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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2018/117

of 14 July 2017

on State aid case SA.29064 (2011/C) (ex 2011/NN)

Ireland — non-application of the Air Travel Tax to transit and transfer passengers

(notified under document C(2017) 4932)

(Only the English text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

After giving notice to the parties concerned to submit their comments ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 21 July 2009, registered with the Commission on 22 July 2009 under number CP 231/2009, the Commission received a complaint from the airline Ryanair Ltd (now Ryanair Designated Activity Company, hereafter: 'Ryanair') that Ireland had granted unlawful and illegal State aid through the Air Travel Tax ('ATT'), an excise duty introduced by Ireland on the departure of passengers on flights from Irish airports.
- (2) By letter dated 28 July 2009, the Commission forwarded the complaint to Ireland and asked for its position on the claims set out in the letter dated 21 July 2009.
- (3) By letter dated 26 August 2009, Ireland asked for an extension of the deadline to reply, which the Commission accepted by way of a letter dated 3 September 2009.
- (4) On 15 October 2009, Ireland responded to the Commission's letter and their reply was registered with the Commission on the same day.
- (5) Since the alleged aid had been implemented without prior notification to the Commission, the case was registered as a non-notified measure. The Commission carried out a preliminary investigation pursuant to Article 108(3) TFEU.

⁽¹⁾ OJ C 220, 17.6.2016, p. 13.

- (6) By decision of 13 July 2011 ('the 2011 Decision') ⁽¹⁾, adopted at the end of the preliminary investigation stage, the Commission rejected most of Ryanair's complaints. In particular, it found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU. But the Commission also decided to initiate a formal investigation procedure concerning the differentiated tax rates applicable to flights to destinations located no more than 300 kilometres from Dublin Airport and all other flights.
- (7) By application lodged at the Registry of the General Court on 24 September 2011, Ryanair brought an action for a partial annulment of the 2011 Decision, in so far as it found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU. The case was registered as Case T-512/11.
- (8) On 25 July 2012, the Commission adopted its decision ('the 2012 Decision') on the application of differentiated ATT rates ⁽²⁾. It found that Ireland had granted State aid in the form of a lower ATT rate applicable to flights to destinations no more than 300 kilometres from Dublin Airport between 30 March 2009 and 28 February 2011. Moreover, the Commission found that State aid to be unlawful and incompatible with the internal market, and required Ireland to recover the incompatible aid from the beneficiaries.
- (9) By applications lodged on 1 November 2012 and 15 November 2012, Ryanair and Aer Lingus appealed the 2012 Decision. Those cases were registered as Case T-473/12 and Case T-500/12.
- (10) By judgment of 25 November 2014, the General Court annulled the 2011 Decision in so far as the 2011 Decision found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU ⁽³⁾. The General Court held that the Commission should have initiated the formal investigation procedure laid down in Article 108(2) TFEU.
- (11) By judgment of 5 February 2015, the General Court annulled the 2012 Decision concerning the differentiated tax rates applicable to flights to destinations located no more than 300 kilometres from Dublin Airport, in so far as the 2012 Decision ordered the recovery of aid from the beneficiaries for an amount which is set at EUR 8 per passenger ⁽⁴⁾. The Commission lodged an appeal before the Court of Justice against that judgment.
- (12) Following the annulment of the 2011 Decision, by letter dated 28 September 2015, the Commission informed Ireland that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the non-application of the ATT to transfer and transit passengers. This decision ('Opening Decision') was published in the *Official Journal of the European Union* ⁽⁵⁾. The Commission invited interested parties to submit their comments on the measure.
- (13) Ireland submitted its comments on the Opening Decision by letter dated 22 December 2015, registered with the Commission on 6 January 2016.
- (14) The Commission received comments from two interested parties. By letter dated 23 August 2016, the Commission forwarded those to Ireland, which was given the opportunity to react. In the absence of a response from Ireland, the Commission reiterated its invitation to Ireland to provide its observations on the comments received from interested parties by way of a letter dated 17 October 2016.
- (15) By letter dated 9 December 2016, the Commission asked Ireland to provide additional information. Ireland replied by letter dated 18 January 2017. In that letter, Ireland also submitted its observations on the comments received from interested parties.
- (16) By judgment of 21 December 2016, the Court of Justice set aside the judgments of the General Court in so far as those judgments had annulled the 2012 Decision ⁽⁶⁾. The Court of Justice thus confirmed that Ireland must recover the sum of EUR 8 per passenger from airlines benefiting from unlawful State aid.

⁽¹⁾ Commission Decision of 13 July 2011 in State aid case SA.29064 (2011/NN) Exemption from air passenger tax, Ireland (OJ C 306, 18.10.2011, p. 10).

⁽²⁾ Commission Decision 2013/199/EU of 25 July 2012 in State aid case SA.29064 (11/C ex 11/NN) Differentiated air travel tax rates implemented by Ireland (OJ L 119, 30.4.2013, p. 30).

⁽³⁾ Judgment of the General Court of 25 November 2014, *Ryanair v Commission*, T-512/11, ECLI:EU:T:2014:989.

⁽⁴⁾ Judgment of the General Court of 5 February 2015, *Aer Lingus Ltd v Commission*, T-473/12, ECLI:EU:T:2015:78.

⁽⁵⁾ OJ C 220, 17.6.2016, p. 13.

⁽⁶⁾ Judgment of the Court of Justice of 21 December 2016, *Commission v Aer Lingus Ltd and Ryanair*, Joined Cases C-164/15 P and C-165/15 P, ECLI:EU:C:2016:990.

2. DETAILED DESCRIPTION OF THE MEASURE AND THE PREVIOUS PROCEDURES

2.1. ATT

- (17) The ATT was established by Section 55(2) of the Finance (No 2) Act 2008 ('the Finance Act') ⁽¹⁾. The Finance Act entered into force on 30 March 2009. Section 55(2) of the Finance Act provides that airlines shall pay the ATT in respect of 'every departure of a passenger on an aircraft from an airport located in Ireland',
- (18) The terms used in the Section 55(2) of the Finance Act are defined in Section 55(1). The definition of the term 'passenger' found in Section 55(2) of the Finance Act explicitly excludes 'a transit or a transfer passenger', meaning that the departure of 'transit or transfer passenger' does not constitute a 'departure of a passenger' for which airlines are liable to pay ATT. A 'transit passenger' is defined as 'a passenger who is on board an aircraft which lands at an airport in the course of its journey and who continues his or her journey on that aircraft'. Furthermore, a 'transfer passenger' means 'a passenger who arrives on a flight to an airport and who departs from the airport on a further flight, other than to the airport where the passenger's journey originated, where both flights are part of a single booking and where the length of time between the scheduled time of arrival of the flight to the airport and the scheduled time of departure of the flight from that airport is not more than 6 hours'. Finally, 'airport' means an airport within the meaning of the Air Navigation and Transport (Amendment) Act 1998, but does not include an airport from which the number of departures of passengers in the previous calendar year was less than 10 000 ⁽²⁾.
- (19) When the ATT was introduced, Section 55(2)(b) of the Finance Act provided that 'Air travel tax shall be charged, levied and paid by reference to the distance between the place of departure of the flight and the place where the flight ends, at the rate of: (i) EUR 2 in the case of a flight from an airport to a destination located not more than 300 kilometres from Dublin Airport, (ii) EUR 10 in any other case'.
- (20) Following an investigation by the Commission regarding a possible infringement of Regulation (EC) No 1008/2008 of the European Parliament and of the Council ⁽³⁾ and Article 56 TFEU on the freedom to provide services, the rates were changed with effect from 1 March 2011 so that a single tax rate of EUR 3 was applicable to all departures from that date onwards, regardless of the distance from Dublin Airport ⁽⁴⁾.
- (21) The ATT was abolished with effect from 1 April 2014.

2.2. Functioning of the ATT

- (22) In its letter dated 18 January 2017, Ireland explained that to determine the tax rate payable, as provided in the guidance issued by the Office of the Revenue Commissioners ('Revenue Commissioners') on 30 March 2009 (see recital 84), the airline should, in the case of journeys consisting of several legs, look at the journey as a whole. Ireland gave an example of a flight with two legs, the first leg being Dublin-Shannon, and the second leg being Shannon-New York. Shannon is within 300 km of Dublin Airport, while New York is more than 300 km from Dublin Airport. The final destination (New York) is more than 300 km from Dublin airport. Thus, according to Ireland, as it is necessary to look at the journey as a whole (meaning Dublin to New York), the flight is subject to ATT at the rate of EUR 10. The departure from Shannon could be ignored, in the sense that no (additional) ATT is due, provided that the passenger meets the definition of 'transfer passenger' or 'transit passenger' at Shannon Airport in accordance with Section 55(1) of the Finance Act. Therefore, the airline was to look at the overall journey and apply the relevant rate which was appropriate to the final destination ⁽⁵⁾.

⁽¹⁾ As amended by Section 18 of the Finance Act 2009 and Section 48 of the Finance Act 2011.

⁽²⁾ Pursuant to Section 2 of the Air Navigation and Transport (Amendment) Act 1998 'airport' means the aggregate of the lands comprised within an aerodrome and all land owned or occupied by an airport authority, including aircraft hangars, roads and car parks, used or intended to be used in whole or in part for the purposes of or in connection with the operation of such aerodrome.

⁽³⁾ 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 (OJ L 293, 31.10.2008, p. 3).

⁽⁴⁾ In the context of the infringement procedure, the Commission provided its formal notice by letter dated 18 March 2010, in which it took the position that Ireland by the differentiation in air travel tax rates failed to fulfil its obligations under Regulation (EC) No 1008/2008 and Article 56 TFEU. Following the letter of formal notice, the Irish authorities amended the tax system.

⁽⁵⁾ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ L 46, 17.2.2004, p. 1), provides that in the case of directly connecting flights, a final destination means the destination of the last flight, whereas in the case of separate flights, a final destination is defined as the destination on the ticket presented at the check-in counter.

- (23) Also Air Lingus, which collected the ATT during the period 2009-2014 in accordance with the guidance issued by the Revenue Commissioners, in its comments on the Opening Decision, confirmed that the ATT did not apply to particular segments of a journey. Instead the taxable event was a journey that started in Ireland and the tax due depended on the final destination stated on the ticket, regardless of whether the passenger took one or more flights to get to the ultimate destination.
- (24) As regards the rate of the ATT, during the period from 30 March 2009 to 1 March 2011, Ireland stated that the lower rate of EUR 2 per passenger applied only where the final destination of the overall journey, irrespective of the number of flights in the journey, was within 300 km of Dublin airport, while the higher rate applied 'in any other case'. According to Ireland, the lower rate (EUR 2) was an exception to the general rule.
- (25) Table 1, information provided by Ireland, illustrates how the ATT was applied, before and after the introduction of a single ATT rate for all taxable departures in 2011.

Table 1

Examples of journeys and the tax payable before and after the change of the ATT rate in 2011

	Period	Departs	Stopover	Destination	Tax payable (EUR)
(a)	30.3.9 to 1.3.11	Dublin	Shannon	New York	10
(b)	2.3.11 to 31.3.14	Dublin	Shannon	New York	3
(c)	30.3.9 to 1.3.11	Dublin	None	New York	10
(d)	2.3.11 to 31.3.14	Dublin	None	New York	3
(e)	30.3.9 to 1.3.11	Dublin	Cork	Cardiff	2
(f)	2.3.11 to 31.3.14	Dublin	Cork	Cardiff	3
(g)	30.3.9 to 1.3.11	Dublin	None	Cardiff	2
(h)	2.3.11 to 31.3.14	Dublin	None	Cardiff	3
(i)	30.3.9 to 31.3.14	New York	Shannon	Dublin	Nil
(j)	30.3.9 to 31.3.14	New York	None	Dublin	Nil

- (26) According to Ireland, the examples set out in Table 1 can be explained as follows:
- (a) The final destination is New York (over 300 km from Dublin airport), so the flight is subject to the EUR 10 rate of ATT. The departure from the stopover in Shannon is exempt from ATT, as the passenger is a transit or transfer passenger at Shannon airport;
- (b) As (a), except that the single rate of EUR 3 applies during this period;
- (c) The final destination is New York (over 300 km from Dublin airport), so the flight is subject to the EUR 10 rate of ATT;

- (d) As (c), except that the single rate of EUR 3 applies during this period;
 - (e) The final destination is Cardiff (under 300 km from Dublin airport), so the flight is subject to the EUR 2 rate of ATT. The departure from the stopover in Cork is exempt from ATT, as the passenger is a transit or transfer passenger at Cork airport;
 - (f) As (e), except that the single rate of EUR 3 applies during this period;
 - (g) The destination is Cardiff (under 300 km from Dublin airport), so the flight is subject to the EUR 2 rate of ATT;
 - (h) As (g), except that the single rate of EUR 3 applies during this period;
 - (i) ATT is not payable on this journey. The departure airport (New York) is not in Ireland and the departure from the stopover in Shannon is exempt, as the passenger is a transit or transfer passenger at that airport. This position applied before and after the amendment of the rates in 2011;
 - (j) ATT is not payable on this journey. The departure airport is not in Ireland.
- (27) Those examples do not include the situation of a journey that starts and ends outside Ireland but involves a stopover in Ireland, for instance London-New York with a stopover at Dublin Airport. However, from all the explanations provided by Ireland, there is no doubt that no ATT would be due for such a journey. Indeed, the departure from London would not be subject to ATT, as London airports are not airports as defined in the Section 55(1) of the Finance Act given that they are outside Ireland, and the departure from Dublin would not be taxed to the extent that the passenger qualifies as a transfer or transit passenger.
- (28) According to information provided by Ireland, the ATT was introduced as a response to financial challenges in the wake of the global financial and economic crisis in order to raise revenues. Ireland mentioned no other objective such as environmental protection.

2.3. The 2011 Decision

- (29) As indicated in recital 6, the 2011 Decision was adopted at the end of a preliminary investigation stage that had commenced on 21 July 2009.
- (30) In order to assess whether the non-application of the ATT to transit and transfer passengers was selective, the Commission first identified the relevant tax system of reference. The Commission considered that the objective and structure of the ATT system was to tax passengers departing from an airport located in Ireland in order to raise revenue for the State budget. The Commission had understood from the information provided by Ireland that the first leg of a journey comprising several legs was always exempted from the ATT. Ireland also provided the examples of journeys from New York to Dublin and from Dublin to New York with and without a stopover in Shannon and applicable ATT rates. Thus, the reference system was understood as a tax that is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland. The Commission also considered that transfer and transit passengers were passengers departing from an Irish airport and thus would appear to be part of that reference system. Hence the exclusion of transfer and transit passengers departed from the normal application of that general tax framework.
- (31) The Commission then examined whether the exclusion of transfer and transit passengers from the ATT was justified by the nature or the general principles of the tax system in the Member State. It found that the purpose of the ATT was to be neutral with regard to the route selected for reaching the final destination, whether there was a stopover or not, and to avoid double taxation. According to the 2011 Decision, if the ATT had been applied to transit and transfer passengers, the airline might have had to pay that tax twice for a journey with a stopover. Therefore, it was concluded that the ATT exemption for transit and transfer passengers, which resulted in passengers being taxed in the same way independently of the route travelled, fell within the nature and logic of the relevant tax system.
- (32) The Commission inferred from those elements that the exclusion of transfer and transit passengers from the ATT was in the nature and logic of the identified tax system ⁽¹⁾.

⁽¹⁾ Reasoning in recitals 30-32, conclusion in recital 37 of the 2011 Decision.

2.4. Judgment of the General Court in Case T-512/11

- (33) As indicated in recital 10, by its the judgment in Case T-512/11 the General Court annulled the 2011 Decision in so far as the 2011 Decision found that the non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU.
- (34) The General Court found that a preliminary investigation of around two years considerably exceeded the period normally required for a preliminary investigation carried out pursuant to Article 108(3) TFEU.
- (35) It also considered that the Commission's examination was incomplete and insufficient. In particular, the General Court found that there were inconsistencies between the content of the letter from Ireland dated 15 October 2009, referred to in recital 4, and the 2011 Decision.
- (36) In that respect, the General Court considered that the Commission endorsed Ireland's view that the part of the journey exempted from payment of the ATT was the first leg, even though the examples reproduced in the table set out in recital 9 of the 2011 Decision were not capable of supporting such conclusion. According to the General Court, whilst this might be the case as regards the example relating to passengers going from Dublin to New York and making a stopover in Shannon, who were subject to payment of the ATT, by contrast, it was not clear, and the Commission did not explain, why passengers taking the opposite route, that is from New York to Dublin with the same stopover, were not subject to payment of the ATT for the departure from the stopover airport of Shannon.
- (37) In addition, by referring to the fact that, according to the Irish authorities, reasons of neutrality also prompt the exemptions for the same categories of passengers granted by other systems of air travel taxation existing in other Member States, whereas explicit reference was made to the United Kingdom, the General Court found that the Air Passenger Duty in force in the United Kingdom could not constitute a relevant reference model in the present case because it provides that it is always the first leg of the journey that is subject to payment of the tax, which did not correspond to the view supported by the Irish authorities in their letter dated 15 October 2009 and confirmed by the Commission in the 2011 Decision.
- (38) The General Court also stressed that the letter dated 15 October 2009 did not refer explicitly to the need to avoid double taxation. Additionally, the General Court noted that Ireland had offered to consider adjusting the law on transfer and transit passengers, by removing the requirement for a single booking as part of the definition of a transfer passenger and that the Commission did not take a position on that statement.
- (39) Those inconsistencies gave grounds for concluding that, when the Commission adopted the 2011 Decision, it did not have the information with which to carry out a sufficiently complete analysis of the selectivity of the measure and to conclude that the rules for the application of the exemption did not raise doubts.
- (40) The General Court concluded that, in the absence of any analysis of the possible compatibility of the disputed measure with the internal market, the Commission should have initiated the formal investigation procedure, in order to gather any relevant information for verifying that the disputed measure was not selective and to possibly conclude that that measure did not constitute State aid, and to allow the applicant and the other parties concerned to present their observations in connection with that procedure.

3. GROUNDS FOR INITIATING THE FORMAL PROCEDURE

- (41) Following the judgment in Case T-512/11, the Commission initiated the formal investigation procedure in order to gather information to verify that the non-application of the ATT to transfer and transit passengers was not selective and to allow the applicant and the other parties concerned to present their observations in connection with that procedure.
- (42) In the Opening Decision, the Commission noted that the non-application of the ATT to departures of transfer and transit passengers resulted in a loss of tax revenue for the State and was therefore financed from State resources and appeared to confer an advantage on the airlines benefitting from it. Furthermore, the Commission could not at the stage of initiating the formal investigation exclude that the non-application of the ATT to transfer and transit passengers was selective.
- (43) The Commission thus preliminarily concluded that since all the criteria in Article 107(1) TFEU *a priori* could be fulfilled, the measure might constitute State aid to airline operators that have operated the routes benefitting from the exemption from the ATT for transfer and transit passengers.

- (44) The Commission therefore invited Ireland to set out again its reasons for the adoption of the ATT and to explain why the ATT did not apply to transfer and transit passengers.
- (45) The Commission also invited Ireland to set out in detail how Section 55 of the Finance Act should be interpreted. The Commission requested that Ireland provide clear examples of how the ATT applies to all relevant categories of routes, clarify whether ATT specifically exempts the second leg of a journey or, more generally, exempts all transfer and transit passengers, and to provide all other information which Ireland considered useful in that respect. The Commission also invited Ireland to provide those examples in relation to the periods before and after the amendment modifying the ATT rates, introduced in 2011.
- (46) Under the preliminary assumption that the reference system is a tax which is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland, the Commission expressed doubts as to whether the non-application of the ATT to transfer and transit passengers derogated from the reference system of taxation by differentiating between economic operators which, in light of the objective assigned to the tax system of the Member State concerned, were in comparable factual and legal situations, and consequently conferred an advantage on certain airlines.
- (47) The Commission also found, however, that the name, and indeed the wording, of the ATT may suggest that its guiding principle is to tax air journeys from an airport in Ireland, rather than each departure from an airport in Ireland. According to the Commission, under that assumption, the non-application of the ATT to transfer and transit passengers seems to directly follow from that principle, since an air journey may involve more than one departure from an airport in Ireland.

4. COMMENTS FROM IRELAND ON THE OPENING DECISION

- (48) In its comments dated 22 December 2015 on the Opening Decision, Ireland rejected any suggestion that the exemption of transfer and transit passengers constitutes State aid.

