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CJEU decision in joined State aid cases Aer Lingus and Ryanair

State aid — Irish tax on airline passengers — Differentiated air travel tax rates — Aid passed on to customers — Computation of aid — Interaction with freedom to provide services

On December 21, 2016 the Court of Justice of the European Union ("CJEU'' or "Court'') rendered its decision in the joined cases Commission v Aer Lingus (C-164/15 P) and Commission v Ryanair (C-165/15 P). These cases concern the Irish air travel tax (ATT), an excise duty on air passenger transport, which was applied at different rates depending on the distance between the departure and the arrival airports, and its compatibility with State aid rules. The Court concluded that this measure constitutes State aid and that the amount of aid to be recovered should be computed as the difference between the EUR 10 tax applied normally and the EUR 2 reduced rate for flights to airports located less than 300 kilometers from Dublin airport.

Background

The ATT is an excise duty on air passenger transport that airline companies must pay in respect of passengers departing on an aircraft from an airport located in Ireland. Between 2009 and 2011, the tax was levied on the basis of the distance between the departure airport and the arrival airport, at the rate of (1) EUR 2 for a flight to a destination located less than 300 kilometers from Dublin airport and (2) EUR 10 in all other cases. In July 2011, the European Commission issued a negative decision (2013/199/EU) in which it concluded that the reduced rate constituted illegal State aid and ordered its recovery from the beneficiaries.

Following appeals brought by Aer Lingus (T-473/12) and Ryanair (T-500/12), the General Court upheld, in July 2015, the Commission's findings on the State aid qualification, but partially annulled the Commission's decision as regards the computation of the amount to be recovered. In its judgment, the General Court concluded that, as the ATT is an excise duty designed to be passed on to passengers, the advantage deriving from the reduced rate may also be passed on to passengers in full or in part. Consequently, the advantage actually obtained by the airlines – and therefore the amount to be recovered - would not necessarily be the difference between the two rates but depend on the choice made by the airlines benefiting from the lower rate to pass this on to their customers.

The appeals brought by the Commission before the CJEU raise the question whether the Commission, in calculating the amount of aid to be recovered, is required to take into account the possibility of airlines passing on to their customers the economic advantage derived from the aid. Cross-appeals were also filed with the CJEU, but rejected.

The CJEU decision

According to the Commission, the General Court violated EU law by creating a new economic test for determining the amount to be recovered.

Referring to the CJEU's settled case law in this respect, and as the Advocate General observed, the Court stated that the recovery entails the restitution of the advantage procured for the beneficiary, not the restitution of any economic benefit it may have enjoyed as a result of exploiting the advantage. Thus, in the case at hand, the advantage which has to be recovered is the difference between the normal rate and the lower rate actually applied to the beneficiaries of the aid, i.e. the sum of EUR 8 per passenger for each of the flights concerned.

The Court rejected the notion of "economic passing on'' used by the General Court. There is no need to assess whether and to what extent the airlines actually utilized the economic advantage, for example, whether it enabled them to offer more competitive ticket prices. This assessment would relate to the benefit they were able to accrue from the exploitation of the advantage granted, and not the advantage itself, which is irrelevant to the recovery of the aid.

Aer Lingus and Ryanair also initiated cross-appeals concerning the classification of the reduced rate of ATT as State aid, but these were dismissed in their entirety. A particular argument in these cross-appeals was that the General Court should have taken into account in its State aid assessment the possibility that the excise duty was in breach of the EU freedom to provide services, so that the tax charged at the higher rate should have been repaid to the companies concerned, thus eliminating the aid to the companies charged at the lower rate. Similarly it was argued that the State aid could have been remedied, for example by raising the lower rate to the higher rate or, conversely, by reducing the higher rate to the lower rate. These and similar arguments were rejected by the CJEU which

pointed out that the assessment of State aid was based on “the effects produced by the measure” and not what might happen in terms of reimbursement of excess tax.

EU Tax Centre comment

The CJEU followed Advocate General Mengozzi’s interpretation of the criteria normally applied for the purposes of quantifying aid granted in the form of a reduced tax rate. This case provides important guidance on the recovery of State aid granted in the form of a tax advantage. In particular, the Court clarified that the “economic passing-on” defense cannot be taken into account when computing the amount of aid to be recovered in those circumstances.

Should you have any questions, please do not hesitate to contact KPMG’s EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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