, *Laboratoires Boiron* (C-526/04, EU:C:2006:528).

121 ATT was a tax of general application and, in the decision at issue, the Commission reached the conclusion that the lower rate of ATT was equivalent to a partial exemption which, in itself, constituted an aid measure. In those circumstances, those liable to pay the tax in question cannot claim that the exemption enjoyed by other businesses constitutes State aid in order to avoid payment of that tax or to obtain reimbursement (judgment of 7 September 2006, *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paragraphs 30 and 32 and the case-law cited).

122 That said, it should be observed that, as is apparent from paragraphs 78 and 79 above, in circumstances such as those of the present cases, the Commission cannot refrain from finding that a case involves State aid on the sole ground that it is possible that the national courts with jurisdiction may order the airlines which did not have the benefit of the lower rate of ATT to repay the excess ATT. As it was under a duty to establish the existence of State aid, the Commission was also under a duty to order the recovery of that aid.

123 In those circumstances, it is for the Member State concerned, in this case Ireland, to ensure, by all appropriate means and in accordance with both domestic and EU legislation, that any national measures which have the effect of reimbursing certain undertakings in respect of a tax does not give rise to new aid incompatible with the FEU Treaty, to the benefit of the undertakings receiving such reimbursement.

124 It is clear from the foregoing considerations that the second plea relied on by Aer Lingus and the second part of the third plea relied on by Ryanair before the General Court must be rejected.

Ryanair's second plea in law

125 In its second plea before the General Court, Ryanair argued that the Commission should have taken account of the proportionate impact of ATT on the various competing undertakings when assessing the advantage conferred by ATT, as, first, a much higher percentage of the flights of certain airlines, in particular Aer Arann, benefited from the reduced rate of ATT and, second, the impact of ATT, calculated at the higher rate, was considerably less on business class and long-haul flights, offered mainly by Aer Lingus.

126 Aer Lingus, in its capacity as intervener in Case T-500/12, does not support Ryanair's claims in so far as concerns Ryanair's second plea in law and considers that the relative extent of the advantage conferred on the various recipients may be relevant for the purpose of determining the amount of aid to be recovered. However, as the only purpose of intervention is to support, in whole or in part, the claims of one of the parties, Aer Lingus' argument on this point is inadmissible.

127 Ryanair's argument cannot succeed. The fact that certain beneficiaries of an aid measure might derive from the advantage which the aid represents a proportionately greater benefit than that enjoyed by the other beneficiaries of the same measure does not preclude the Commission from either classifying the measure in question as State aid incompatible with the single market or ordering the recovery of the advantage derived from the use of the aid.

128 It follows that Ryanair's second plea in law before the General Court is unfounded and must be rejected.

129 Accordingly, first, as Aer Lingus' first and fifth pleas before the General Court and the first, fourth and fifth pleas relied on by Ryanair before that court were rejected by the General Court, and the pleas raised by Aer Lingus and Ryanair, in their respective cross-appeals, challenging the grounds of the judgments under appeal supporting the dismissal of their applications have not been successful, paragraph 2 of the operative part of the judgments under appeal is now final and, second, as it is apparent from all the foregoing considerations that the other pleas put forward by Aer Lingus and Ryanair before the General Court seeking the annulment of the decision at issue must also be rejected, their respective actions for annulment must be dismissed in their entirety.

Costs

130 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

131 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

132 As Aer Lingus and Ryanair have been unsuccessful both in their cross-appeals and in their actions before the General Court and the Commission has applied for costs, they must be ordered to bear their own costs and to pay the costs incurred by the Commission both before the General Court and before the Court of Justice.

133 In accordance with Article 140(1) of the Court's Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, Member States which have intervened in the proceedings are to bear their own costs. It follows that Ireland is to bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Sets aside the judgments of the General Court of the European Union of 5 February 2015,** *Aer Lingus* **v** *Commission* **(T-473/12, not published, EU:T:2015:78), and** *Ryanair* **v** *Commission* **(T-500/12, not published, EU:T:2015:73), in so far as they annul 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 rates implemented by Ireland, in so far as that article ordered that the aid be recovered from the beneficiaries in an amount which is set at EUR 8 per passenger in recital 70 of that decision;**

2. **Dismisses the cross-appeals;**

3. **Dismisses the actions brought by Aer Lingus Ltd and Ryanair Designated Activity Company for annulment of Decision 2013/199;**

4. **Orders Aer Lingus Ltd and Ryanair Designated Activity Company to bear their own costs and to pay the costs incurred by the European Commission both before the General Court of the European Union and in the proceedings before the Court of Justice of the European Union;**

5. **Orders Ireland to bear its own costs.**

Bay Larsen Vilaras Malenovský

Safjan Šváby

Delivered in open court in Luxembourg on 21 December 2016.

A. Calot Escobar
Registrar

L. Bay Larsen
President of the Third Chamber