4.1. On the interpretation and application of Section 55 of the Finance Act

- (49) Ireland stated that the liability to pay the ATT was defined in the Finance Act, which must be interpreted strictly. Relying on jurisprudence of the Irish Supreme Court, Ireland stressed that under Irish law, a taxpayer could only be liable to pay a tax or suffer a disadvantage if this is explicit in law and quoted from the judgment *Texaco (Ireland) Ltd v Murphy (Inspector of Taxes)*: 'It is an established rule of law that a citizen is not to be taxed unless the language of the statute clearly imposes the obligation' ⁽¹⁾. On that basis, Ireland stated that in order to determine whether a journey was subject to the ATT, it was necessary to look at the wording of the Finance Act. Any doubt over the application of the Finance Act would benefit the taxpayer.
- (50) Pursuant to Section 55(2)(c) of the Finance Act, the ATT becomes 'due when a passenger departs from an airport on an aircraft'. In this respect, Ireland noted that:
- the definition of 'passenger' excludes (subject to certain conditions) persons who are disabled, or under the age of two, or transfer or transit passengers.
 - the definition of 'airport' also excludes some journeys, as no tax is due in respect of a departure from an airport outside Ireland and from certain airports with small passenger numbers ⁽²⁾.
 - the definition of 'aircraft' excludes aircraft which cannot carry more than 20 passengers, and also excludes aircraft used for State or military purposes.
- (51) In light of recital 50, Ireland considered that no ATT was due in respect of transfer and transit passengers, regardless of the leg of the journey concerned. Ireland confirmed that the second leg of a journey was not automatically exempt from the tax. According to Ireland, the second leg of a journey might have been or might not have been taxed, depending on the application of Section 55 of the Finance Act to the facts, including whether the passenger was a transfer or transit passenger (the same applied to the first leg of a journey). The definition of 'airport' might also exclude some journeys, as no ATT was due in respect of a departure from an airport outside Ireland.

⁽¹⁾ Judgment of the Supreme Court of 15 May 1992, *Texaco (Ireland) Ltd v Murphy (Inspector of Taxes)*, Irish Tax Reports (IV) 1988-1993.

⁽²⁾ In that respect, Ireland refers to the definition of 'airport' in Section 55(1) of the Finance Act, and the later amendment.

- (52) Ireland also pointed out that the transfer and transit passenger exclusions are normal in air travel taxes implemented by other countries, for example the United Kingdom, France and Germany. Ireland contended that the rules for each tax must be read in the context of the relevant national law.

4.2. On the interpretation of the exemption of transfer and transit passengers

- (53) Ireland commented on paragraph 88 of the judgment in Case T-512/11 which relates to the following statement contained in recital 20 of the 2011 Decision: 'As to the non-application of the tax on transit and transfer passengers, the Irish authorities state that the fact that any first leg of an overall journey is not subject to the tax ensures that the passenger is not punished because a route includes a stopover in order to get to the final destination'. In the abovementioned paragraph of its judgment in case T-512/11, the General Court had indicated that whilst the Commission had no reason to doubt the information contained in Ireland's letter dated 15 October 2009, on which paragraph 20 of the 2011 Decision is based, the fact remained that even following the Irish authorities' interpretation that any first leg of a journey including a stopover is exempt from the payment of the ATT, the examples produced in the table set out in paragraph 9 of the 2011 Decision were not capable of supporting that interpretation. The General Court pointed out that it was not clear, and the Commission did not explain, why passengers travelling from New York to Dublin with a stopover in Shannon are not subject to payment of the ATT for the departure from the stopover airport of Shannon. Ireland referred to paragraph 13 of its letter of 15 October 2009, which reads 'In respect of transfer passengers, the exemption merely ensures that the first leg of an overall journey isn't subject to ATT'. Ireland pointed out that that paragraph follows on from a description of a Dublin-New York flight with a Shannon stopover and it was correct in the context of such a journey, but it was incorrect to characterise this as a general rule by which the first leg of any journey would never be taxed under the ATT.

- (54) With respect to the example brought forward by the General Court in paragraph 88 of the judgment in Case T-512/11, involving a journey from New York to Dublin with a stopover in Shannon, Ireland explained that no ATT is due with respect to any of the legs constituting that journey because of the wording of the Finance Act, in particular:

- the first leg (New York to Shannon) is exempt because the tax is only levied on departures from Irish airports.
- the second leg (Shannon to Dublin) is exempt because at Shannon airport, the passenger qualifies as a transit or transfer passenger as defined in Section 55(1) of the Finance Act.

- (55) Ireland concluded that the overall journey from New York to Dublin with a stopover in Shannon would be exempted from ATT because of the wording of the Finance Act. According to Ireland, the explanations in its letter dated 15 October 2009 were intended to clarify the law but they are not binding.

4.3. On the rationale for the exemption for transit and transfer passengers and the reference system to use to assess it

- (56) As regards the reasons for exempting transfer and transit passengers, Ireland explained that it was not appropriate to tax individual flights separately if in reality they were part of a single journey. In that respect, Ireland referred to:

- the text of the definition of 'transfer' or 'transit passenger' for the purposes of the ATT, pursuant to Section 55(1) of the Finance Act (the provision is cited in recital 18);
- the text of Ireland's letter to the Commission, dated 15 October 2009, by which Ireland explained that the ATT was intended to tax a single journey, even if the journey was divided into different segments.

- (57) In particular, Ireland referred to the hypothetical scenario, provided in its letter dated 15 October 2009 to the Commission, of a flight from the United States which had a stopover in Shannon and then went on to Dublin. The text passage stated that 'the flight is clearly US-Dublin, and the fact of the stopover shouldn't generate any ATT liability'. In describing a flight going in the opposite direction, the text stated that 'for flights leaving the country with a stopover, the only aim of the exemption is to ensure that both legs of the journey don't have to be taxed separately'. According to Ireland, this underlined that the journey from Dublin to the United States was seen as a single journey and should thus only be subject to the ATT once, even if it involved several departures.

- (58) Ireland declared that this was the reason why Section 55(1) of the Finance Act explicitly excludes 'transfer' and 'transit' passengers, as defined in that section, from the scope of the ATT.
- (59) Considering the reference system envisaged by the Commission in the Opening Decision either as (i) a tax charged on every *departure*, or else (ii) a tax charged on every *journey*, which might involve several segments, Ireland suggested that the aim of the ATT was to tax each journey only once. According to Ireland, it would be more accurate to see the ATT as a tax on journeys rather than a tax on departures. Section 55(2) of the Finance Act refers to 'departure' as the trigger for the ATT. The definitions and sections of the Finance Act described in recitals 18 and 19 demonstrate, however, that the service which was taxed was the journey and that the real objective was to tax journeys, not departures.

4.4. On the distinction between point to point airlines and others

- (60) Ireland held that assessing whether the airline operators providing only point-to-point services and those providing connecting flights are in a comparable factual and legal situation in light of the objective assigned to the tax system of the Member State concerned can be only a secondary reason for rejecting the complaint. Ireland's primary submission is that the ATT aimed to tax journeys, not individual departures. As a result, the exemption for transfer and transit passengers merely reflects the fact that a single journey can be comprised of several 'legs'. Ireland also pointed out that the ATT was not designed to favour or penalise any specific business model.

4.5. On the nature and general scheme of the tax

- (61) Finally Ireland stated that if the exemption for transfer and transit passengers conferred advantages on certain airlines, it could result directly from the basic and guiding principles of the Irish tax system such as the avoidance of double taxation or tax neutrality.
- (62) Recalling the terms of its letter of 15 October 2009, Ireland explained that the exemption was intended to avoid over-application of the ATT. In particular, it was intended to avoid discrimination against passengers whose journey involved a stopover. Necessarily, this reference to discrimination involved comparing (a) passengers whose journey involved a stopover and (b) passengers who flew directly. As the aim was to treat both in the same way, this supports the conclusion that the aim of the ATT was to tax each journey only once.
- (63) Ireland also invoked the need to avoid double taxation. Although this principle may not have been cited in Ireland's letter dated 15 October 2009, that letter invoked issues of equity and equal treatment which cause States to refrain from double taxation. Similarly, Ireland invoked the principle of tax neutrality.

5. COMMENTS FROM INTERESTED PARTIES

5.1. Comments from Ryanair

- (64) Ryanair is of the opinion that the measure is selective and therefore constitutes State aid pursuant to Article 107(1) TFEU, without falling under any of the exemptions set out in Article 107(2) and (3) TFEU.
- (65) The airline pointed out that its observations should be read against the background of:
- its complaint to the Commission dated 21 July 2009 against the granting of unlawful aid through the ATT;
 - its application dated 24 September 2011 to the General Court in Case T-512/11, together with its annexes;
 - its other written and oral submissions dated 24 September 2011 submitted to the General Court in Case T-512/11 including, in particular, its reply dated 17 January 2012.

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

- (66) Ryanair agrees that the exclusion of transfer and transit passengers in the example of the Dublin-Shannon-New York flight would concern the second leg of the journey. Accordingly, Ryanair argues that the total tax due before the change in rates with effect from 1 March 2011 should have only been the lower rate of EUR 2 (for Dublin Shannon) instead of the EUR 10 shown in Table 1.

- (67) Moreover, even if Ireland provides evidence that the application of this measure in practice was consistent with the interpretation that the first leg of a journey was exempt from the ATT, in Ryanair's views, this would not be sufficient to remedy the distortion reflected in the Finance Act.

5.1.2. *On the 'normal' or reference system of taxation*

- (68) Ryanair reserves its position on the definition and relevance of the 'normal' or reference system of taxation, pending the outcome of the appeal before the Court of Justice in the judgment in Joined Cases C-164/15 P and C-165/15 P ⁽¹⁾. Ryanair contends that the Commission's definition of the 'normal' or reference system of taxation is inconsistent with some of the conclusions it draws in the remainder of the Opening Decision.

5.1.3. *On the question of whether the non-application of the ATT in relation to transfer and transit passengers derogates from the system of reference*

- (69) Referring to paragraph 44 of the Opening Decision and quoting from that text passage, Ryanair questions how the Commission, based on the previous conclusion on the reference system of taxation, argues in paragraph 44 that 'the objective of the ATT is to tax air journeys starting at an airport in Ireland' but then jumps, without further explanation or analysis, to the illogical conclusion that in light of this objective 'it may be appropriate to distinguish the legal and factual situation of airlines providing only point-to-point services from that of airlines that also provide services that involve a transfer or transit at such airports'. ⁽²⁾ The previous conclusion Ryanair refers to is given in paragraph 42 of the Opening Decision, where the Commission takes the preliminary view that the reference system of taxation is a tax which is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland.
- (70) Ryanair views the quotes in paragraph 44 of the Opening Decision as an attempt to justify a distinction between the legal and factual situation of airlines providing point-to-point services from that of airlines that also provide services that involve a transfer or transit. Ryanair regards such a distinction as flawed and regrettable, as it would evidently lay the ground for a final decision that the measure under investigation did not constitute State aid.
- (71) In its comments, Ryanair refers to paragraph 45 of the Opening Decision, where the Commission, having regard to decisional practice in Union merger control, explains that services that involve a transfer or transit constitute, from the perspective of the customer, a journey from the airport of origin to the airport of destination, and not two separate journeys. In Ryanair's view, in doing so, the Commission confuses the very narrow technical exercise of defining relevant product markets in merger cases with the notion of 'comparable factual and legal situations' in State aid cases. Referring to jurisprudence of the Court and the Opening Decision ⁽³⁾, Ryanair submits that the notion of 'comparable factual and legal situations' are not determined through substitutability of demand and supply (which, according to Ryanair, are criteria typically used in merger reviews and other competition cases, and relied upon here by the Commission), but are a function of the objectives pursued by the scheme under consideration.
- (72) The 'comparable factual and legal situations' in State aid cases are according to Ryanair almost always much more broader in scope than the 'relevant product markets' in merger cases, as the objectives pursued by the domestic scheme in this or other State aid cases had nothing to do with the relevant product market definition in merger control cases. In that respect, Ryanair again refers to Court jurisprudence pursuant to which the Court did not delimit the 'comparable factual and legal situations' based on the perspective of the customers or the beneficiaries' business models, as the Commission would propose to do in this Decision.

⁽¹⁾ As explained in recital 16, the Court of Justice pronounced judgment on 21 December 2016.

⁽²⁾ Paragraph 44 of the Opening Decision reads as follows: 'The non-application of the ATT in relation to transfer and transit passengers derogates from the common regime under which every departure of a passenger on an aircraft from an airport in Ireland is subject to the tax. It is open to question, however, whether that derogation involves differentiation between economic operators who are, in the light of the objective assigned to the ATT, in comparable factual and legal situations. If the objective of the ATT is to tax air journeys starting at an airport in Ireland, it may be appropriate to distinguish the legal and factual situation of airlines providing only point-to-point services from that of airlines that also provide services that involve a transfer or transit at such airports'.

⁽³⁾ Reference by way of example to judgment of the General Court of 22 January 2013, *Salzgitter v Commission*, T-308/00, ECLI:EU:T:2013:30, paragraph 81, by analogy with the judgment of the Court of Justice of 8 November 2011, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECLI:EU:C:2001:598. Ryanair also refers to paragraphs 21 and 28-30 of the Opening Decision.

- (73) In its comments, Ryanair refers to the Commission's decisional practice, for example in the area of online and land-based gambling activities, where the Commission would accept that undertakings with different business models are in a comparable legal and factual situation in the sense referred to in recital 72 ⁽¹⁾.
- (74) Ryanair explains that if the reference system of the ATT is a tax which is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland, the only logical consequence can be that the scheme had to be agnostic as to the passengers' views about their journey or the business model of the airlines concerned. A different interpretation would reflect a selective approach, narrower than the ATT objective, and thus meet one of the key conditions of State aid.
- (75) Specifically, selectivity in this Decision would stem from the fact that although traditional airlines, which offer transfer and transit flights, and those following only point-to-point flights (such as Ryanair) are in a comparable factual and legal situation for State aid purposes, only the former would benefit from the exemption of transfer and transit passengers for the ATT.
- (76) Ryanair asserts that the beneficiaries of this exemption are easy to define *a priori*. Moreover, it could not be claimed that the exemption was open to all airlines, without discrimination. Firstly, it is virtually impossible for an airline to adapt its fundamental business model from a point-to-point to a hub-and-spoke model; to Ryanair's knowledge, there is no single precedent of such a change on the market. Secondly, such an adjustment would be further hindered through capacity constraints in most airports.
- (77) To conclude with, the non-application of the ATT in relation to transfer and transit passengers was in Ryanair's opinion a clear derogation from the system of reference and the objectives pursued by the ATT in the sense that those terms are interpreted by Union case law. In this context, Ryanair refers to its previous submissions, according to which Ireland's undeclared but real objectives were to selectively support certain domestic airlines and promote Dublin airport as an international hub.

5.1.4. *On the question of whether the non-application of the ATT to transfer and transit passengers results directly from its basic and guiding principles*

- (78) Ryanair rejects the idea that the exemption of transfer and transit passengers from the ATT results directly 'from its basic and guiding principles'. Ryanair regards the Opening Decision as an attempt to justify such a conclusion by a set of contorted arguments put together *ex post facto* by Ireland and the Commission in order to cancel out the clear implications of the ATT's 'reference system' and 'objective', as previously defined in the Opening Decision, through the hazy term of 'basic and guiding principles'.
- (79) Having regard to Section 6.1.5 of the Opening Decision, Ryanair comments on a number of principles that it considers to be postulated by the Commission or Ireland or both:

- On 'clarity of application' ⁽²⁾: Ryanair raises the question of whether [one is supposed to accept that] such 'clarity' would be achieved through the selective circumvention of the ATT's reference system and objective.
- On avoidance of 'over-application of the ATT' ⁽³⁾: Ryanair finds this term unclear. Ryanair refers to a Commission decision on State aid to reduce the costs of electricity-intensive companies resulting from the financing of support to energy from renewables ⁽³⁾, and more specifically to recital 32 of that Decision, which stipulates that 'The measure is also selective because only [energy-intensive users] within certain specific sectors can benefit from it'. On that basis, Ryanair concludes that fair and just application of the ATT only provides an additional argument against the exemption of transfer and transit passengers. By the same token, the Commission should find that an exemption for airlines that are intensive users of airport infrastructure due to their hub-and-spoke model constitutes State aid. Ryanair argues that if, as the Commission mentions in the Opening Decision, Ireland's alleged wish to shield passengers from the consequences of taking a flight with a stopover ⁽²⁾, then the measure in question constitutes aid of a social character, and its compatibility has to be reviewed under Article 107(2) TFEU.

⁽¹⁾ Commission Decision of 17 March 2015 in State aid case SA.34469 (2014/NN ex 2012/CP) Differential tax rates for online and land-based gambling in Spain (OJ C 136, 24.4.2015, p. 1), recital 56.

⁽²⁾ With reference to paragraph 48 of the Opening Decision.

⁽³⁾ Commission Decision of 31 August 2015 in State aid case SA.42424 Reduced contribution to financing of RES support for energy-intensive users, Denmark (OJ C 369, 6.11.2015, p. 1), recital 32.

- On the assumption that ‘Transfer and transit passengers exclusions are normal in air travel taxes operated by other countries, for example the United Kingdom’: With reference to paragraphs 41 to 44 of its previous Application to the General Court in Case T-512/11, Ryanair dismisses the argument of ‘common international practice’. Ryanair argues that the reference to the United Kingdom as a supposedly similar example is inconsistent with the Commission’s belatedly corrected understanding of the ATT mechanism discussed in Section 6.1.2 of the Opening Decision.
 - On the assumption ‘The name and indeed the wording of the ATT may suggest that its guiding principle is to tax air journeys from an airport in Ireland, rather than each departure from an airport in Ireland’: ⁽¹⁾ According to Ryanair, this position cannot be maintained as in the relevant legal provision defining the ATT, the word ‘every’ is used only once and only in connection with the word ‘departure’ rather than the word ‘journey’. Ryanair stresses that a ‘departure’ is not the same as a ‘journey’. Therefore, the Commission’s conjecture that the focus of this text of the Finance Act is on ‘every journey’ rather than ‘every departure’ was a simple negation of the text of the Finance Act clear letter and meaning, aiming to justify the unjustifiable. More generally, the name that a Member State puts on a measure is not a factor upon which Union law relies to determine whether that measure constitutes State aid.
- (80) With regard to the length of the preliminary investigation procedure, litigation and the formal investigation procedures, Ryanair states that the relevant facts should be clear enough by now. Ryanair worries that, under the circumstances, the Commission’s comment in the Opening Decision that its current conclusion on the compliance of the contested exemption with the ATT’s ‘basic and guiding principle’ may need to be revised in light of the information gathered in the formal investigation offers very limited hope that the Commission will actually change its views. In that respect, Ryanair stresses that in any event, no information or *ex post facto* argument may be allowed to distort the clear letter and implications of the contested exemption of transfer and transit passengers or be used as an excuse for a no aid finding in this Decision.

5.1.5. *On the existence of State aid*

- (81) Ryanair calls on the Commission to reconsider its preliminary findings in light of its submissions.
- (82) In its comments, Ryanair agrees with the Commission’s view that, insofar as the measure at issue constitutes State aid, it does not fall under any of the exemptions specified in Article 107(2) and (3) TFEU.

5.2. **Comments from Aer Lingus**

- (83) Aer Lingus submits that the ATT’s exemption for transfer and transit passengers does not constitute State aid within the meaning of Article 107(1) TFEU for the following two reasons:
- the ATT’s reference system is that it taxes departures on an aircraft from an Irish airport by reference to the entire journey, such that a journey comprising two connecting flights is treated as a single journey and that journeys commencing outside of Ireland are not subject to the ATT. The ATT is levied only once, in relation to the overall itinerary. Based on that ‘journey reference system’, the ATT cannot be considered selective and would thus not constitute State Aid.
 - even if the Commission were to maintain its preliminary view that the ATT’s reference system is based on every departure of a flight from an Irish airport, the exemption for transfer and transit passengers is not selective because it does not discriminate between economic operators: pure point-to-point carriers face objectively different circumstances compared to airlines that operate services for transfer and transit passengers. The exemption would, in any event, also be justified because the exemption addresses both double taxation concerns and is aligned with the ATT’s guiding principle of referencing the tax to the journey.

5.2.1. *On the purpose of the ATT*

- (84) Aer Lingus sought clarification from the Revenue Commissioners as to the interpretation of the Finance Act. On 30 March 2009, the Revenue Commissioners sent an email to Aer Lingus clarifying the interpretation of the Finance Act. Aer Lingus contends that on the basis of that email, it is clear from the interpretation of Section 55(2) of the Finance Act that the tax is to be determined on the basis of the final destination,

⁽¹⁾ With reference to paragraph 49 of the Opening Decision.

disregarding any intermediate stop-over locations. Aer Lingus concludes that regardless of the number of segments a journey includes, the tax is levied on the basis of the passenger's final destination and is assessed once, by reference to the overall journey, regardless of whether it comprises one or more flights. The relevant passage from the email dated 30 March 2009 reads as follows:

'The flight ends at the passenger's final destination as booked by them, regardless of the route planned for them to their destination by the airline operator. In your outlined scenario of the transatlantic flights [Shannon-Dublin-Chicago], if a person books a flight from Shannon to Chicago with Aer Lingus, the rate of tax that Aer Lingus should apply is EUR 10, as the place where that flight ends is Chicago i.e. more than 300 km from Dublin Airport. The fact that there is a stopover en route does not change the position' (emphasis added by Aer Lingus).

- (85) Aer Lingus considers this interpretation as consistent with the definitions of transfer and transit passengers which refer to the passenger's 'journey' rather than the passenger's flight. According to Aer Lingus, it follows that a 'journey' can be non-stop or can include a stop-over of no more than six hours.

5.2.2. *On the reasons to tax a passenger's journey from Ireland and not a transfer/transit flight*

- (86) According to Aer Lingus, the exemption in question gives effect to the basic principle that the tax is to be determined on the basis of the final destination, disregarding any intermediate stop-over locations.
- (87) Aer Lingus argues that, in addition, the exemption would serve the purpose of avoiding double taxation not only in Ireland but also cross-border. In that respect, Aer Lingus refers to a passage from the email referred to in recital 84 it had received from the Revenue Commissioners:

'The effect of the definition of "transfer passenger" is to avoid tax being charged separately on each leg of the journey (...), where the flights are within 6 hours of each other. If the flights were more than six hours apart, the "transfer passenger" exemption wouldn't apply and each element of the trip would fall to be taxed separately (that is, two departures, each subject to the appropriate rate of ATT)' (emphasis added by Aer Lingus).

- (88) On the basis of the passage referred to in recital 87, Aer Lingus concludes that whether a passenger departing on a flight which is part of an itinerary with two (or more) segments from an Irish airport is subject to the ATT depends firstly on the place of departure of the first flight, and secondly on the place of arrival of the final destination. This would avoid:

— the ATT applying to more than one leg of a journey; and

— the ATT applying to one leg of the journey while another jurisdiction's equivalent tax already applies to the same journey.

- (89) Aer Lingus explains that the exemption in question is not unique to Ireland's ATT but an inherent feature of other air travel tax regimes. In that respect, Aer Lingus points to the application of air passenger duty ('APD') in the United Kingdom which would treat connecting flights as a single journey rather than two separate journeys, provided that the connection satisfies certain specified requirements ⁽¹⁾. Aer Lingus further explains that while the definition of what constitutes a 'connecting flight' depends on a number of factors, including the time gap between the relevant flights and whether the connection is to a domestic flight in the United Kingdom or an international flight, the overriding principle, in Aer Lingus' view, is that connecting flights are treated as a single journey and APD is only levied on journeys deemed to have commenced in the United Kingdom. By way of exception, flights arriving from and departing to the same country would not be regarded as being connected (for example, Paris-London-Marseille) and APD would be levied on journeys commencing in the United Kingdom. Aer Lingus further notes that to qualify for the connecting flights exemption, the connected flights must be detailed on the same ticket or conjunction tickets and self-connections would not therefore qualify for this exemption.

⁽¹⁾ With reference to the website of HM Revenue and Customs, Excise Notice 550: Air Passenger Duty, <https://www.gov.uk/government/publications/excise-notice-550-air-passenger-duty/excise-notice-550-air-passenger-duty>

(90) Aer Lingus mentions further examples of taxes ⁽¹⁾:

- France: The French *Aviation Civile Taxe* would exempt passengers connecting at a French airport (stop-over less than 24 hours) and direct transit passengers (same flight number and aircraft). The tax would be calculated by reference to the final point of the single-ticket journey.
- Austria: A tax calculated by reference to the furthest point shown in a single-ticket itinerary with a connecting flight if the transfer is within 24 hours.
- Germany: Tax on the basis of the furthest geographical point shown on the ticket; a 12 hour or 24 hour rule applies, depending on the transfer country.

5.2.3. On the application of the ATT before and after 2011

(91) Aer Lingus provided examples, reproduced in Table 2, to illustrate the application of the ATT, as well as the reasons for the exemption of transfer and transit passengers.

Table 2

Examples of the application of the ATT before and 2011 provided by Air Lingus

	Route	Pre 2011 (EUR)	Post 2011 (EUR)	Taxable event
1	Dublin-New York	10	3	— Departure from an Irish airport — Journey distance: more than 300 km
2	New York-Dublin	0	0	— No departure from an Irish airport — Possibly subject to US tax
3	Dublin-Manchester	2	3	— Departure from an Irish airport — Journey distance: less than 300 km
4	Manchester-Dublin	0	0	— No departure from an Irish airport — Possibly subject to UK tax
5	London-Dublin-New York <i>Stopover: less than six hours</i>	0	0	— Departure from a UK airport not subject to Irish tax but subject to UK tax — Departure from an Irish airport exempted because it is a transfer as defined
6	London-Dublin-New York <i>Stopover: more than six hours</i>	10	3	— Departure from a UK airport not subject to Irish tax but subject to UK tax — Departure from an Irish airport subject to Irish tax as it is not a transfer as defined: journey distance more than 300 km

⁽¹⁾ Aer Lingus provided excerpts from the IATA List of Ticket and Airport Taxes and Fees, providing details on the Austrian, German and French taxes.

	Route	Pre 2011 (EUR)	Post 2011 (EUR)	Taxable event
7	New York-Shannon-Dublin <i>Stopover: less than six hours</i>	0	0	— Departure from US airport not subject to Irish tax but possibly subject to US tax — Departure from an Irish airport exempted from Irish tax because it is a transfer as defined
8	New York-Shannon-Dublin <i>Stopover: more than six hours</i>	2	3	— Departure from US airport not subject to Irish tax but possibly subject to US tax — Departure from an Irish airport subject to Irish tax as it is not a transfer as defined: journey distance more than 300 km
9	Dublin-Shannon-New York <i>Stopover: less than six hours</i>	10	3	— Departure from an Irish airport (DUB): subject to Irish tax — Departure from an Irish airport (SNN) not subject to Irish tax because it is a transfer as defined — Journey distance: more than 300 km
10	Dublin-Shannon-New York <i>Stopover: more than six hours</i>	12	6	— Departure from an Irish airport (DUB): subject to Irish tax and the journey distance less than 300 km — Departure from an Irish airport (SNN) subject to Irish tax as it is not a transfer as defined; journey distance more than 300 km

(92) Aer Lingus provided comments on Table 2:

- Table 2 provides examples of the ATT collected in practice on various routes, in line with the contemporaneous guidance provided by the Revenue Commissioners (as mentioned in recitals 84 and 87);
- examples 1 to 4, which are all single flight journeys, illustrate that the flight must depart from an Irish airport for it to be a taxable event under the Irish ATT;
- examples 5 to 8, which involve journeys commencing outside of Ireland, illustrate how the exemption avoids a passenger having to pay air transport tax in different jurisdictions in respect of the same journey; and that a stop-over must be limited to six hours;
- examples 9 and 10, which involve journeys commencing in Ireland with a connecting flight in Ireland, illustrate how the exemption avoids a passenger being subject to the ATT more than once, provided that stopover is not more than 6 hours; and that the tax is calculated by reference to the entire journey.

5.2.4. On Aer Lingus' application of the ATT and the transfer/transit exemption

(93) Aer Lingus refers to the Opening Decision where reference was made to a letter from Ireland dated 15 October 2009, in which it is explained that in the case of a journey including several segments, the ATT exempts the first leg of such a journey ⁽¹⁾. Aer Lingus stresses that it does not recognise this principle and is unable to shed light on why such a principle was suggested.

⁽¹⁾ Paragraphs 19 and 20 of the Opening Decision.

- (94) According to Aer Lingus, such a principle is not in line with the Revenue Commissioner's guidance provided in the email dated 30 March 2009 referred to in recital 84, and is not the way in which ATT was calculated by Aer Lingus in practice. Nor would it be consistent with the examples in paragraph 20 of the Opening Decision, which do not illustrate the application of the transit passenger exemption to the first leg of a journey but rather demonstrate that a journey is not subject to the ATT if it commences outside of Ireland ⁽¹⁾.
- (95) Aer Lingus asserts that it collected the ATT in accordance with the Revenue Commissioner's guidance and reported the amount sent by way of self-declaration to the authorities ⁽²⁾.

5.2.5. *On the presence of State aid*

- (96) Aer Lingus argues that there is no selectivity in exempting transfer and transit passengers from the ATT. According to Aer Lingus, it is inherent in the ATT scheme that a transfer or transit passenger is to be disregarded, as the ATT does not apply to particular segments of a journey. Instead, the taxable event is a journey that starts in Ireland and the tax due depends on the ultimate destination stated on the ticket, regardless of whether the passenger takes one or more flights to get to that ultimate destination.
- (97) In that respect, Aer Lingus refers to paragraph 41 of the Opening Decision where the Commission took the preliminary view that the taxable event is a journey that starts in Ireland and that the tax due depends on the ultimate destination stated on the ticket, regardless of whether the passenger takes one or more flights to get to that ultimate destination:

'Another possible reference system may be a tax charged in respect of air travel from an airport in Ireland, the notion of "air travel" being understood as a journey from an airport in Ireland to a final destination that may consist of one or more segments. If this were the correct reference system, it seems obvious that the ATT should not apply to transfer or transit passengers. Hence the measure would not be selective' (emphasis provided by Aer Lingus).

5.2.6. *On other matters*

- (98) Under the assumption that if the Commission were still to maintain its preliminary view that the ATT's reference system is the taxation of every departure (individually), Aer Lingus submitted that:

- the exemption of transfer/transit passengers is not selective; and
- even if the exemption were to be considered selective, it would be justified.

5.2.6.1. *On the first point 'the exemption of transfer/transit passengers is not selective'*

- (99) Referring to case law ⁽³⁾, Aer Lingus submits that the non-application of the ATT to departures of transfer and transit passengers would only be selective if it differentiated between economic operators who, in light of the objective assigned to the ATT, are in comparable factual and legal situations. In that respect, Aer Lingus refers to the question whether the non-application to transfer and transit passengers favours carriers such as Aer Lingus (which offers single tickets for journeys comprising two or more flights) as against point-to-point carriers (which do not offer single tickets for such journeys and therefore had to levy the ATT for each flight for passengers whose journey included a self-connection).
- (100) Aer Lingus concludes that given the differing factual and legal situation between pure point-to-point services and single-ticketed services — notably the different costs to the carrier and level of service to the passenger — the exemption for transfer and transit passengers was not selective, namely for the following reasons:
- there is certainly a significant portion of Aer Lingus' passengers that chooses to self-connect ⁽⁴⁾, for whatever reason, regardless of Aer Lingus having the ability to offer single tickets for the overall journey. By definition,

⁽¹⁾ See the examples contained in paragraph 20 of the Opening Decision reproduced in recital 91 above.

⁽²⁾ Aer Lingus provided an example of such a report and explained that the calculation presented simply deducts a stated number of transfer/transit passengers.

⁽³⁾ Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Zementwerke*, C-143/99, ECLI:EU:C:2001:598.

⁽⁴⁾ A passenger who makes several independent bookings for different flights forming his/her journey, as opposed to making a single booking covering several flights with one service provider.

Aer Lingus is not in a position to identify or quantify the number of passengers preferring to travel on a self-connecting basis — any more than point-to-point carriers are able to clearly quantify such passengers (who may, for example, self-connect onto a different carrier). For those passengers who self-connect, Aer Lingus is in the same factual and legal position as pure point-to-point carriers.

- Aer Lingus' situation is however factually and legally different for those passengers who purchase single-ticketed transfer or transit journeys. In that respect, Aer Lingus refers to part of the last sentence of paragraph 45 [(44)] ⁽¹⁾ of the Opening Decision, where, according to Aer Lingus, the Commission itself recognises that 'it may be appropriate to distinguish the legal and factual situation of airlines providing only point-to-point services from that of airlines that also provide services that involve a transfer or transit at such airport'.

(101) With reference to passages of the Opening Decision relating to the differences between journeys including several flights under a single booking and journeys involving several flights under separate bookings, Aer Lingus, in the context of selectivity, also makes the following observations:

- with respect to the passage 'The business models of airlines focusing on point-to-point services and those operating services which may involve a transfer or transit are very different.' ⁽²⁾ Aer Lingus stresses that it implements specific procedures to accommodate transfer and transit passengers. This involves the operation of a seamless transfer such as transfer desks and through fares and assuming responsibility for missed connections (for example by providing care and assistance, accommodation). According to Aer Lingus, these are significant costs and responsibilities, none of which apply to self-connecting passengers.
- with respect to the passage 'Services that involve a transfer/transit constitute, from the perspective of the customer, a journey from the airport of origin to the airport of destination, and not two separate journeys' ⁽³⁾. Aer Lingus explains that, for the passengers, the service experience is also different, avoiding multiple check-ins, multiple tickets, potentially different baggage allowances etc.
- with respect to the passage 'The entire journey involving two or more segments is sold as one and can be travelled with a single ticket.' ⁽⁴⁾ Aer Lingus explains that this is obviously not the case for a self-connecting journey. In fact, a self-connecting journey would involve at least two separate tickets (and two separate contracts) possibly with two different airlines. A single ticket would be based on a single contract with one airline.
- with respect to the passage 'Passengers do typically not have to reclaim their luggage when transferring.' ⁽⁵⁾ According to Aer Lingus, this is indeed the opposite for self-connecting passengers. There are no luggage transfer services for self-connecting passengers at any of the Irish airports.
- with respect to the passage 'Checks on passengers and luggage are typically different.' ⁽⁵⁾ Aer Lingus explains that self-connecting passengers will have to check-in for each flight separately.

5.2.6.2. On the second point 'even if the exemption were to be considered selective, it would be justified'

(102) Aer Lingus submits that the measure avoids double taxation and applies within Ireland as well as cross-border. Such exemption indeed would be commonly applied by other jurisdictions, such as the United Kingdom.

(103) Aer Lingus further submits that the guiding and basic principle of the ATT is that it is calculated by reference to the entire journey. In the case of a single-ticket, the single ticket would equate to a single journey (in so far as any stopover takes less than six hours). However, for a self-connecting service composed of two separate bookings, each booking would be considered as separate by the airlines' booking systems and not recognised as transferring passengers.

⁽¹⁾ Aer Lingus erroneously referred to paragraph 45 of the Opening Decision, which however does not contain the sentence quoted in the relevant passage of its comments on the Opening Decision.

⁽²⁾ Paragraph 45 last sentence of the Opening Decision.

⁽³⁾ Paragraph 45 first sentence of the Opening Decision.

⁽⁴⁾ Paragraph 45 second half of the sentence of the Opening Decision.

⁽⁵⁾ Paragraph 45 last part of the second sentence of the Opening Decision.

5.3. Comments from Ireland on observations from interested parties

- (104) Overall, Ireland agreed with the points made by Aer Lingus, with the exception of those summarised in recitals 93 and 94. According to Ireland, Aer Lingus quoted a letter from Ireland dated 15 October 2009 saying that if a journey consisted of several segments, the first leg was always exempted from ATT. Ireland referred to its letter dated 22 December 2015 in which it explained that this was a misunderstanding. Ireland's letter dated 15 October 2009 had given a specific example in which the first leg of the journey was not subject to ATT. However, Ireland considers that this should not be interpreted as a general statement that the first leg was always exempted.
- (105) As regards comments made by Ryanair on the tax payable (see recital 65), Ireland pointed out that Ryanair did not itself carry transfer or transit passengers and therefore had no practical experience of applying the rules concerning ATT. Nor does Ryanair explain its reasoning, according to Ireland.

6. ASSESSMENT OF THE NON-APPLICATION OF THE AIR TRAVEL TAX TO TRANSIT AND TRANSFER PASSENGERS

6.1. Preliminary comments: the proper interpretation of the ATT with respect to the exemption for transit and transfer passengers

- (106) In its letter dated 15 October 2009, Ireland stated that the exemption for transit and transfer passengers ensures that the 'first leg' of an overall journey is not subject to the ATT. That statement led to confusion about the correct interpretation of the exemption, as is apparent from the General Court's judgment in Case T-512/11.
- (107) In the light of the comments received from Ireland and third parties, it is now clear that the Irish legislation should be understood as set out in Section 2.2 above.
- (108) As explained there, under Section 55(2) of the Finance Act airlines are liable to pay the ATT for every departure of a passenger on board an aircraft from an airport located in Ireland, whereas transit and transfer passengers are not considered to be passengers within the meaning of Section 55(2) the Finance Act and therefore the ATT does not apply to their departure. Consequently, it cannot be said in general terms that the ATT applies to a specific leg of an air journey.
- (109) It should be noted that when the 2011 Decision was adopted, there were two different rates applicable to flights to destinations located no more than 300 kilometres from Dublin Airport and all other flights. It is now clear that the applicable tax rate depended on the distance to the final destination, irrespective of the location of transit or transfer. For instance, a journey from Dublin to New York with a stopover at Shannon would be taxed at the rate of EUR 10, not EUR 2. The departure from Dublin Airport would give rise to taxation at the rate of EUR 10 ATT, even though Shannon is within 300 kilometres of Dublin Airport, because the distance from Dublin Airport to New York exceeds that threshold. Furthermore, the departure from the stopover at Shannon Airport is not subject to ATT, since the passenger is a transit or transfer passenger at that airport.
- (110) The qualification as a transit or transfer passenger at an Irish airport did not depend on the location of the airport from which the passenger came when landing at the Irish airport, which could be also outside Ireland, e.g. in the case of a journey from London to New York with a stopover of not more than six hours at Shannon. No ATT would be due for such a journey because the airport of departure in London is located outside of Ireland, while the passenger qualifies as a transfer or transit passenger when departing from Shannon Airport.

6.2. Existence of aid

6.2.1. Introduction

- (111) 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 shall, in so far as it affects trade between Member States, be incompatible with the internal market.

- (112) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient, which must be an undertaking (namely carry out an economic activity); (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.
- (113) In this case, it is appropriate to first consider whether the non-application of the ATT to transfer and transit passengers is liable to confer a selective advantage to certain airlines.

6.2.2. Selectivity

6.2.2.1. Introduction

- (114) A measure is selective, if it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU.
- (115) For measures applicable to all undertakings fulfilling certain criteria which mitigate the charges that those undertakings would normally have to bear, the selectivity of a measure should normally be assessed by means of a three step analysis ⁽¹⁾. First, the common or normal tax regime applicable in the Member State is identified: 'the reference system'. Second, it should be determined whether a given measure constitutes a derogation from that system, insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. If the measure in question does not constitute a derogation from the reference system, it is not selective. If it does (and therefore is *prima facie* selective), it must be established, in the third step of the analysis, whether a measure which derogates from the reference system is justified by the nature or the general scheme of the reference tax system. If a *prima facie* selective measure is justified by the nature or the general scheme of the system, it will not be considered selective and it will thus fall outside the scope of Article 107(1) TFEU.
- (116) In certain exceptional cases, the three-step approach cannot be applied, given the practical effects of the measures concerned. In such cases, it may also be necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others. Otherwise, instead of laying down general rules applying to all undertakings, from which a derogation is made for certain undertakings, the Member State could achieve the same result, circumventing the State aid rules, by adjusting and combining its rules in such a way that their very application results in a different burden for different undertakings ⁽²⁾. In this respect, it must be recalled that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them on the basis of their effects, and thus independently of the techniques used ⁽³⁾.
- (117) Below, the three-step analysis will first be applied to the ATT's exemption for transit and transfer passengers (Sections 6.2.2.2 and 6.2.2.3). Second, the Commission will then consider whether the ATT has been designed by the Member State in a clearly arbitrary or biased way, so as to favour certain undertakings over others (Section 6.2.2.4).

6.2.2.2. Determination of the system of reference

- (118) The reference system is the benchmark against which the selectivity of a measure is assessed. The reference system is comprised of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. The identification of the reference system therefore depends on elements such as the taxable persons, the taxable base, the taxable events and the applicable tax rates.

⁽¹⁾ See, for example, judgment of the Court of Justice of 8 September 2011, *Paint Graphos and Others*, Joined Cases C-78/08 to C-80/08, EU: C:2011:550, paragraph 49; judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, ECLI:EU: C:2011:551, paragraph 62; judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline v Finanzlandesdirektion für Kärnten*, C-143/99, ECLI:EU:C:2001:598, paragraphs 42-54; judgment of the Court of Justice of 29 April 2004, *GIL Insurance v Commissioners of Customs & Excise*, C-308/01, ECLI:EU:C:2004:252, paragraph 72. See also points 127 and 128 of the Commission Notice on the notion of aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ('the Notice on the notion of aid') (OJ C 262, 19.7.2016, p. 29).

⁽²⁾ Judgment of the Court of Justice of 15 November 2011, *Commission and Spain v Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732. See also points 129-131 of the Notice on the notion of aid.

⁽³⁾ Judgment of the Court of Justice of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, ECLI:EU:C:2008:757, paragraphs 85 and 89 and the case law cited, and judgment of the Court of Justice of 8 September 2011, *Commission v Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 51.

6.2.2.3. ATT

- (119) The ATT constitutes a distinct tax regime in its own right, which is not part of a wider fiscal system. Therefore, the reference system does not go beyond the limits of the ATT itself.
- (120) The key question in this case is whether the non-application of the ATT to transit and transfer passengers is part of the reference system or whether that non-application constitutes a derogation from the reference system. In the first case, the ATT is considered as a tax that applies to all passengers departing from Ireland on an air journey, it being understood that an air journey may consist of more than one flight. In that approach, it is logical that the tax is not levied twice when the overall journey involves more than one departure from an Irish airport. Moreover, passengers who start their journey in a third country are not taxed, since their journey did not depart from an Irish airport ('journey system'). In the second case, the ATT is considered as a tax that applies to all passengers departing on an aircraft from an airport in Ireland, and the non-application of the ATT to transit and transfer passengers constitutes a derogation from that rule ('departure system').
- (121) On a first analysis, the wording of Section 55(2)(a) of the Finance Act ('every departure of a passenger on an aircraft from an airport') might suggest that the departure system constitutes the appropriate reference system. That is also the preliminary view the Commission took in the Opening Decision: the reference system is a tax that is charged in respect of every departure of a passenger on an aircraft from an airport in Ireland.
- (122) That preliminary conclusion was based on the fact that the Finance Act referred to the taxation of departures. However, having conducted the formal investigation and collected further information on the proper interpretation on Section 55(2) of the Finance Act, and in light of Ireland's explanation that the ATT was intended to tax any single journey originating from an Irish airport, even if the journey was divided into different legs (see recital 59), it can be concluded that the objective of the system was to tax air journeys starting in Ireland. On that basis, and for all the reasons set out below, the reference system is the taxation of journeys originating in Ireland.
- (123) First, it should be observed that the definition of 'passenger' does not include transfer or transit passengers. Therefore, the wording of the Finance Act allows the conclusion that the reference system is a 'journey system' excluding transfer and transit passengers, since the departure of a transfer or transit passenger does not constitute a 'departure of a passenger' within the meaning of 55(2) of the Finance Act and, as such, not a taxable event ⁽¹⁾. Considering that the reference system is a 'journey system' is also consistent with the underlying objective of the legislation, as presented by Ireland in its comments on the Opening Decision.
- (124) Moreover, the way in which the ATT functioned confirms that the tax related to air journeys. Thus, during the period when differentiated rates applied, the tax rate was determined by reference to tax the final destination of the passenger as stated on the ticket, regardless of whether the passenger took one or more flights to get to that destination (see recitals 22 and 23 respectively and examples of the application of the ATT reproduced in Table 2). For instance, the tax payable in relation to a passenger travelling from Dublin to New York with a stopover in Shannon was EUR 10, and not EUR 2 (see recital 91).
- (125) Furthermore, the Commission notes that, in principle, it is legitimate to tax air travel on the basis of a rate applied once to an air journey from a given airport in Ireland to a given final destination, sold under a single booking, instead of taxing separate legs of such a single journey separately. Such separate taxation would imply that the tax is paid twice for a passenger who transfers onto another aircraft at an Irish airport, which may indeed raise issues of equity and equal treatment (see recital 63).
- (126) Indeed, excise duties such as the ATT typically apply to the acquisition of a final product or service by a customer, and not to the separate components that may constitute this final product or service. For the reasons explained below, a journey comprising several legs, where the passenger qualifies as a transit or transfer passenger at each stopover airport, can be regarded as a single service.

⁽¹⁾ It therefore seems more appropriate to consider that the ATT does not apply to transit and transfer passengers, as opposed to considering such passengers as 'exempted' from the tax.

- (127) In this respect, it should be noted that airlines market their services as journeys from a given point of origin (A) to a final destination (B), even if such a journey involves a stop at an intermediary airport (C). Such a service fundamentally involves air transport from A to B, the existence and location of the intermediary airport C being a secondary, and, from the perspective of the passenger, ultimately irrelevant feature of that service (except for its possible impact on the overall travelling time of the passengers) ⁽¹⁾. In principle, it is therefore acceptable and non-discriminatory to tax an indirect journey, sold as a single service, from A to B via C in the same way as a direct journey from A to B (A being in Ireland in both situations), since both services satisfy the same customer need (namely travelling from A to B).
- (128) It remains to be considered whether the definitions of transit and transfer passengers contained in the Finance Act reflect those principles. This is analysed in the following recitals.
- (129) As mentioned in recital 18, transit passengers are defined as passengers who remain on the same aircraft for the incoming and outgoing flight. The Commission considers that in such a situation, it is clear that there is in effect a single journey, the only difference with a direct flight being that the aircraft stops briefly at a given airport on its way to the final destination.
- (130) As regards transfer passengers, three conditions were used to define transfer passengers at airport C when travelling from airport A to airport B via airport C: (i) the maximum duration of the time spent at C should not exceed 6 hours; (ii) A and B, must not be identical; and (iii) the flights from A to C and C to B must be purchased under 'a single booking'. The Commission considers that all three conditions are adequate and proportionate. Point (i) ensures that C is a genuine stopover airport, where the passenger essentially prepares and waits for his or her connecting flight, and not a 'disguised' final destination. In this respect, six hours is a reasonable time limit, ensuring that C is a real stopover airport ⁽²⁾. Point (ii) ensures that the journey is not a disguised direct flight from A to C and back. As regards (iii), as explained in recitals 132-134 below, it ensures that the journey from A to B is sold as a single integrated service to the customer.
- (131) The ATT's exemption for transfer passengers imposed the condition that all the flights making up the single journey must be booked under a single booking.
- (132) When a passenger makes a single booking covering several flights (or 'legs'), he or she enters into a single contract with the supplier covering the various flights. By contrast, when a passenger makes more than one booking covering different flights, he or she enters into separate independent contracts with one or more suppliers. This already shows that a single booking corresponds to the purchase of a single service containing different components, whereas multiple bookings correspond to several separate services purchased independently by the passenger.
- (133) Under a single booking, the entire journey involving two or more flights is sold as one booking and a passenger has a single ticket and one reservation reference for the entire journey. Moreover, as pointed out both by Ireland and Aer Lingus in their comments on the Opening Decision (see recital 101), there are a number of important differences between a journey comprising several flights sold under a single booking and a journey comprising several flights sold under separate bookings. In particular, under a single booking, the passenger does not need to comply with several different check-in, baggage and travel documentation requirements for each of the flights making up the journey, but rather with only one set of requirements covering the entire journey to the final destination. In addition, if the first flight is cancelled or delayed to such an extent that the passenger misses the connecting flight, the provider of a single-booking journey has to assume responsibility for the missed connection (such as providing care and assistance, accommodation, and rebooking the passenger on the next available flight or offering compensation).
- (134) A journey made up of multiple legs that are booked separately involves the purchase of independent services. That implies, for instance, that when the passenger misses his second flight due to a delay in the arrival of the first flight, he cannot claim assistance from the provider of the second flight. The passenger would simply appear as a 'no show' for the second flight. Furthermore, when multiple flights are purchased under separate bookings, the passenger has to reclaim his luggage at each airport and check-in again for the subsequent flights. Aer Lingus stressed that there were no luggage transfer services for self-connecting passengers at any of the Irish airports (see recital 101).

⁽¹⁾ This is consistent with the Commission's standard practice in antitrust and merger cases of defining the relevant markets for scheduled air services on the basis of the origin — destination approach.

⁽²⁾ Like Ireland, the United Kingdom also applies a six hour criterion for defining passengers on connecting flights (at least for those situations where the first flight arrives before 5 p.m.).

- (135) In light of this, the main difference between the two situations is that, in one case, the passenger purchases an integrated service (journey from A to B) with two components that are combined by the supplier of the service, whereas in the other situation, the passenger combines the two components him/herself at his/her own risk, and thus effectively purchases two separate services. Therefore, a passenger flying from airport A to airport B via airport C under a single booking buys a service which is fundamentally different from the services bought by a passenger who separately books a flight from airport A to airport C and a flight from airport C to airport B.
- (136) The fact that a single booking covering several flights differs materially from several flights covered by separate bookings is exemplified by the notice addressed by easyJet, one of the main point-to-point carriers operating in the Union, to passengers on its website:
- ‘easyJet is a point to point carrier (only flies from departure and arrival airports) and does not operate a connecting flights service for onward travel using our flights or the flights of other airlines. If you have booked an onward flight with us this represents a separate contract and we consider each flight as a separate journey’ ⁽¹⁾.
- (137) It is thus proportional and non-discriminatory to tax each of those two services separately whilst taxing an indirect journey purchased under a single booking only once.
- (138) In light of the above assessment (see recitals 131-137), the Commission considers that the definitions of transfer and transit passengers under the Finance Act are thus consistent with the objective of taxing single air journeys from a given origin in Ireland to a given destination, purchased as a single integrated service by a customer.
- (139) It can be concluded that the system of reference is the ATT as set out in the Finance Act, hence including the non-application of the tax to transit and transfer passengers (journey system).

6.2.2.4. Derogation from the system of reference

- (140) Given that the non-application of the ATT to transfer and transit passengers is part of the system of reference, there is no derogation from the reference system.
- (141) Consequently, the assessment of the ATT using the three-step approach shows no selectivity.

6.2.2.5. The ATT has not been designed in a clearly arbitrary or biased way so as to favour certain undertakings over others

- (142) In order to draw a final conclusion on selectivity it still needs to be determined whether the ATT has been designed by Ireland in a clearly arbitrary or biased way, so as to favour certain undertakings over others.
- (143) In its comments on the Opening Decision, Ryanair argued in essence that the ATT exemption for transit and transfer passengers induces unjustified discriminations between two business models, namely the business model of hub-and-spoke carriers, which offer single bookings covering several flights, and the business model of point-to-point carriers such as Ryanair, which do not, and that it could not be claimed that the exemption was open to all airlines, without discrimination.
- (144) It should be noted first that there is no evidence on the file that Ireland designed the non-application of the ATT of transit and transfer passengers in such a way so as to favour certain undertakings over others. In this respect, it can be observed that various Member States operate similar taxes that also contain exemptions for transit and transfer passengers.
- (145) The argument of Ryanair that it is virtually impossible for an airline to adapt its fundamental business model from a point-to-point to a hub-and-spoke model and that to its knowledge, there is not a single precedent for such a change on the market, should be nuanced, since it Ryanair has now started to offer connecting flights ⁽²⁾. In May 2017, Ryanair announced that it was launching its first connecting flights through Rome Fiumicino Airport, providing its customers with the opportunity to book and transfer directly onto connecting Ryanair flights for the first time. In this respect, Ryanair’s Chief Commercial Officer stated: ‘Ryanair is pleased to launch our first connecting flights service via Rome Fiumicino Airport, allowing customers to book connecting Ryanair flights on the lowest fares in Europe. Starting with an initial 10 Rome routes, customers will be able to transfer

⁽¹⁾ See <http://www.easyjet.com/en/help/at-the-airport/connect-and-transit> (visited on 28 March 2017).

⁽²⁾ See <https://corporate.ryanair.com/news/news/170517-connecting-flights-launched-at-rome-fiumicino/?market=en> (visited on 1 June 2017).

onto their next flight without having to go landside, and have their bags checked through to their final destination. This new service under Year 4 of our “Always Getting Better” programme, will be rolled out across the entire Ryanair network, (with further Rome routes to be added in the coming weeks and months) as long as the Rome Fiumicino trial proves to be a success’⁽¹⁾. Customers will also receive one booking reference for both flights. This demonstrates that Ryanair started to provide a new service which it views itself as novel and fundamentally different from the point-to-point flights it has operated so far.

- (146) Second, it can be observed that the ATT leads to separate services being taxed separately, namely, multiple flights purchased under multiple bookings, and single integrated services being taxed only once, namely the component flights of a single journey purchased under a single booking. In light of the reasons stated above (see Section 6.2.2.3 of this Decision), this differentiation flows from the fundamental differences between the services purchased by the customer in each situation, which translate into important practical consequences, in particular in terms of check-in, luggage management, and the responsibility of the airline in the event of a missed connection. The fact that some airlines have adopted a business model focussing on point-to-point services whereas others focus on network services does not imply that it would be discriminatory to tax differently what are objectively different services. As explained in Section 6.2.2.3 above, it can be considered legitimate to tax air journeys starting in Ireland, as opposed to taxing every single departure of passenger on aircraft out of Ireland.
- (147) The Commission notes that the claims made by Ryanair as regards alleged discrimination seem to be implicitly based on the premise that some passengers construct an air journey by buying multiple flights from Ryanair, with a view to travelling from a given airport to another airport ‘via’ other airports, and that such multiple flights should be treated in the same way as a single booking⁽²⁾. Otherwise, Ryanair would have no reason to consider itself discriminated against vis-à-vis airlines which offer single bookings for multiple flights. However, Ryanair has not indicated that it carried any such passengers in the period during which the ATT applied, let alone provided any data as regards the number of such passengers⁽³⁾. More importantly, nothing in Ryanair’s submissions is capable of calling into question considerations set out in recitals 132 to 134 which justify treating a multiple flights purchased under a single booking as a fundamentally different service from multiple flights linking the same airports but purchased under separate bookings, the latter being in reality several independent services.
- (148) As mentioned in recital 38, in its judgment in Case T-512/11, the General Court noted that Ireland was open to considering adjusting the ATT, by removing the requirement for a single booking as part of the definition of a transfer passenger, if necessary.
- (149) The formal investigation showed (see recitals 131-148) that the single booking condition was not discriminatory, as it ensured that only air journeys originating from an Irish airport and sold as a single integrated service to the customer, regardless of the number of flights included in the journey, were subject to the ATT. Therefore, the Commission concludes that it was not needed for Ireland to remove the single booking condition from the definition of a transfer passenger in order to ensure that State aid was not involved.
- (150) It can be concluded that the Ireland has not designed the ATT in a clearly biased and arbitrary manner so as to favour certain undertakings over others. On the contrary, the non-application of the ATT to transit and transfer passengers appears justified and reasonable.

6.2.3. Conclusion on the existence of aid

- (151) In light of the above assessment, the measure under investigation fails to meet at least one of the conditions laid down by Article 107(1) TFEU, as it is not selective. As the various conditions of the notion of State aid within the meaning of Article 107(1) TFEU are cumulative, it follows that the measure does not constitute State aid. It is therefore not necessary to assess whether the other conditions for a measure to constitute State aid are fulfilled.

⁽¹⁾ See <https://corporate.ryanair.com/news/news/170517-connecting-flights-launched-at-rome-fiumicino/?market=en> (visited on 1 June 2017).

⁽²⁾ This would be the case for instance for a passenger buying a ticket for a flight from Shannon to Dublin and a separate ticket for a flight from Dublin to Barcelona, with a difference of less than six hours between the arrival of the passenger at Dublin Airport and his/her departure from that airport to Barcelona. Under the ATT, the departures from Shannon and from Dublin would each be taxable events. However, had the definition of transfer passengers not referred to the notion of single booking, the departure from Dublin would not have been a taxable event under the ATT; only the departure from Shannon would have been a taxable event.

⁽³⁾ In the past, Ryanair actively discouraged passengers from connecting onto further Ryanair flights. See Commission Decision of 27 June 2007 in merger case COMP.M.4439 Ryanair/Aer Lingus (OJ C 47, 20.2.2008, p. 14), recital 48.

7. CONCLUSION

(152) The non-application of the ATT to transfer and transit passengers did not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The non-application to transfer and transit passengers of the Air Travel Tax, introduced by the Republic of Ireland through the Finance (No 2) Act 2008, did not constitute aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to Ireland.

Done at Brussels, 14 July 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission

COMMISSION DECISION (EU) 2018/118**of 31 August 2017****on State aid SA.35818 (2016/C) (ex 2015/NN) (ex 2012/CP) implemented by Spain for Iberpotash***(notified under document C(2017) 5877)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a),

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By complaint of 30 November 2012, the Commission was informed that Spain had implemented several alleged aid measures for Iberpotash S.A., renamed ICL Iberia Súaia & Sallent in 2014 (both hereinafter referred to as 'Iberpotash'). The complainant, who wishes that its identity be kept confidential ('the Complainant'), supplemented its complaint by additional submissions of 28 December 2012, 14 February 2014, 24 February 2014, 6 May 2014 and 27 January 2015.
- (2) The complaint was forwarded to Spain on 10 January 2013 together with a request for information. Spain replied on 8 March 2013. Additional requests for information were sent to Spain on 14 May 2013, 16 January 2014 and 26 March 2014. By letters dated 13 June 2013, 14 February 2014 and 15 April 2014, respectively, Spain provided the Commission with further information in reply of those requests.
- (3) A preliminary assessment letter was sent to the Complainant on 30 January 2015. Reacting to the preliminary assessment letter, the Complainant submitted further information on 5 March 2015 (preliminary reply) and 21 April 2015 (final reply to the preliminary assessment letter). In addition, a meeting was held with the Complainant on 9 March 2015 and additional information was submitted by the Complainant on 4 June 2015.
- (4) The final reply of the Complainant to the preliminary assessment letter was sent for comments to Spain on 9 June 2015, together with an additional request for information. Spain replied on 8 July 2015. On the request of Spain, a non-confidential version of the preliminary assessment letter was sent to Spain on 31 July 2015.
- (5) By letter dated 26 January 2016, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of two of the alleged aid measures. By the same letter, the Commission concluded that the other three measures complained of do not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽²⁾. The Commission invited interested parties to submit their comments on the two alleged aid measures.
- (7) By letter dated 19 April 2016, Spain provided comments on the decision to initiate the procedure. By letter dated 6 October 2016, the Commission asked Spain to provide additional information that was submitted by Spain by letter dated 28 November 2016.
- (8) The Commission received comments from three interested third parties including Iberpotash, the alleged beneficiary of the aid. It forwarded them to Spain, which was given the opportunity to react; its comments were received by letters dated 27 July 2016 and 6 April 2017.

⁽¹⁾ OJ C 142, 22.4.2016, p. 18.

⁽²⁾ See footnote 1.

2. DETAILED DESCRIPTION OF THE AID

2.1. RECIPIENT

- (9) Iberpotash owns and operates two potash mines in the basin of the river of Llobregat in the Bages region in Catalonia, one in Súria and another in Sallent and Balsareny. Potash is used for the production of fertilisers. In addition, Iberpotash also produces and sells salt mainly for industrial purposes.
- (10) Iberpotash is a subsidiary of ICL Fertilisers, an Israeli multinational which is the largest producer of fertilisers worldwide. The potash mines operating in the region already as of 1920s had been State owned till 1998. Iberpotash acquired the potash mines in Suria and Sallent/Balsareny on the basis of a sales and purchase agreement concluded on 21 October 1998 with the Sociedad Estatal de Participaciones Industriales — SEPI, a public holding of the Spanish State.

2.2. ALLEGED STATE AID MEASURES

- (11) According to the Complainant, the Spanish authorities provided illegal and incompatible State aid to Iberpotash through a number of measures. All these alleged aid measures relate to Iberpotash's environmental obligations with respect to its mining sites in the basin of the river of Llobregat and the salt waste heaps created at these sites as a result of decades of operation of the mines. These alleged State aid measures include:
- (a) Failure of the Spanish authorities to comply with Article 14 of Directive 2006/21/EC of the European Parliament and of the Council ⁽³⁾ ('Extractive Waste Directive') which allegedly led to reduced financial guarantees for obtaining the permits to operate Iberpotash's mines ('Measure 1: reduced level of the financial guarantees').
 - (b) Investments made by the Spanish authorities in order to limit and/or repair the damages allegedly caused by Iberpotash to the environment in breach of the 'polluter pays' principle. These investments include:
 - construction of a new brine collector in function since 2008 ('Measure 2: new brine collector'),
 - investments in improvement of water treatment facilities in Abrera and Sant Joan Despí at the Llobregat river ('Measure 3: investments in water treatment facilities'),
 - covering of a salt waste heap on Iberpotash mining site of Vilaforns ('Measure 4: covering of Vilaforns waste heap').
 - (c) Financing of an environmental study concerning the waste heap of Cogulló ('Measure 5: Cogulló waste heap study').
- (12) The Complainant estimates that the total alleged aid to Iberpotash due to these measures ranges between EUR 260 million and EUR 407 million.
- (13) The Complainant also submitted a separate complaint on an alleged breach of EU environmental law. Based on this complaint, the Commission sent in July 2014 a letter of formal notice to Spain, thus starting the infringement procedure for non-compliance with obligations under the Extractive Waste Directive. In September 2015, an additional letter of formal notice extended the infringement procedure to the non-compliance with Directive 2000/60/EC of the European Parliament and of the Council ⁽⁴⁾ ('Water Framework Directive'). The infringement procedure is pending ⁽⁵⁾.

2.3. GROUNDS FOR INITIATING THE PROCEDURE

- (14) On 26 January 2016, the Commission adopted a decision to open formal investigation with respect to measures 1 and 4 ⁽⁶⁾ ('the Opening Decision') in order to address its doubts whether these measures constitute State aid within the meaning of Article 107(1) of the Treaty and whether they are compatible with the internal market.

⁽³⁾ Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC (OJ L 102, 11.4.2006, p. 15).

⁽⁴⁾ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

⁽⁵⁾ The alleged breaches of the Extractive Waste Directive put forward in this infringement procedure do not relate to the amount of the financial guarantees under Article 14 of the directive as assessed in the present decision.

⁽⁶⁾ See footnote 1.

- (15) At the same time, the Commission concluded that measures 2, 3 and 5 do not constitute State aid within the meaning of Article 107(1) of the Treaty. Since this conclusion has not been disputed, measures 2, 3 and 5 are not the object of the present decision and shall not be further assessed hereinafter.

2.3.1. DOUBTS CONCERNING MEASURE 1: REDUCED FINANCIAL GUARANTEES

- (16) The Commission found in the Opening Decision that it could not exclude that Measure 1 may constitute State aid. In particular, it had doubts whether Measure 1 involved transfer of State resources and provided any economic advantage to Iberpotash and it thus invited the Spanish authorities and third parties to provide more evidence in this respect.
- (17) To the extent Measure 1 constituted State aid, the Commission had doubts that it could be found compatible.

2.3.2. DOUBTS CONCERNING MEASURE 4: COVERING OF VILAFRUNS WASTE HEAP

- (18) The Commission found in the Opening Decision that public financing of the covering of Vilafruns waste heap is likely to constitute State aid. In particular, it considered that Measure 4 was likely to provide a selective economic advantage to Iberpotash by ensuring better prevention against pollution at the waste facility owned by Iberpotash and thus ensuring compliance with its environmental obligations. The Commission thus invited the Spanish authorities and third parties to comment on these preliminary conclusions.
- (19) Further, the Commission considered that since the investment costs were fully financed by the public authorities and Iberpotash covers only subsequent maintenance costs, the aid intensity of Measure 4 is well above the intensities for aid for undertakings which go beyond Community standards or increase the level of environmental protection in the absence of these standards under Section 3.1.1 of the *Community guidelines on State aid for environmental protection* (2008/C 82/01) (‘the 2008 Environmental Guidelines’) ⁽⁷⁾. Therefore, the Commission expressed doubts on the compatibility of such aid and invited the Spanish authorities and third parties to comment on this preliminary finding.

3. COMMENTS FROM INTERESTED PARTIES

3.1. COMMENTS FROM IBERPOTASH

- (20) Iberpotash, for the most part, aligns its comments with the ones submitted by Spain on both measures under investigation.
- (21) Iberpotash notes, in addition, that Measure 1 does not involve State resources because there has been no transfer of resources by Spain to Iberpotash up to date. Besides, the risk of this happening is very low, since Iberpotash does not face economic difficulties and will be able to bear the costs of environmental restoration should the amount of the guarantee prove to be insufficient. Iberpotash expresses the same concerns as Spain with regards to the selectivity of the measures and whether they confer an economic advantage or distort competition between member States.
- (22) Iberpotash repeats that Measure 4 is compatible with the 2008 Environmental Guidelines and that the applicable aid intensity for the restoration of contaminated sites is 100 %.

3.2. COMMENTS FROM THE FIRST INTERESTED PARTY (COMPLAINANT)

- (23) The first interested party, who wishes that its identity be kept confidential, supports the opening of the formal investigation procedure and supports the Commission’s arguments in the Opening Decision for both Measures.
- (24) The first interested party adds that the setting of an insufficient guarantee entails a real burden for the public authorities, who bear the cost of Iberpotash’s environmental obligations. It also notes that Iberpotash gained an economic advantage because Iberpotash used the financial resources it saved in order to finance its own economic activities.
- (25) The first interested party agrees with the Commission that the aid is incompatible because it constitutes operating aid.

⁽⁷⁾ Community guidelines on State aid for environmental protection (OJ C 82, 1.4.2008, p. 1).

- (26) As regards Measure 2, the first interested party draws the Commission's attention to a decision of the Barcelona Provincial Court of 22 February 2016 that confirmed the liability of Iberpotash to restore the lands damaged by its activities. It also adds that the covering of the salt tip is not a 'pilot' project because no documents related to the public financing of this measure describe the project as such, and because the method used is a well-known one that has been used by other mining companies for at least 15 years for similar tips.

3.3. COMMENTS FROM THE SECOND INTERESTED PARTY

- (27) The second interested party, who also wishes that its identity be kept confidential, supports the Opening Decision of the Commission.
- (28) As regards Measure 1, it notes in addition that the question whether the guarantee amount complies with applicable EU or Spanish legislation is irrelevant, because the aid consists in the State's assuming the financial risk of restoring the affected facilities; the quantification of such risk is exclusively a question of fact, not of law.
- (29) Furthermore, the second interested party questions Iberpotash's availability to pay for the environmental restoration when the obligation arises, because Iberpotash's only Spanish assets are its mining facilities, which will be closed and therefore be of low value after 2035.
- (30) The second interested party also notes that the setting of a sufficient guarantee amount would entail an annual cost of at least EUR 2 806 000 for Iberpotash, which is hardly an insignificant amount. It adds that the setting of the guarantees at the current amount also results in Iberpotash avoiding the collateralisation of its financial reserves.
- (31) With regard to Measure 2, the second interested party observes that the Supreme Court judgment of 14 May 2009 along with Council Directive 75/442/EEC ⁽⁸⁾ and the applicable Spanish law provides that Iberpotash is solely responsible for covering the Vilafruns tip from the very moment that mining rights were transferred to it, regardless whether the site is active or not.
- (32) As regards Measure 4, the second interested party argues that covering of Vilafruns waste heap is a responsibility of Iberpotash and that Iberpotash thus received a selective advantage due to public financing of the covering. Further, the second interested party disagrees with qualification of the covering as a pilot project of a new technique of restoration. It argues that covering salt waste heaps with geomembranes is an old technique used already for a long time e.g. by Alsatian and German potash companies.
- (33) Finally, the second interested party argues that the question whether Iberpotash is the sole potash producer in Spain is irrelevant, because the relevant potash market is global. An effect on trade is unquestionable because, geographically, Iberpotash competes with French salt producers, as apparent by the proximity (less than 100 km away) of the Suria and Sallent sites to the French border.
- (34) Both the first and the second interested party provided comments also with respect to other three measures analysed in the Opening Decision (measures relating to (i) new brine collector, (ii) investments in water treatment facilities, and (iii) Cogulló waste heap study). However, as noted in recital 15, the Commission has already concluded in the Opening Decision that these measures do not constitute State aid and are thus not the object of the formal investigation procedure. The comments of the third parties provided exclusively with respect to these measures not covered by the formal investigation are thus considered irrelevant for the purpose of this decision.

4. COMMENTS FROM SPAIN

4.1. COMMENTS ON THE OPENING DECISION

- (35) As regards Measure 1, Spain is of the view that the amount of the guarantee has always been appropriate and set in accordance to the applicable Spanish and Union legislation. More particularly, Spain argues that the possible infringements of Extractive Waste Directive do not include setting the guarantee amount too low, therefore there cannot have been an infringement of the Directive.

⁽⁸⁾ Council Directive 75/442/EEC of 15 July 1975 on waste (OJ L 194, 25.7.1975, p. 39).

- (36) In addition, with regards to the issue of determining the appropriate guarantee amount, Spain dismisses as inconclusive the statement dated 2 October 2013 of Ms Assumpta Feran (the Director of the Directorate in charge of the environment at the Generalitat de Catalunya) before the Environmental Committee of the Catalan Parliament, who stated that the financial guarantee should amount to EUR 200 million. According to Spain, the statement was made amidst a debate among opposing political parties and therefore driven by political considerations. Spain also finds the judgment of 11 October 2011 of the Higher Court of Justice of Catalonia inconclusive for the determination of the appropriate guarantee amount, because the court itself refrained from calculating it.
- (37) Furthermore, Spain considers as unreliable the study that the complainant supplied and that the Commission cited in recital 71 of the opening decision, because the study did not calculate the appropriate guarantee amount based on the criteria set forth in Decree 202/1994 of 14 of June, i.e. the applicable legislation relative to the guarantee amount.
- (38) Spain argues, in addition, that Measure 1 does not confer a selective economic advantage to Iberpotash. Any alleged advantage was fixed based on a legal framework which was equally applicable to all potential competitors. What is more, the exploitations of Sallent and Suria are the only active ones in Spain, therefore Iberpotash could not have gained an advantage since there are no comparable exploitations in Spanish territory.
- (39) Spain supports that no State resources are involved because, in case that the guarantee amount proves to be insufficient, Iberpotash's obligation to restore the land affected by the extraction activities remains valid. Spain can enforce Iberpotash's obligation by means of seizure of the latter's rights and property on Spanish territory.
- (40) Finally, Spain notes that Measure 1 does not distort competition or affect trade between Member States, because the costs to be incurred by Iberpotash if it were obligated to set a higher guarantee amount are negligible for the standards of the potash extraction industry.
- (41) In relation to Measure 4, Spain argues that Iberpotash cannot have gained an economic advantage because, by not being a polluter, Iberpotash did not have the obligation to cover the salt tip of Vilafruns, according to the generally applicable Spanish legislation. In addition, Iberpotash bears the maintenance costs of the covering of the tip and, therefore, even if, thanks to the public financing, it saved the tip's building costs, it is bound to spend a much greater amount on its maintenance for the next decades and therefore loses any economic advantage gained by the measure.
- (42) Spain alleges that Measure 4 cannot be selective because Iberpotash is the only undertaking in Spain involved in potash extraction activities.
- (43) In addition, the measure does not have a distortive effect on competition between Member States given that the extracted salt, due to transportation difficulties, cannot be transferred between member States.
- (44) If, despite the above, the Commission decides that Measure 4 constitutes State aid, Spain considers that it falls within the thresholds for *de minimis* aid of Commission Regulations (EC) No 1998/2006 ⁽⁹⁾ and (EU) No 1407/2013 ⁽¹⁰⁾.
- (45) Finally, Spain asks that Measure 4 be declared compatible on the basis of the 2008 Environmental Guidelines and especially in view of the innovative character of the technology used to cover the Vilafruns salt tip, which, unlike the technology used in other mining facilities, it is also designed to prevent leaks of the deposited material.

4.2. RESPONSE OF SPAIN TO COMMENTS SUBMITTED BY THIRD PARTIES

- (46) Spain responded to the observations formulated on Measure 1 by the two interested parties by pointing out, once more, to the administrative procedure in place under Spanish law for the enforcement of the environmental obligations of Iberpotash and for the recoupment from Iberpotash of any amount Spain would eventually pay if the guarantee for the environmental restoration proves to be insufficient. The ability to enforce as such Iberpotash's obligation means that there is no burden on the State budget and, consequently, no transfer of State resources.

⁽⁹⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

⁽¹⁰⁾ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid (OJ L 352, 24.12.2013, p. 1).

- (47) Spain responded to the observations formulated on Measure 4 by the two interested parties by explaining that the decision of the Barcelona Provincial Court of 22 February 2016 included a list of areas where Iberpotash was obligated to implement measures of environmental restoration, which neither includes the Vilafruns tip nor mentions that the tip is a source of pollution. What is more, the persons convicted pursuant to the decision belonged to the company that exploited the mines before the acquisition of the mining concession by Iberpotash. Besides, those persons were convicted for actions and omissions that took place long before the covering of the Vilafruns tip.
- (48) Spain also reiterates its arguments with regards to the lack of obligation of Iberpotash, according to Spanish law, to cover the Vilafruns tip.
- (49) Finally, Spain points out that, although the first interested party highlights that no documents related to the public financing of the covering of the tip describe the project as a 'pilot' project, nevertheless said party does not question that the technology used for the covering of the tip is distinguishable and, unlike the technology used in other potash mines, it is also designed to prevent leaks of the deposited material. The fact that the word 'pilot' is not mentioned does not exclude the innovative character of the technology used.

5. ASSESSMENT OF THE AID

- (50) This decision first assesses whether the two Measures under scrutiny entail State aid to Iberpotash in the meaning of Article 107(1) TFEU, and then whether such aid, were it to be present, would be lawful and compatible with the internal market.

5.1. EXISTENCE OF STATE AID

- (51) By virtue of Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
- (52) In order to conclude whether State aid is present, the Commission must assess whether the cumulative criteria of Article 107(1) TFEU (i.e. transfer of State resources and imputability, selective advantage, potential distortion of competition and affectation of intra-EU trade) are met for the Measures under assessment.

5.1.1. MEASURE 1: REDUCED LEVEL OF THE FINANCIAL GUARANTEES

- (53) Under national law and, in case of mines already operated on 1 May 2008 as of 2014 also Union law, operators of mining facilities are obliged to establish a financial guarantee aimed at ensuring that they have sufficient resources set aside for covering the costs of restoration of their sites once their mining activities are closed. Further, these resources may be used by public authorities under the relevant national law to finance environmental protection measures which the operators are obliged to take but fail to do so. The operator may establish such guarantees in the form of a bank guarantee for which they pay a fee. According to the Complainant, Iberpotash received an illegal and incompatible aid by having the amount of the financial guarantee set by the relevant authorities at a very low level.

5.1.1.1. *Selective economic advantage*

- (54) The Commission first needs to assess whether the levels of the financial guarantees as set by the Spanish authorities were indeed lower than required by the applicable rules in the relevant period. This is a necessary requirement for any existence of possible State aid with respect to this particular measure. If, on the contrary, the level of the guarantees had been set in line with applicable rules, then Iberpotash would have been treated as any other undertaking in a similar situation and there would have been no reason to consider it has been selectively favoured by the concrete application in its case of the rules laid down to set financial guarantees.

Applicable legislation

- (55) Therefore, it is necessary first to summarise the relevant Union and national rules governing the setting of the financial guarantees.

- (56) According to Article 14 of the Extractive Waste Directive, the competent national authorities must, 'prior to the commencement of any operations involving the accumulation or deposit of extractive waste in a waste facility, require a financial guarantee (e.g. in the form of a financial deposit, including industry-sponsored mutual guarantee funds) or equivalent'. The aim of this guarantee is that 'all obligations under the permit issued pursuant to this Directive, including after-closure provisions, are discharged' and that 'there are funds readily available at any given time for the rehabilitation of the land affected by the waste facility'.
- (57) According to Article 14(2) of the Directive, the calculation of the guarantee should be made on the basis of (i) the likely environmental impact of the waste facility, and (ii) the assumption that independent and suitably qualified third parties will assess and perform any rehabilitation work needed. The size of the guarantee shall be periodically adjusted in accordance with any rehabilitation work needed.
- (58) As regards the national rules, the Extractive Waste Directive has been transposed to the Spanish law by a Royal Decree 975/2009 of 12 June 2009 on waste management in mining and quarrying and protection and rehabilitation of areas affected by mining activities ('Royal Decree 975/2009'). According to First Transitory Disposition (Disposición transitoria primera) of the Royal Decree 975/2009, the provisions of that act concerning the financial guarantees (i.e. in particular Article 43) would apply as from 1 May 2014 to the mining sites already operated as on 1 May 2008 (i.e. including Iberpotash's sites).
- (59) However, before the applicability of the Royal Decree 975/2009 transposing the Extractive Waste Directive, in the Catalan region the permits, restoration plans and guarantees in case of mining companies had been governed by Law 12/1981 establishing additional measures for the protection of natural sites affected by mining activities ('Law 12/1981') ⁽¹¹⁾ and by Decree 202/1994 establishing the criteria for determining the guarantees related to the restoration programmes for mining activities ('Decree 202/1994') ⁽¹²⁾. According to Article 8(2) of Law 12/1981, the financial guarantee should be established while taking into account the area affected by the restoration and/or the global costs of such restoration. Article 2 of Decree 202/1994 quantifies the amount of guarantees per hectare for various standard restoration measures and indicates that for any other specific measures the amount should take into account their costs ⁽¹³⁾. Further, Article 3 of Decree 202/1994 stipulates that for mining activities not situated in natural sites of special interest (including Iberpotash's sites), the resulting amount on the basis of Article 2 should be reduced by 50 %.

Financial guarantee amounts set for Iberpotash

- (60) On the basis of these national rules, Iberpotash obtained from the Generalitat de Catalunya a permit to operate its extractive activity of potash on its site in Súria on 9 November 2006 and on its site in Balsareny/Sallent on 28 April 2008. These permits constitute individual administrative decisions which set the financial guarantees to EUR 1 130 128 for the site in Balsareny/Sallent and EUR 773 682,28 (increased to EUR 828 013,24 in 2008) for the site in Súria. These amounts of the guarantees have been revised only in 2015, when the Spanish authorities proposed significantly higher levels amounting to EUR 6 979 471,83 for the site in Balsareny/Sallent (effective only after the approval by the Higher Court of Justice of Catalonia in December 2016 — see below) and EUR 6 160 872,35 for the site in Súria (effective as of May 2015). The amounts of guarantees were set by individual and specific decisions adopted by the Generalitat addressed to Iberpotash.

Evidence that Iberpotash's guarantee amounts are lower than required

- (61) In this respect it needs to be stressed that it is first for the competent environmental authorities to determine and approve the amounts of the financial guarantees under national or regional rules applicable to the case at hand. Even though the Commission is responsible for safeguarding the correct transposition and implementation of the Extractive Waste Directive, which is applicable to Iberpotash's financial guarantees as of 1 May 2014, this Directive leaves a significant discretion to the Member States in determining the exact amount of the guarantees. For this reason, the Commission has not engaged in its own evaluation of the correct levels of the financial guarantees according to the Extractive Waste Directive but limits its assessment to evaluating the existing evidence of the insufficiency of the financial guarantees. In fact, there is a number of pieces of evidence suggesting that the amount of the financial guarantees as set by the public authorities in 2006 and 2008 was actually lower than required under the applicable legislation.

⁽¹¹⁾ Ley 12/1981, de 24 de diciembre, por la que se establecen normas adicionales de protección de los espacios de especial interés natural afectados por actividades extractivas.

⁽¹²⁾ Decreto 202/1994, de 14 de junio, por el que se establecen los criterios para la determinación de las fianzas relativas a los programas de restauración de actividades extractivas.

⁽¹³⁾ See Article 2.4(h) of Decree 202/1994.

- (62) Most importantly, the Higher Court of Justice of Catalonia (Tribunal Superior de Justicia de Cataluña) ruled on 11 October 2011 that the amount of the financial guarantee for Iberpotash's Cogulló waste heap at its site of Balsareny/Sallent amounting to EUR 585 153 was lower than required. The judgment rules that the amount of the guarantee does not respect the legal and regulatory parameters set by the national legislation, referring in particular to Article 8(2) of Law 12/1981 and Decree 202/1994. The judgment states that, even in the absence of any conclusive proof ('una prueba concluyente determinada') of the correct amount of the guarantee, the Court is able to conclude that the guarantee amount set to only EUR 585 153 is clearly not in line with these legal provisions. The court thus declares the guarantee as insufficient and not in line with the applicable legislation and orders the Spanish authorities to set a new level of the financial guarantee. This judgment was fully confirmed on appeal by the judgment of the Supreme Court (Tribunal Supremo) of 9 July 2014. Finally, as noted by the Spanish authorities, by its finding of 14 December 2016, the Higher Court of Justice of Catalonia confirmed that a newly proposed amount of EUR 6 979 471,83 for the whole site at Balsareny/Sallent was adequate.
- (63) In view of the national judgment of the Higher Court of Justice of Catalonia of 11 October 2011 authoritatively interpreting the relevant national rules, the Commission considers as demonstrated that the original amount of the financial guarantee for Iberpotash's site at Balsareny/Sallent set in 2006 at the level of EUR 1 130 128 (including EUR 585 153 for the Cogulló waste heap) was significantly insufficient. By its finding of 2016, the Higher Court of Justice of Catalonia confirmed that the overall amount for Balsareny/Sallent should have actually been set at a level which is at least six times higher, and most likely even higher for the period preceding the announcement of the Plan Phoenix in 2011 — see recitals 73, 80 and 81 below.
- (64) Even though there is no similar court ruling with respect to the guarantee for the site in Súria, there is convincing evidence that the finding of clear insufficiency of the level of guarantee would have been equally probable in case of any court action. The amount of the original guarantee of EUR 773 682,28 (increased to EUR 828 013,24 in 2008) reflects proportionally the fact that the site at Súria is smaller than at Balsareny/Sallent as regards the mass of the waste accumulated and the total area of the waste heaps ⁽¹⁴⁾. Further, the guarantee for Súria has been significantly increased to EUR 6 160 872,35 at the same time as for Balsareny/Sallent (i.e. only after the order of the court and its confirmation on appeal) and by even higher proportion (more than seven times higher). Therefore, in the absence of any other factors explaining the difference of the amounts of the guarantees for Súria on the one hand and Balsareny/Sallent on the other hand, the amount of the guarantee for Súria can also be considered as insufficient.
- (65) Both the Spanish authorities and Iberpotash confirm in their submissions that the Higher Court of Justice of Catalonia has considered that the guarantee for El Cogulló was insufficient. They attempt at mitigating the court's judgment by claiming that: (i) the court acknowledged that, at least partly, the situation dates back to 1929, (ii) the court admitted that it has no conclusive proof, and (iii) the court allegedly did not find any concrete infringement of a particular legal norm. However, none of these arguments with respect to the judgment affect the finding of insufficiency of the guarantee. The fact that the Spanish authorities in fact reviewed the guarantee amount following the confirmation of the judgment in appeal and submitted it for approval to the court confirms the relevance of the judgment. In addition, the judgment of 11 October 2011 explicitly refers to the relevant legislative provisions set out in Article 8(2) of Law 12/1981 and in Decree 202/1994.
- (66) In addition to the authoritative finding by a national court, the investigation has revealed several other pieces of evidence corroborating the finding that the original level of the financial guarantees was unduly low.
- (67) First, third parties have submitted official transcripts from the hearing before the Environmental Committee of the Catalan Parliament of 2 October 2013 with explicit statements of the Director-General for Environment at the Generalitat de Catalunya according to which the guarantees were clearly insufficient. The Director-General suggested that the required guaranteed amount could possibly reach up to EUR 200 million. Even though the transcripts of a political discussion in parliament do not contain any relevant justification for the amount advanced, and thus need to be treated cautiously, the orders of magnitude and difference with the actual amount do confirm the conclusions reached by experts in the field, who considered the amount of the guarantees set in 2006 and 2008 as clearly insufficient.

⁽¹⁴⁾ According to the ERF Study submitted by the complainant (see recital 68), in 2011 the active waste heap in Balsareny/Sallent (El Cogulló) had an area of 35 hectares and the mass of waste of 41 Mt while the active waste heap in Súria (El Fusteret) had an area of 27 hectares and the mass of waste of 22 Mt.

- (68) Second, the Complainant submitted a study of August 2012 that it commissioned from environmental experts ('ERF Study'). The study is an expert survey analysing and compiling extensive existing information (legal, academic or resulting from market investigation) on the relevant topic. The ERF Study analysed the existing situation as regards the environmental impact of Iberpotash's mining sites and forecasted future developments as regards the total amount of material accumulated on the waste heaps. It concludes that the environmental impacts of the waste heaps were significant and expected to further grow in the future.
- (69) Based on available information, the ERF Study estimates the following evolution of the volume of waste accumulated on waste heaps in Suria and Sallent till the end of the mining activities in 2035:

Table 1

Estimated accumulation of the waste on the heaps in Suria and Sallent

	Volume in 2012 (in kt)	Net annual increase of the volume (in kt/year)	Volume in 2035 (in kt)
Sallent	41 000	1 454	74 531
Suria	22 000	525	33 895
TOTAL	63 000	1 979	108 426

- (70) Further, the ERF Study analyses possible options for restoration of the waste heaps including: (i) backfilling of the waste material in the underground mines, (ii) dissolution of the salt contained in the waste heaps by pumping water and disposal of the resulting brine either to the sea or underground, or (iii) covering the waste heaps with material preventing infiltration of rain water and preventing leaks of salts in the environment. It concludes that in the situation of Iberpotash's sites the most appropriate method is the covering of the waste heaps. It is a rather simple and well known method since it has been already used in a number of cases, even by the Catalan authorities themselves. In addition, it is the most appropriate method for restoration by public administrations in case the mining company does not fulfil its obligations since, contrary to other methods, it does not require any additional installation of significant industrial infrastructure. Therefore, the ERF Study calculates the expected costs of restoration of Iberpotash's sites by covering the heaps.
- (71) The calculation of the expected costs is based on the analysis of the unit costs of the individual components of the covering for the waste heap resulting from a market research by the experts with suppliers of various works and supplies involved and using the 2012 pricing data published by the Catalan Institute of Technology and Construction (Institut de Tecnologia de la Construcció de Catalunya — ITEC). For comparison, the study also uses overall costs of restorations for different restoration options as estimated in the study prepared in 2001 by Symonds Group for DG Environment of the European Commission ⁽¹⁵⁾. It also includes the costs of maintenance and control of the covered heaps for additional 10 years after the finalisation of the covering. These unit costs are then applied to the estimated amount of the waste material on the heaps in three different moments in time: (i) actual amounts in 2012, (ii) amounts expected in 2015 (year of the expected start of the production of salt from the waste material in a new plant in Suria), and (iii) amounts expected in 2035 (when the mining activities of Iberpotash are planned to be stopped). The resulting total costs of restoration in these periods are summarised in the following table:

Table 2

Estimated restoration costs according to the ERF Study

Year	Estimated restoration costs (EUR million)		
	Suria	Balsareny/Sallent	Total
2012	24,8	46,2	71,0

⁽¹⁵⁾ A study of the costs of improving management of mine waste, Symonds Group in association with COWI, report to DG Environment, European Commission, final report October 2001.

Year	Estimated restoration costs (EUR million)		
	Suria	Balsareny/Sallent	Total
2015	26,9	52,3	79,2
2035	38,2	83,8	122,0

- (72) On this basis, the ERF Study considers that the amount of the financial guarantee based on the new legislative rules of the Royal Decree 975/2009 should definitely not be lower than the basic costs of restoration in 2012 amounting to EUR 71 million for both sites and its appropriate amount, taking into account the total costs in the future, should rather be around EUR 100 million.
- (73) Finally, the ERF Study analyses the impact of the planned extraction and commercialisation of the salt in the heaps based on the newly announced Plan Phoenix that started to be implemented in 2012. Taking into account various scenarios as regards the expected production of potash and salt in the future (including the most ambitious plans of Iberpotash to sell annually 1,5 million tonnes of salt), the ERF Study concludes that under any of those scenarios, the Plan Phoenix would only slow down but not stop the continued annual growth of the total waste material accumulated at Iberpotash's sites. In the most optimistic scenario, the Plan Phoenix would lead to a reduction of the total waste material deposited on the heaps to 1 213 kt per year (compared to 1 979 kt per year without the Plan Phoenix). Therefore, while the Plan Phoenix has an appreciable impact by reducing the annual waste accumulation by up to almost 40 %, the ERF Study considers that the Plan Phoenix cannot be considered as a self-sufficient restoration measure, but rather as a mitigating factor, since it will at most lead to slow down of the growth of the existing waste heaps but not to their elimination.
- (74) Iberpotash argues that the ERF Study cannot serve as a basis for calculating the amount of the guarantee since it itself acknowledges that it is not based on the relevant provisions of the Decree 202/1994 and since it contains a number of imprecise and incorrect statements and data.
- (75) The Commission acknowledges that the study does not follow the relevant provisions of Decree 202/1994 and focuses rather on the conditions of Royal Decree 975/2009 transposing the Extractive Waste Directive focussing on the expected costs of restoration. However, its results indicating the estimated restoration costs for individual Iberpotash's sites are based on a sound methodology and reasonable assumptions as described above in recitals 68-73 and are thus indeed relevant for the calculation of the guarantees also under Decree 202/1994. This is demonstrated in particular by Article 2.4(h) of Decree 202/1994, which refers to the costs of any other specific restoration measures that may be necessary and thus not limiting the calculation to the measures individually enumerated in the previous points of Article 2 ⁽¹⁶⁾.
- (76) Further, the relevance of the extent of the damage to the environment and expected restoration costs is also, at least implicitly, evident from the wording of the judgment of the Higher Court of Justice of Catalonia of 11 October 2011, which states with respect to the amount of the financial guarantees that: 'the key and central provision is Article 8(2) of the Law No 12/1981 [...] providing that in any case, in relation to the restoration, the amount should be established based on area affected by the restoration, overall costs of the restoration or by both these criteria [...] ("el precepto cardinal y central del caso es el artículo 8.2 de Ley 12/1981[...] al disponer que en cualquier caso, en lo referente a la restauración, la cuantía debe fijarse en función de la superficie afectada por la restauración, por el coste global de la restauración o por ambos aspectos conjuntamente [...]")' and which then concludes that the authorisation is not in conformity with the applicable law since it 'has not set the guarantees in the present case in conformity with the legal limits [...] ("no ha establecido una fianza ajustada al caso en los límites legales [...]")'. Finally, such expected restoration costs are clearly relevant for the calculation of the guarantee according to Article 43 of the Royal Decree 975/2009 applicable to Iberpotash as of 1 May 2014.
- (77) In addition, the Commission notes that, apart from general criticism of the alleged imprecise and incorrect assumptions of the ERF Study, neither the Spanish authorities nor Iberpotash identify those alleged imprecisions and incorrect assumptions or provide any specific arguments or propose any own alternative estimation of the total restoration costs for Iberpotash's sites.

⁽¹⁶⁾ The appropriateness of using Article 2.4(h) of the Decree 202/1994 in this respect seems to be also acknowledged by the observations of Iberpotash on the Opening Decision (see in particular paragraph 68 of the observations).

- (78) The Spanish authorities argue that the amounts of the guarantees complied with the criteria under the national law by taking into account the expected costs according to the restoration plan existing at the time. In addition, Iberpotash submitted its own expert study with the aim to demonstrate that the guarantee was sufficient with respect to both criteria indicated in the national legislation, i.e. the size of the area affected and the expected costs of restoration.
- (79) However, as explained above, the compliance with the criteria under the national law was clearly not confirmed by the court judgment. In addition, the measures contained in the restoration plan and taken into account in the study submitted by Iberpotash were limited to building perimetric canals, basins for the rain brine collected and similar measures aimed at limiting pollution, but clearly not leading to a permanent restoration of the waste heaps. The study does therefore not include nor quantify proper restoration measures for the calculation of expected costs. Since the expected actual costs of restoration are relevant for the calculation of the financial guarantee both under the Catalan (see recital 75 above) and under the Union legislation, the conclusions of the study provided by Iberpotash cannot serve as a basis for calculating the full and correct amount of the guarantees. As shown not only by the ERF Study but also by examples of similar waste heaps in France or Germany ⁽¹⁷⁾, such restoration normally involves either (a) total removal of the heaps (e.g. by backfilling of the material underground), (b) gradual desalinisation of the heaps by pumping water into the heap and collecting the resulting brine, or (c) permanent covering of the heaps. These proper restoration measures are, however, significantly more expensive than building perimetric canals, basins for the rain brine collected and similar measures aimed solely at limiting pollution. This is also demonstrated by the costs of covering of the Vilaforns dump that amounted to EUR 7,9 million (not including the annual maintenance costs). Considering that Vilaforns with around 3 million tonnes of salt material is a small heap compared to the active Cogulló heap (Balsareny/Salent) with 41 million tonnes or Fusteret heap (Suria) with 22 million tonnes, the total costs of restoring these active mines and covering the corresponding waste heaps are likely to be significantly higher than the costs for Vilaforns.
- (80) Further, Iberpotash argues that the amount of the waste on the heaps will be significantly reduced due to its Plan Phoenix announced in 2011 which aims at processing the waste on the heaps in order to produce technical salt to be sold on the market. As part of this project, Iberpotash plans to build a vacuum salt plant extracting salt from the waste material produced during its potash mining activities and sell this salt on the market. It expects to start by selling annually around 750 thousand tonnes of salt and later plans to increase this amount up to 1,5 million tonnes of salt per year.
- (81) However, even though the plan to process and commercialise at least part of the waste material could in principle reduce the volume and salinity of the heaps and thus also the expected costs of their restoration, this plan was announced by Iberpotash only in 2011 and its implementation starting as of 2012 is still ongoing. Therefore, the Plan Phoenix clearly should not have been taken into account for the establishment of the amount of the guarantees in 2006 and 2008, as it was still too uncertain at this point in time.

Conclusion on existence of selective economic advantage

- (82) In view of the above, the Commission considers that the collected evidence and submitted expert reports corroborate the finding of the national court that the original amounts of the financial guarantees were clearly insufficient to ensure proper restoration.
- (83) Therefore, the Commission considers that the financial guarantees set by the Spanish authorities in 2006 and 2008 were indeed lower than the level normally required under the applicable national legislation. Therefore, Iberpotash has been granted an economic advantage in the form of lower banking fees paid annually for the financial guarantee. Since according to Iberpotash its bank fees for the guarantees amounted to 1 % of the amount of the guarantees per year, a significantly lower total level of the guarantees decreased the relevant bank fees paid by Iberpotash accordingly and thus reduced its costs as compared to other operators whose guarantees had to comply with the law. Therefore, the Commission considers that Iberpotash enjoyed an economic advantage due to the reduced level of the financial guarantees.
- (84) The arguments of the Spanish authorities and Iberpotash that the public authorities did not provide to Iberpotash any advantage or preferential treatment as a result of a rigorous application of the relevant rules cannot be

⁽¹⁷⁾ See e.g. Annual Report of the German potash mining company K+S Kali GmbH for 2015, page 48 (<http://www.k-plus-s.com/en/archiv/finanzberichte.html>), the restoration methods used for Alsatian waste heaps as described in the ACA document provided as Annex 2 to the submission of the Spanish authorities of 19 April 2016 or a book by a German expert Henry Rauche: *Die Kaliindustrie im 21. Jahrhundert*, Springer-Verlag Berlin Heidelberg 2015, <https://mining-report.de/blog/henry-rauche-die-kaliindustrie-im-21-jahrhundert/>

accepted since it has been established above that these decisions of public authorities led to a level of the financial guarantees which was lower than normally required. Further, the argument that the Catalan legislation was in fact stricter than similar rules at the State level or in other regions of Spain is not relevant since such costs are site-specific and the rules concerning the financial guarantees to be established by Iberpotash which had to be respected were the ones applicable in Catalonia where the waste heaps were located. Iberpotash was allowed by the public authorities to maintain lower financial guarantees than was normally required by the Catalan legislation applicable to it and thus received a selective advantage in the form of lower bank fees for the reduced guarantees as compared to other operators in a similar position.

- (85) The Commission thus concludes that Measure 1 provided a selective economic advantage to Iberpotash.

5.1.1.2. *Transfer of State resources*

- (86) As regards the State resources criterion, the Complainant submits that a too low guarantee not covering the full restoration costs presents a (potential) transfer of State resources. It would allegedly consist of a risk that in case Iberpotash does not fulfil its obligations regarding the restoration of its sites, the State would have to bear these costs. The complainant refers to the Commission decision in the Georgsmarienhütte case ⁽¹⁸⁾ where the Commission considered as State aid an exemption from a steel producer's environmental obligations with regard to the recycling and disposal of industrial dust.
- (87) The Spanish authorities and Iberpotash argue that even in case the guarantee would be lower than required, Iberpotash would still have the general obligation to restore its sites and would be obliged to pay the costs of such restoration. These costs are in no way limited by the amount of the financial guarantee. Therefore, the State does not relieve Iberpotash of its financial obligations. Furthermore, any risk that Iberpotash would not in the future be able to cover all these costs and that the State would need to intervene from the State resources, is extremely remote and unlikely in view of Iberpotash's mother company's healthy financial situation. The Spanish authorities argue that in case Iberpotash in the future does not fulfil these obligations, there are enough Iberpotash assets in Spain that could be seized by the authorities in order to cover the costs of restoration.
- (88) The Commission notes that the guarantees at issue in this case are not examined under State aid rules as to the amount of fee possibly foregone in light of the risk or exposure incurred by the guarantor (i.e. a private bank, not the State) but as to the risk for the State in case the guaranteed amount is lower than the actual costs of the environmental damage and in case the guaranteed company does not or cannot pay the full restoration costs.
- (89) As regards the precedent case raised by the complainant, the Georgsmarienhütte case was significantly different since the land of Lower Saxony clearly assumed the responsibility for the disposal of the dust and actually paid DEM 64,64 million for such disposal. This is not the case here since, irrespective of the amount of the guarantee, Iberpotash remains responsible for the restoration of its mining sites and the Spanish authorities have until now not committed to pay any restoration costs instead of Iberpotash. The Georgsmarienhütte case thus cannot serve as any precedent for the present case.
- (90) The financial guarantee by Iberpotash is provided in the form of a bank guarantee which is not freely available to the State. It can be used only for measures strictly defined by the law, in particular for financing the removal of waste, restoration of the site and other environmental measures in case Iberpotash does not fulfil its environmental obligations. The State does not acquire any interest on the funds of the guarantee or any other financial advantage which would be reduced in case of a lower amount of the guarantee. Further, the State has so far not been in a position where it would need to make any use of the guarantee for any of the above purposes. However, even if the reduced amount of the guarantee has so far not led to any actual effect on State resources, this fact alone does not exclude the existence of a potential effect on State resources due to increased risk for the State to be obliged to spend its resources in the future.
- (91) Indeed, the creation of a concrete risk of imposing an additional burden on the State in the future is sufficient for the purposes of fulfilling the notion of State aid, pursuant to Article 107(1) of the Treaty ⁽¹⁹⁾. The Court of Justice has also held that the link to and effect on State resources of a State aid measure needs not to be direct for this criterion to be met.

⁽¹⁸⁾ Commission Decision 1999/227/ECSC of 29 July 1998 on aid granted by the Land of Lower Saxony (Germany) to Georgsmarienhütte GmbH (OJ L 83, 27.3.1999, p. 72).

⁽¹⁹⁾ See also case C-200/97 Ecotrade, ECLI:EU:C:1998:579, in particular paragraph 41.

- (92) The very purpose of such financial guarantees is to make sure that the mining companies have sufficient resources kept aside to cover future restoration costs whatever their financial situation in the (often rather distant) future might be. It is thus evident that in case the amount of the guarantee is significantly lower than expected restoration costs, there is at the least an increased risk that State resources might be affected in the future. This risk of potential costs to public budget is clearly higher than in case the guaranteed amount would have been correctly set in line with the applicable legislation, taking due account of the expected restoration costs. If these resources are significantly lower than necessary, State resources would ultimately have to cover a greater part of these costs in case Iberpotash is for whatever reason not willing or able to do so. In addition, in case of Iberpotash's inability to pay the restoration costs in the future, the alleged possibility for the Spanish authorities to seize assets of Iberpotash is unlikely to bring significant additional resources since the only Spanish assets of Iberpotash (and the whole ICL group) are its potash mining facilities. However, once the potash mines are closed the value of these assets is doubtful.
- (93) The fact that the State would be obliged to step in on its own account in case Iberpotash is not willing or able to take the necessary restoration measures with respect to its waste heaps is well established in the applicable legislation.
- (94) Firstly, pursuant to Article 102 of Law 39/2015 ⁽²⁰⁾, the State may take measures in lieu of the party legally responsible for taking such measures. Spain would have to (i) enjoin Iberpotash to take specifically defined measures; (ii) inform Iberpotash that the administration will otherwise take such measures itself, and at what cost; (iii) implement such measures; and (iv) attempt to recover the cost from Iberpotash, which by definition will not be possible if Spain must execute the insufficient financial guarantee. While this decision is formally facultative, in the event of Iberpotash defaulting on its obligations to restore its facilities, Spain would have no option other than to pay upfront for such restoration, because Spain would otherwise not comply with its own obligations.
- (95) Secondly, as noted in recital 13, Spain may be in breach of its obligations under the Extractive Waste Directive and the Water Framework Directive. Therefore, should Iberpotash abandon its facilities after depleting the mineral resources and not restore such facilities, given the insufficient guarantee, the only way for Spain to meet its obligations under those Directives and eventually avoid daily penalty payments imposed by the European Court of Justice is to pay itself for the removal of the salt tips or an equally effective restoration.
- (96) Thirdly, under the provisions of the Spanish Law 27/2006 of 18 July 2006 ⁽²¹⁾ the Spanish authorities can be compelled to comply with their obligations under the environmental legislation. Any non-governmental organisation that meets the criteria set out in Law 27/2006 may, in the event of an environmental infringement listed at Article 18(1) of Law 27/2006 (including e.g. infringements concerning the obligations in the area of water protection), take action in court to force the administration to comply with its environmental obligations.
- (97) Fourthly, Directive 2004/35/CE of the European Parliament and of the Council ⁽²²⁾ indicates in Article 6(3) that where an operator responsible to take remedial actions with respect to an environmental damage fails to comply with its obligations, the competent authority may take these measures itself, as a means of last resort. Similarly, under Article 5(3), the competent authority may, if the relevant operator fails to do so, take necessary preventive measures in order to eliminate an imminent threat of an environmental damage. If Iberpotash does not take necessary restoration measures once its mining activities are closed, the unrestored waste heaps may become an imminent threat for the environment requiring thus remedial or preventive action by the competent public authorities as a means of last resort.
- (98) Finally, the Spanish authorities themselves indicate ⁽²³⁾ that according to Article 9 of Law 12/1981 in case the operator does not comply with its obligations, the Administración de la Generalitat can forcefully execute these measures at the costs of the operator. They indicate that in practice the administration implements the relevant measures that are then financed from the financial guarantee or, in case the guarantee is not sufficient, from the sale of assets of the operator. Therefore, in case the financial guarantee is significantly lower than required, the public administration runs a risk that the assets of the operator are not sufficient to finance the relevant

⁽²⁰⁾ Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas: <https://www.boe.es/buscar/act.php?id=BOE-A-2015-10565&p=20151002&tn=1#a99>

⁽²¹⁾ Ley 27/2006, de 18 de julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente.

⁽²²⁾ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ L 143, 30.4.2004, p. 56).

⁽²³⁾ See in particular paragraph 11 of the Spanish authorities comments on third party observations submitted on 27 July 2016.

measures it executed. This confirms that a too low financial guarantee increases the risk that the restoration measures taken by the administration will not be sufficiently covered by the assets of the operator (especially in case it does not have any other Spanish activities as in case of Iberpotash) and would need to be paid from the public resources.

- (99) Therefore, a level of guarantees which is significantly lower than necessary as required by law is exposing the State to a concrete risk of additional burden on its resources. The increased risk of additional burden on the State is thus sufficiently concrete to constitute at least a potential impact on State resources due to an excessively low level of the financial guarantee.
- (100) The level of the financial guarantees to be established by Iberpotash has been set by the administrative decisions of Generalitat de Catalunya approving the permits to operate its extractive activity of potash. Given that the notion of (Member) State for the purposes of application of Article 107(1) TFEU includes all levels of public authorities, regardless of whether it is a national, regional or local authority, the decision to apply a reduced level of the financial guarantees is imputable to the State.
- (101) Therefore, the Commission concludes that Measure 1 involved a transfer of State resources and is imputable to the State.

5.1.1.3. *Potential distortion of competition*

- (102) The Commission considers that the reduced costs of Iberpotash due to a level of financial guarantees which is lower than required by the relevant legislation are liable to distort competition on the markets where Iberpotash is active — mainly markets for potash and salt. As explained below (see recital 110 and following), this reduction of costs amounted over the relevant period to around EUR 1,8 million and thus, contrary to the claims of the Spanish authorities, was not negligible.
- (103) Further, the fact that Iberpotash is the sole Spanish producer of potash does not exclude a potential distortion of competition since the relevant geographic market is clearly wider than the national Spanish market. The Commission has already in 1993 considered that the potash market was wider than Spain, including as well France, the UK and other Member States except Germany ⁽²⁴⁾. Further, Iberpotash in its Sustainability Report of 2014 ⁽²⁵⁾ indicates that only 23 % of its production of potash and salt is sold in Spain, while 50 % go to other European countries, 18 % to South America and there are also further sales to North America, Africa and Asia. In all these regions Iberpotash competes with other producers of potash and salt and this competition is liable to be affected by artificially lowered costs of Iberpotash.
- (104) Finally, the potential distortion of competition is not put into question by the argument of Iberpotash that irrespective of the level of the financial guarantees its environmental obligations remain the same (i.e. to ensure restoration of its sites and prevent pollution) and it anyway needs to maintain provisions to cover possible environmental liabilities. In addition to these accounting provisions, the obligation of maintaining specific financial guarantees in line with the relevant legislation in fact represents normal but specific operating costs borne by Iberpotash — or any other mining company subject to the same rules — as a result of fees that the bank charges for establishing and maintaining the guarantee and their unduly low level thus has the potential to favour Iberpotash and distort competition.
- (105) The Commission thus concludes that Measure 1 has a potential to distort competition.

5.1.1.4. *Affectation of intra-EU trade*

- (106) As already indicated above, the markets for potash and salt are clearly cross-border markets with 50 % of Iberpotash's production being exported to other European countries. Therefore, the reduced level of the financial guarantees is liable to affect trade between EU Member States.

⁽²⁴⁾ See Commission Decision 94/449/EC of 14 December 1993 relating to a proceeding pursuant to Council Regulation (EEC) No 4064/89 (Case No IV/M.308 — Kali- Salz/MdK/Treuhand) (OJ L 186, 21.7.1994, p. 38).

⁽²⁵⁾ Memoria de Sostenibilidad 2014, page 15, <http://www.icliberia.com/noticia/icl-iberia-presents-the-sustainability-report>

- (107) The argument of Iberpotash that the markets for salt are only national or even regional due to high transportation costs is thus not supported by the figures provided by Iberpotash in its Sustainability Report of 2014, since 80 % of its production of salt is being exported not only to other European countries but also to Asia, North Africa and America. In addition, the observations of Iberpotash on the Opening Decision are contradictory in this point since they claim on the one hand that the market for salt is national or even regional and on the other hand that a French producer of salt is its direct competitor and is trying to exclude Iberpotash from the market.
- (108) The Commission thus concludes that Measure 1 affects intra-EU trade.

5.1.1.5. *Quantification of the aid*

- (109) Establishing the actual amount of the aid first requires establishing at least an approximate 'correct' amount of the financial guarantees under the applicable legislative rules in the relevant period. Then, the aid amount would correspond to the difference between the expected amount of banking fees that Iberpotash would have had to pay to constitute this correctly set guarantee amount, and the actual amount of banking fees that the company paid.
- (110) The third party claims that the amount of aid should not be limited to the lower banking fees but should include also the necessity to provide sufficient collateralisation to the bank in the form of financial reserves. However, given that the amount of the 'corrected' guarantees as estimated below is relatively modest in view of the annual turnover of Iberpotash (around EUR 300 million) and the whole ICL group (USD 5,4 billion) it is unlikely that securing a higher guarantee amount would require significant additional costs to the company.
- (111) Since, according to the Spanish authorities, the Higher court of Justice of Catalonia has found in December 2016 the increased amount of EUR 6 979 471,83 for Balsareny/Sallent site to be in line with the applicable legislation, the Commission considers that at present the 'correct' amount of the guarantees for Balsareny/Sallent corresponds to this currently applicable amount approved by the court.
- (112) Further, the Commission by analogy (see also recital 64 above) considers that the increased amount of EUR 6 160 872,35 for the guarantee for Suria applicable since 2015 can also be considered as in line with the applicable legislation. Even though there is no authoritative court conclusion with respect to this site, the increased amount of the guarantee for a smaller site at Suria is in fact almost comparable to the approved amount for Balsareny/Sallent. This confirms that the amount can be considered as adequate and in line with the applicable legislation.
- (113) Therefore, the correct amount of the guarantees at present corresponds in total to EUR 13 140 344,18.
- (114) However, the calculation of this amount takes into account the Plan Phoenix announced in 2011 and gradually implemented as of 2012. The plan envisages, among others, investment in a vacuum salt plant in order to process and commercialise salt included in the potash mining waste. According to the plan, Iberpotash should be ultimately selling annually around 1,5 million tonnes of salt.
- (115) The Commission agrees with the ERF Study that the Plan Phoenix as such cannot be considered as a restoration measure and would in fact not stop the growth of the waste deposits during the operation of the mines. However, the Commission also recognises the claims of Iberpotash and the Spanish authorities that the plan does have an impact on the total expected restoration costs. The ERF Study does not take into account the fact that the salt processing and sales are likely to continue also once the potash mining activities are stopped. The Plan Phoenix is thus likely to gradually contribute to elimination of the waste heaps in the future and as such can be taken into account for setting the appropriate level of the guarantees as has been the case for the increased levels of guarantees proposed in 2015 and, at least for Balsareny/Sallent, confirmed by the national court.
- (116) This fact, however, means that the current level of financial guarantees cannot be considered as adequate for the period before the start of the Plan Phoenix in 2012. Even though also before announcing Plan Phoenix Iberpotash processed and sold rather minor amounts of salt from its waste heaps, most of the salt waste was being simply accumulated on the waste heaps with a hope that it might be commercially used in the future ⁽²⁶⁾. However, there was no concrete plan on how and when to increase the salt processing facility so that the amounts of salt waste eliminated in this way would be more substantial and thus have an appreciable impact on the future restoration costs. Therefore, as regards the period before the launch of the Plan Phoenix, such rather hypothetical future reduction of the waste heaps due to the processing and sale of significant amounts of salt should not be taken into account.
- (117) The Commission thus has to consider other available evidence for estimating an approximate 'correct' amount of the guarantees in the period 2006-2011 based on the restoration costs as expected at that moment, without the impact of the Plan Phoenix.

⁽²⁶⁾ See Iberpotash's comments on the Opening Decision, paragraph 23.

- (118) As already explained above (see recitals 68-81), the most reliable estimates of the total expected restoration costs (without Plan Phoenix) were provided in the ERF Study submitted by the complainant. The Commission considers the assumptions of this expert report to be credible, as they are largely based on market research and benchmarking with similar sites elsewhere in the world. On the contrary, as explained above, the study provided by Iberpotash cannot be considered as a reliable estimate of expected restoration costs because it does not consider proper restoration measures (see recital 79).
- (119) The ERF Study estimates the total restoration costs to amount to at least EUR 71 million. Moreover, all other indications of possibly correct amounts in the ERF Study or from other sources (see Section 5.1.1.1 above) are even higher. Therefore, the Commission considers that in the absence of any better estimates for the period 2006-2011 the relevant expected restoration costs to be taken into account amount to EUR 71 million (EUR 24,8 million for Suria and EUR 46,2 million for Balsareny/Sallent).
- (120) Finally, according to Article 3 of the Decree 202/1994 (the legislation applicable in that period) the resulting amount of the financial guarantee on the basis of Article 2 (i.e. based on expected restoration costs) should be reduced by 50 % for mining activities not situated in natural sites of special interest (including Iberpotash's sites).
- (121) Therefore, the Commission considers on the basis of available evidence that the 'correct' amount of the financial guarantees for Iberpotash mining activities amounts to at least EUR 12,4 million for Suria (for the period 2006-2011) and EUR 23,1 million for Balsareny/Sallent (for the period 2008-2011).
- (122) According to Iberpotash the current costs of the guarantee amount to 1 % of the guarantee amount per year. Using the above correct guarantee amounts for the two relevant periods, the total aid granted to Iberpotash in the form of lower guarantee fees would then each year amount to 1 % of the difference between the 'correct' amount and the actual amount established for that year, as shown in the following table.

Table 3

Calculation of the amount of aid

(thousand EUR, rounded)	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Balsareny/Sallent											
— actual guarantee	—	—	1 130	1 130	1 130	1 130	1 130	1 130	1 130	1 130	1 130
— 'correct' guarantee	—	—	23 100	23 100	23 100	23 100	6 979	6 979	6 979	6 979	6 979
— difference in the fees	—	—	146,5 ⁽¹⁾	219,7	219,7	219,7	58,5	58,5	58,5	58,5	58,5
Suria											
— actual guarantee	774	774	828	828	828	828	828	828	828	828	6 161
— 'correct' guarantee	12 400	12 400	12 400	12 400	12 400	12 400	6 160	6 160	6 160	6 160	6 160
— difference in the fees	9,7 ⁽²⁾	116,3	115,7	115,7	115,7	115,7	53,3	53,3	53,3	53,3 ⁽³⁾	0
Total difference in fees for Iberpotash	9,7	116,3	262,2	335,4	335,4	335,4	111,8	111,8	111,8	76,3	58,5

⁽¹⁾ Since the guarantee for Balsareny/Sallent was set by the authorisation issued on 29 April 2008, the difference in the guarantee fees for Balsareny/Sallent in this year is calculated as 8/12 of the annual amount.

⁽²⁾ Since the guarantee for Suria was set by the authorisation issued on 9 November 2006, the difference in the guarantee fees for Suria in this year is calculated as 1/12 of the annual amount.

⁽³⁾ Since the guarantee for Suria was increased to the 'correct' amount as of May 2015, the difference in the guarantee fees for Suria in this year is calculated as 4/12 of the annual amount.

- (123) Therefore, the total amount of aid granted to Iberpotash in the form of lower bank fees for the reduced level of the guarantees for the whole period 2006-2016 amounts to EUR 1 864 622.

This aid was granted at the moment the reduced levels of the guarantees were set in the environmental authorisations issued by the Spanish authorities, i.e. on 6 November 2006 for Suria and on 29 April 2008 for Balsareny/Sallent.

5.1.1.6. *Conclusion on existence of aid: Measure 1*

- (124) In light of the above, the Commission comes to the view that Measure 1 constitutes State aid and will therefore assess its lawfulness and compatibility with the internal market.

5.1.2. MEASURE 4: INVESTMENT TO COVER THE VILAFRUNS WASTE HEAP

- (125) On 17 December 2007, the Ministry of Environment of Spain and the Generalitat de Catalunya signed a convention by which they agreed to cooperate and share the costs with respect to the project aimed at covering the waste heap of Vilaforns and thus reducing its negative environmental impact. The Ministry of Finance agreed to contribute EUR 4 million to the investment costs while the rest was to be covered by the Agència Catalana del Agua, a public undertaking managed by the Generalitat de Catalunya. The works on the project started in August 2008 and lasted 18 months. The total investment costs amounted to EUR 7 887 571 and were entirely covered by public authorities as agreed in the 2007 convention.
- (126) The project consisted in covering the Vilaforns waste heap with an impermeable sheeting ('lámina impermeable') which would seal the waste heap and insulate the waste salt from any contact with water from exterior and thus prevent any leaks of salt from the heap. The sheeting was protected by geotextile foils and covered by soil enabling planting vegetation on top of the covered heap.
- (127) Vilaforns waste heap is at the premises and in the ownership of Iberpotash. It was transferred to it as part of the sales agreement of 21 October 1998 by which Iberpotash acquired the mining activities in the Catalan region from the Sociedad Estatal de Participaciones Industriales — SEPI a public holding of the Spanish State. At the time of the transfer, the waste heap was already inactive since the operation of the mine to which Vilaforns waste heap belonged was stopped already in 1973.

5.1.2.1. *Selective economic advantage*

- (128) As indicated above, the investment in the covering of the Vilaforns waste heap at the premises of and in the ownership of Iberpotash was fully financed by public authorities. Iberpotash only bears the maintenance costs of the installation during its life-time.
- (129) The covering realised in 2008-2009 relates to a waste heap which is owned by Iberpotash since 1998 when the site was privatised together with other potash mining sites in the region. The heap relates to a mine which ceased operations already in 1973 and thus Iberpotash took over the site when it was no longer operational. Iberpotash thus argues that it has no obligation to take any measures to prevent pollution from the heap either under the national or Union legislation since Iberpotash was not the original polluter.
- (130) The Spanish authorities do not agree with these arguments of Iberpotash and claim that Iberpotash has a general obligation to take appropriate measures to prevent pollution from the waste heap in its ownership and to manage the heap in line with the applicable legal rules. Iberpotash is thus liable for ensuring environmental protection measures required under the relevant legislation and also for any environmental damage caused by this heap.
- (131) Further, third party comments point to the responsibility of Iberpotash to manage Vilaforns from the very moment that mining rights were transferred to it. Such responsibility was based on the Spanish Act 6/1993 of 15 July 1993 on management of waste and also on the Royal Law-Decree 1/2001 of 20 July 2001 recasting the Spanish Water Act. The third party claims that the fact that Vilaforns was no longer active when acquired by Iberpotash is irrelevant since any holder of a mining concession must manage any mining waste in its entirety, i.e. including any waste generated prior to the holder's acquisition of the concession.

- (132) The Commission considers that the fact that the mine at Vilafruns waste heap stopped operating already in 1973 does not as such exclude responsibility of Iberpotash as its owner to assure appropriate restoration. As confirmed by the Spanish authorities, all restoration plans including the plan of 2008 included specific restoration measures that Iberpotash was obliged to take with respect to the Vilafruns heap. According to Article 121 of the Spanish Mining Act of 1973, a non-fulfilment of obligations included in the restoration plan constituted a serious infringement. In addition, the Spanish authorities confirm that, in line with the applicable water protection legislation, Iberpotash was always obliged to take necessary measures to avoid water pollution from all its installations, including Vilafruns heap. The Commission also notes that according to Article 4 of the Extractive Waste Directive, the operator shall take all necessary measures to prevent or reduce as far as possible any adverse effects on environment also in case of management of waste facility after its closure.
- (133) Also, Iberpotash claims that the sales agreement for the site includes a clause that can be interpreted as excluding responsibility of Iberpotash resulting from activities before 1997, i.e. including any responsibility for the waste heap. Iberpotash in this respect refers to a judgment of the Supreme Court of 14 May 2009 citing the sales contract provision stipulating that the selling party should compensate the buyer for any obligations resulting from third party claims in relation to facts before the transfer that were not reflected in the balance sheet and not evident during the due diligence process. Iberpotash argues that the obligations relating to Vilafruns restoration were not evident before the sale and there were no related provisions in the balance sheet due to the fact that no such legal obligation existed at that time.
- (134) However, the Spanish authorities indicate that the share sales agreement of 1998 did not include any specific provisions that would oblige the seller to take over any responsibilities of the buyer following the transfer of shares.
- (135) The Commission further notes that the provision cited in the judgment of the Supreme Court is rather a standard contractual provision protecting the seller against subsequent third party claims related to facts not known during the sale. However, Iberpotash cannot claim that it was not aware of the existing Vilafruns waste heap taken over as part of the transaction and of the general responsibility of waste holder to ensure proper management of its waste facilities. The fact that Iberpotash accepted environmental obligations with respect to Vilafruns heap in various restoration plans confirms it was aware of such responsibilities.
- (136) The Commission thus considers that as a consequence of the acquisition of the potash mining activities in Catalonia in 1998, Iberpotash was responsible for ensuring proper management of the Vilafruns waste heap in line with the applicable legal rules.
- (137) However, while accepting such conclusion, the Spanish authorities claim that the obligations of Iberpotash did not include the covering of Vilafruns waste heap. According to the Spanish authorities, Iberpotash's obligations would have been fulfilled by substantially cheaper measures that had been included in its original restoration plan of 2008 (namely installation of a tubing/drainage system, other types of protection and restoration with total costs of around EUR [...] (*)). They thus argue, together with Iberpotash, that the public investment into the covering of the heap does not constitute an economic advantage to Iberpotash since the costs Iberpotash saved (EUR [...]) are more than balanced by the maintenance costs it has to bear for the life-time of the installation (amounting to EUR [...] only for the period from March 2015 to March 2016) and the opportunity costs of not being able to process and sell the salt from the covered Vilafruns heap as it plans to do for its other heaps (²⁷).
- (138) The Commission considers that, regardless of the extent of Iberpotash's obligations with respect to Vilafruns, it is not acceptable that public investment of EUR 7,9 million into a significantly better environmental protection amounting in principle to the restoration of the mining site without any investment costs to Iberpotash indeed did not bring any economic advantage to Iberpotash. The installation of the covering of the waste heap aimed at reducing significantly the pollution caused by leaks from the Vilafruns heap. The alternative measures in the absence of aid would have not provided such good and long-lasting protection and would have exposed Iberpotash to risks of having to bear the consequences of the pollution (as demonstrated by the criminal judgments of 18 December 2014 and 25 February 2015 related to its other mining sites — see recitals 27 and 94 of the Opening Decision). Therefore, the construction of the facility paid from public resources enabled Iberpotash to better prevent pollution, lower its environmental risks for the future and provide for a long-lasting restoration of the heap (in line with similar restorations of salt waste heaps in France or Germany as explained above in recitals 26 and 32). Iberpotash would have been ultimately obliged to ensure a proper restoration of Vilafruns waste heap.

(*) Confidential information

(²⁷) See observations of the Spanish authorities to the Opening Decision, paragraph 55.

- (139) Finally, the Commission considers that the measure is selective since it specifically aimed at public financing of the covering of Vilafruns waste heap in the ownership of Iberpotash. The Spanish authorities argue that the measure cannot be selective since Iberpotash is the only potash mining company in Spain and thus there is no possibility of comparison with other companies. However, the fact that Iberpotash is the only potash mining company in Spain does not invalidate the selectivity of the measure that is clearly aimed for a specifically identified waste facility and not any other.
- (140) The Commission thus concludes that Measure 4 provided a selective economic advantage to Iberpotash.

5.1.2.2. *Transfer of State resources*

- (141) The total investment costs of the covering of Vilafruns waste heap were paid by public authorities, EUR 4 million by the Ministry of Environment of Spain and the remaining EUR 3 887 571 by the Agencia Catalana del Agua, public undertaking managed by the Generalitat de Catalunya, which thus honoured the commitment to cover the rest of the investment costs that the Generalitat de Catalunya accepted in the convention of 17 December 2007.
- (142) Neither the Spanish authorities nor Iberpotash claimed absence of State resources with respect to this measure.
- (143) In addition, the decision to provide public financing for the covering of Vilafruns waste heap was taken by the Ministry of Environment of Spain and the Generalitat de Catalunya and it is thus clearly imputable to the State.
- (144) Therefore, the Commission concludes that Measure 4 involved transfer of State resources and is imputable to the State.

5.1.2.3. *Potential distortion of competition*

- (145) As indicated in detail above (see recitals 103 and 105), Iberpotash is in competition with other producers of potash and salt. Therefore, the fact that at least part of its environmental obligations with respect to Vilafruns were financed from public resources is liable to distort competition by artificially reducing Iberpotash's costs and thus providing an undue advantage vis-à-vis its competitors.
- (146) The Commission thus concludes that Measure 4 has a potential to distort competition.

5.1.2.4. *Affectation of intra-EU trade*

- (147) Both potash and salt are traded within the EU (see above recitals 106 and 107) and the Commission thus concludes that Measure 4 affects intra-EU trade.

5.1.2.5. *Conclusion on existence of aid: Measure 4*

- (148) In light of the above, the Commission comes to the view that Measure 4 constitutes State aid amounting to EUR 7 887 571 and will therefore assess its lawfulness and compatibility with the internal market.

5.2. *LEGALITY OF THE AID*

- (149) Both Measure 1 and Measure 4 were granted in breach of the notification and stand-still obligations laid down in Article 108(3) TFEU. Therefore, the Commission considers that both measures thus constitute unlawful State aid.

5.3. *COMPATIBILITY OF THE AID*

5.3.1. *MEASURE 1: REDUCED LEVEL OF THE FINANCIAL GUARANTEES*

- (150) Neither the Spanish authorities nor Iberpotash allege any compatibility grounds for the aid in the form of financial guarantees lower than required under relevant law.
- (151) The Commission considers that the measure constitutes operating aid to Iberpotash as it allowed costs from guarantee fees being lower than requisite in the long period between 2006 and 2016.

- (152) The Commission has not found any possible compatibility ground for such operating aid granted without pursuing any apparent objective of common interest and thus concludes that the measure consisting in reduced level of the financial guarantees of Iberpotash constitutes incompatible aid in the form of lower banking fees resulting from the unduly low level of the financial guarantees.

5.3.2. MEASURE 4: INVESTMENT TO COVER OF VILAFRUNS WASTE HEAP

- (153) The Spanish authorities argue that should the covering of Vilaforns waste heap constitute State aid, it would be compatible on the basis of Section 3.1.1 of the 2008 Environmental Aid Guidelines concerning the environmental aid for undertakings which go beyond Union standards or which increase the level of environmental protection in the absence of Union standards.
- (154) They submit that the covering of the waste heap is a pilot project aiming at testing a new technology for preventing salt waste heap leakages. The Vilaforns site has allegedly been chosen for this pilot project due to its particular characteristics (smaller volume, location as a first salt heap most upstream of the Llobregat river, the fact that it has been inactive already for decades). By providing the authorities with data about actual results, it would enable them to better address the general problem of salt waste heaps in the region. In this respect, the project is expected to contribute to the preservation, protection and restoration of environment in the region of the Llobregat river basin and thus pursues an objective of common interest.
- (155) The Spanish authorities further explain that the project is part of a general plan for improved management of the Catalan water basin including various measures; some financed from public and others from private resources.
- (156) The Commission considers that the 2008 Environmental Aid Guidelines indeed provide a basis for compatibility assessment in the current case. In particular, point 205 of the 2008 Environmental Aid Guidelines, read in conjunction with point 248 of the 2014 Energy and Environmental aid Guidelines ⁽²⁸⁾ allows the Commission to apply the rules laid down in the 2008 Environmental Aid Guidelines to unlawful aid granted in 2009-2011.
- (157) According to Section 3.1.1 of the 2008 Environmental Aid Guidelines, investment aid enabling undertakings to go beyond Union standards for environmental protection or to increase the level of environmental protection in the absence of Union standards will be considered compatible with the common market within the meaning of Article 87(3)(c) of the EC Treaty (now Article 107(3)(c) TFEU) provided that the conditions set out in points 74 to 84 and Section 3.2 of the 2008 Environmental Aid Guidelines are fulfilled.
- (158) The Union standards for restoration of extractive waste are set out in the Extractive Waste Directive. However, according to Article 24(4) of the Directive, Article 5, Article 6(3) to (5), Articles 7 and 8, Article 12(1) and (2) and Article 14(1) to (3) shall not apply to the waste facilities that stopped accepting waste before 1 May 2006, as it is the case for Vilaforns waste heap. Therefore, in the case at hand there are no specific Union standards that would set the level to be attained for Vilaforns waste heap in environmental terms.
- (159) One third party claims that Iberpotash was already in 2008-2009 under an immediate legal obligation to ensure that the heap was covered, without, however, providing any specific evidence for these claims. In any event, the Commission considers that even though Iberpotash would have ultimately been obliged to ensure proper restoration of Vilaforns waste heap in the future, there was no such obligation in 2008-2009 and, in the absence of the aid, Iberpotash would have been able to continue managing the waste heap by fulfilling its obligations according to the applicable restoration plan.
- (160) In line with point 79 of the 2008 Environmental Aid Guidelines, the aid intensity of such aid in case of large enterprises must not exceed 50 % of the eligible costs. Where the investment concerns the acquisition of an eco-innovation asset or the launching of an eco-innovation project, the aid intensity may be increased by 10 percentage points, provided that the conditions of point 78 of the 2008 Environmental Aid Guidelines are fulfilled. In addition, the aid intensity may amount to 100 % where the investment aid is granted in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, effectively ensuring

⁽²⁸⁾ Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020 (OJ C 200, 28.6.2014, p. 1).

that the aid is limited to the minimum necessary for achieving the environmental gain (see point 77 of the 2008 Environmental Aid Guidelines). Such a bidding process must be non-discriminatory and provide for the participation of a sufficient number of undertakings. In addition, the budget related to the bidding process must be a binding constraint in the sense that not all participants can receive aid.

- (161) According to point 80 of the 2008 Environmental Aid Guidelines, the eligible costs must be limited to the extra investment costs necessary to achieve a higher level of environmental protection, decreased by any operating benefits and increased by any operating costs during the first five years. In the absence of the Union standards, these extra investment costs consist of the investment costs necessary to achieve a higher level of environmental protection than that which the undertaking in question would achieve in the absence of any environmental aid (see point 84(c) of the 2008 Environmental Aid Guidelines).
- (162) In the case at hand, the Spanish authorities argue that before the investment in the covering of the heap, Iberpotash's applicable restoration plan included specific restoration measures for Vilafruns waste heap aimed at limiting leakages from the waste heap and thus minimising its impact on the environment. The expected costs of these measures, constituting a counterfactual situation in the absence of State aid in line with point 81(a) of the 2008 Environmental Aid Guidelines, amounted to EUR [...]. The Commission understands that these measures were considered sufficient by the Spanish authorities to ensure fulfilment of the environmental obligations applicable at that time to the inactive Vilafruns waste heap.
- (163) In addition, as explained by the Spanish authorities, the covering of Vilafruns waste heap was considered as a so called 'pilot project' in order to verify in practice suitability of that restoration method for addressing the environmental problems of the Llobregat region. Therefore, the covering was not made because of any actual legal obligation to do so but rather in view of a more general public interest in finding the most appropriate restoration method to be in the future implemented for all other waste heaps affecting the environment of the region.
- (164) Therefore, the covering of Vilafruns waste heap in 2008-2009 enabled Iberpotash to increase the level of environmental protection resulting from its activities in the absence of Union standards in line with point 74(b) of the 2008 Environmental Aid Guidelines.
- (165) In view of the above, the extra investment costs for the investment project would amount to investment costs of EUR 7 887 571 minus the costs of EUR [...] in the counterfactual scenario. Since Vilafruns has not been in operation for a number of years, there are no operating benefits from the covering of the waste heap. Operating costs for the maintenance of the installation last year amounted according to the Spanish authorities to EUR [...]. Presuming they stay at this level during the first five years, the total amount of operating costs to be added to the eligible costs would be EUR [...]. The total eligible costs would thus amount to EUR 7 804 922,60 ⁽²⁹⁾.
- (166) Since the aid amounted to the total investment costs of EUR 7 887 571, it constitutes more than 100 % of eligible costs.
- (167) The Spanish authorities have not provided any evidence that Vilafruns waste heap would have been selected in a genuinely competitive bidding process on the basis of clear, transparent and non-discriminatory criteria from a larger number of possible other projects. In fact, the heap has been chosen by the Spanish authorities only due to its characteristics that were considered as suitable for the project (see above recital 154). Therefore, point 77 of the 2008 Environmental Aid Guidelines allowing an aid intensity of up to 100 % cannot be used in the case at hand.
- (168) Further, the Commission considers that the method of restoring a waste heap by covering it with an impermeable layer ensuring its insulation from water cannot be considered as an eco-innovation project within the meaning of point 78 of the 2008 Environmental Aid Guidelines. Despite arguments of the Spanish authorities that the covering is unique and innovative, this method cannot be considered as new or substantially improved compared to the state of the art in the industry in the Union for the following reasons.
- (169) There may be technical differences between Vilafruns covering and the covering made in case of Alsace waste heaps as explained by a technical contribution by Agencia Catalana del Agua. However, similar methodologies

⁽²⁹⁾ I.e. EUR 7 887 571 minus EUR [...] plus EUR [...].

aimed at covering and sealing the heap with impermeable material had been already realised, in particular in Germany. According to a book by a German expert specifically dealing with available technologies in the potash industry ⁽³⁰⁾, there is a large experience of 30 years of covering of whole potash mining waste heaps in Germany with the aim to prevent entry of water into the heap and thus minimise leakage. The book claims that experiments in covering the waste heaps in Germany date back to 1950s and that as of 1970s, but in particular since 1990s, a number of mainly middle-sized waste heaps were covered in Germany while trying various types of materials and techniques. The 2015 Annual Report of the German potash mining company K+S indicates that small and medium-sized disused tailing piles have been covered as part of their old pile strategy in an effort to avoid and minimise long-term impact on nature and the environment. Overall, 41 disused tailing piles in Lower Saxony and two in Baden-Württemberg are currently being maintained. Fifteen of these have been revegetated and another six are in the process of being revegetated ⁽³¹⁾.

- (170) Therefore, even though the technical details of these projects may vary depending on the particular conditions of each site, the project cannot be considered as eco-innovation according to Section 3.1.1 of the 2008 Environmental Aid Guidelines.
- (171) The maximum aid intensity for Iberpotash as a large enterprise according to point 76 of the 2008 Environmental Aid Guidelines is thus 50 % of eligible costs.
- (172) Therefore, the maximum aid amount that the Commission considers compatible with the internal market under the 2008 Environmental Aid Guidelines as investment aid enabling Iberpotash to increase the level of environmental protection is EUR 3 902 461,30.
- (173) Consequently, the Commission considers the rest of the total aid amount for this measure (i.e. EUR 3 985 109,70) as illegal and incompatible aid.

6. RECOVERY

- (174) According to the Treaty and the Court's established case-law, the Commission is competent to decide that the Member State concerned must abolish or alter aid when it has found that it is incompatible with the internal market ⁽³²⁾. The Court has also consistently held that the obligation on a Member State to abolish aid regarded by the Commission as being incompatible with the internal market is designed to re-establish the previously existing situation ⁽³³⁾.
- (175) In this context, the Court has established that this objective is attained once the recipient has repaid the amounts granted by way of unlawful aid, thus forfeiting the advantage which it had enjoyed over its competitors on the market, and the situation prior to the payment of the aid is restored ⁽³⁴⁾.
- (176) In line with the case-law, Article 16(1) of Council Regulation (EU) 2015/1589 ⁽³⁵⁾ stated that '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 [...]'.
(177) Thus, given that the measures in question:
- (a) the total amount of aid granted to Iberpotash under Measure 1 in the form of lower bank fees for the reduced level of the guarantees for the period 2006-2016 and amounting to EUR 1 864 622; and

⁽³⁰⁾ Henry Rauche: Die Kaliindustrie im 21. Jahrhundert, Springer-Verlag Berlin Heidelberg 2015, <http://www.springer.com/de/book/9783662468333>. The existence of this book was pointed to us by one of the interested parties. It was written by an expert with 30-year experience in the potash industry and constitutes, also according to independent reviews (see e.g. <https://mining-report.de/blog/henry-rauche-die-kaliindustrie-im-21-jahrhundert/>) a comprehensive overview of the state-of-the-art techniques and technologies in the potash industry.

⁽³¹⁾ 2015 Annual Report of K+S, page 48, <http://www.k-plus-s.com/en/archiv/finanzberichte.html>

⁽³²⁾ See Case C-70/72 Commission v Germany [1973] ECLI:EU:C:1973:87, paragraph 13.

⁽³³⁾ See Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECLI:EU:C:1994:325, paragraph 75.

⁽³⁴⁾ See Case C-75/97 Belgium v Commission [1999] ECLI:EU:C:1999:31, paragraphs 64 and 65.

⁽³⁵⁾ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

- (b) the part of the Measure 4 going beyond the maximum aid intensity for investment aid enabling Iberpotash to increase the level of environmental protection by covering Vilafruns waste heap and amounting to EUR 3 985 109,70, were implemented in violation of Article 108 of the Treaty, and are to be considered as unlawful and incompatible aid, they must be recovered in order to re-establish the situation that existed on the market prior to their granting. Recovery should cover the time from when the advantage accrued to the beneficiary, that is to say when the aid was put at the disposal of the beneficiary, until effective recovery, and the sums to be recovered should bear interest until effective recovery.

7. CONCLUSION

- (178) The Commission finds that Spain has unlawfully implemented the aid granted to Iberpotash under Measure 1 in the form of unduly low guarantee fees resulting from the unduly low level of the guarantees for the period 2006-2016 amounting to EUR 1 864 622 in breach of Article 108(3) of the Treaty on the Functioning of the European Union. The Commission finds that this aid is incompatible with the internal market and must be recovered.
- (179) The Commission finds that Spain has unlawfully implemented the investment aid enabling Iberpotash to increase the level of environmental protection by covering Vilafruns waste heap (Measure 4) in breach of Article 108(3) of the Treaty on the Functioning of the European Union.
- (180) However, the Commission finds that part of Measure 4 amounting to EUR 3 902 461,30 is compatible with the internal market within the meaning of Article 107(3)(c) as it is in line with the 2008 Environmental Aid Guidelines.
- (181) On the contrary, the Commission finds the remaining part of the total aid amount for Measure 4 going beyond the authorised maximum aid intensity, namely EUR 3 985 109,70, is incompatible with the internal market and must be recovered,

HAS ADOPTED THIS DECISION:

Article 1

1. The State aid in favour of Iberpotash in the form of unduly low guarantee fees resulting from the unduly low level of the guarantees for the period 2006-2016 amounting to EUR 1 864 622, unlawfully granted by Spain, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.
2. The State aid for covering Vilafruns waste heap amounting to EUR 3 902 461,30 unlawfully granted by Spain, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Iberpotash is compatible with the internal market within the meaning of Article 107(3)(c).
3. The remaining part of State aid for covering Vilafruns waste heap amounting to EUR 3 985 109,70 unlawfully granted by Spain, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, in favour of Iberpotash is incompatible with the internal market.

Article 2

1. Spain shall recover the aid referred to in Article 1(1) and (3) from the beneficiary.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ⁽³⁶⁾ and with Commission Regulation (EC) No 271/2008 ⁽³⁷⁾ amending Regulation (EC) No 794/2004.
4. Spain shall cancel all outstanding payments of the aid referred to in Article 1(1) and (3) with effect from the date of adoption of this decision.

Article 3

1. Recovery of the aid referred to in Article 1(1) and (3) shall be immediate and effective.
2. Spain shall ensure that this decision is implemented within four months following the date of notification of this Decision.

Article 4

1. Within two months following notification of this Decision, Spain shall submit the following information to the Commission:
 - (a) the total amount (principal and interests) to be recovered from the beneficiary;
 - (b) a detailed description of the measures already taken and planned to comply with this Decision;
 - (c) documents demonstrating that the beneficiary has been ordered to repay the aid.
2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid referred to in Article 1(1) and (3) has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary.

Article 5

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 31 August 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission

⁽³⁶⁾ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).

⁽³⁷⁾ Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 82, 25.3.2008, p. 1).

COMMISSION DECISION (EU) 2018/119
of 18 September 2017
on State aid SA.47702 (2017/C) (ex 2017/N) — United Kingdom
Alternative package to replace the commitment for the Royal Bank of Scotland to divest the
Rainbow business
(notified under document C(2017) 6184)
(Only the English text is authentic)
(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By decisions of 14 December 2009 ⁽²⁾ ('Restructuring Decision'), the Commission declared a number of State aid measures ⁽³⁾ granted to Royal Bank of Scotland ('RBS') compatible with the internal market. The conclusion was reached on the basis of the restructuring plan ('Restructuring Plan') and of the commitments ('Commitments') issued by the Government of the United Kingdom (the 'UK authorities').
- (2) By decision of 9 April 2014 ⁽⁴⁾ ('Amended Restructuring Decision'), the Commission declared that the notified amended list of commitments ⁽⁵⁾ ('Amended Commitments') does not constitute State aid. The Amended Commitments also do not affect the conclusion reached in the Restructuring Decision that the State aid provided to RBS is compatible with the internal market on the basis of Article 107(3)(b) of the Treaty on the Functioning of the European Union (TFEU).
- (3) Since the Amended Restructuring Decision was adopted, the Commission services, the UK authorities and RBS (directly or via the Monitoring Trustee appointed pursuant to the Restructuring Decision) have had frequent exchanges, in the form of meetings, conference calls and exchanges of emails and documents.
- (4) On 17 February 2017, Her Majesty's Treasury ('HMT') announced publicly that it would seek a formal amendment to replace the commitment to divest the Rainbow business ⁽⁶⁾ with a package of measures aiming to increase competition in the SME and mid-corporate banking market ⁽⁷⁾ ('SME and mid-corporate banking market').
- (5) By letter dated 2 March 2017, the UK authorities notified the Commission of the formal request to replace the commitment to divest the so-called Rainbow business, as identified in the Restructuring Decision ⁽⁸⁾ and subsequently amended the Amended Restructuring Decision ⁽⁹⁾.

⁽¹⁾ OJ C 142, 5.5.2017, p. 8.

⁽²⁾ OJ C 119, 7.5.2010, p. 1.

⁽³⁾ For a full list of the State aid measures approved, see recitals 31 to 77 of the Restructuring Decision.

⁽⁴⁾ OJ C 24, 23.1.2015, p. 4.

⁽⁵⁾ For an overview of the amendments requested, see recitals 27 to 49 of the Amended Restructuring Decision.

⁽⁶⁾ Recital 73 of the Restructuring Decision.

⁽⁷⁾ Pursuant to recital 73 of the Restructuring Decision, SME banking market is defined as the segment of the banking market covering firms with a turnover up to GBP 25 million and mid-corporate as the segment covering firms with a turnover between GBP 25 million and 1 billion.

⁽⁸⁾ Recital 93 of the Restructuring Decision.

⁽⁹⁾ Recital 28 and Amended Commitments 3.1 and 3.2 (A) of Annex I to the Amended Restructuring Decision.

- (6) By letter dated 4 April 2017 ('Opening Decision'), the Commission informed the UK authorities that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of such request.
- (7) On 5 May 2017, the Opening Decision was published in the *Official Journal of the European Union* ⁽¹⁰⁾. The Commission called on interested parties to submit their comments.
- (8) On 8 May 2017, the UK authorities submitted their response to the Opening Decision.
- (9) During May and June 2017, the Commission received comments from interested parties. Meetings were held with some interested parties to clarify the comments received. The Commission provided the UK authorities with the comments received from interested parties.
- (10) On 22 June 2017, the UK authorities submitted their response to the comments received from interested parties and to comments received as part of the UK authorities' own market testing exercise ⁽¹¹⁾.
- (11) By letter dated 28 July 2017, the UK authorities sent an updated notification to the Commission, reflecting an update to the alternative package proposed in the original notification of 2 March 2017.

2. ADDITIONAL OBSERVATION

- (12) Since the United Kingdom notified on 29 March 2017 its intention to leave the European Union, pursuant to Article 50 of the Treaty on European Union, the Treaties will cease to apply to the United Kingdom from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification, unless the European Council in agreement with the United Kingdom decides to extend this period. As a consequence, and without prejudice to any provisions of the withdrawal agreement, this Decision only applies until the United Kingdom ceases to be a Member State.

3. DETAILED DESCRIPTION OF THE MEASURE/AID

3.1. RBS AND THE IMPLEMENTATION OF THE RESTRUCTURING PLAN AND THE AMENDED RESTRUCTURING PLAN

3.1.1. RBS

- (13) Based in Edinburgh, RBS ⁽¹²⁾ is one of the largest financial services groups in Europe servicing private, corporate and institutional customers. At the end of 2016 it had a total balance sheet of GBP 799 billion ⁽¹³⁾ and total risk weighed assets ('RWA') ⁽¹⁴⁾ of GBP 228 billion.
- (14) A detailed description of the State aid measures in favour of RBS can be found in recitals 31 to 54 of the Restructuring Decision. The Amended Restructuring Decision ⁽¹⁵⁾ indicated that the only not yet terminated or repaid capital aid measure in 2013 was the GBP 45,5 billion recapitalisation in ordinary shares and B shares ⁽¹⁶⁾, to which the Dividend Access Share ('DAS') held by the State was related. The DAS was created to provide enhanced dividend rights to the UK Authorities.

⁽¹⁰⁾ See footnote 1.

⁽¹¹⁾ This market testing includes the UK Authorities' interviews with six large Challenger Entities, 12 smaller Challenger Entities and seven Venture Capital and Fintech respondents, as well as RBS commissioned research by Charterhouse into the switching behaviour of customers within the W&G perimeter. The large Challenger Entities were CYBG PLC; Co-op Bank; Handelsbanken; Metro Bank; Santander UK PLC; and TSB Bank. The smaller Challenger Entities were Aldermore Group PLC; Allied Irish Bank; Atom Bank; Cumberland Building Society; Danske Bank; Monzo; OakNorth Bank; Paragon Bank PLC; Shawbrook Bank; Starling Bank; Tesco Bank; and Virgin Money. The VC/Fintech respondents were British Business Bank Investments Limited; Business Growth Fund; Funding Circle; Louise Beaumont (an independent fintech expert); Iwoca; Nesta; and, Transferwise.

⁽¹²⁾ A detailed description of RBS can be found in the recitals 4 to 11 of the Amended Restructuring Decision. Key pro forma figures from 2008 to 2016 are described in recitals 7 to 10 of the Opening Decision.

⁽¹³⁾ In this decision, the Commission uses the results published by RBS in its annual report and accounts for full-year 2016.

⁽¹⁴⁾ RWA is a measure of the amount of a bank's assets, adjusted for risk. This measure is used in determining the capital requirements.

⁽¹⁵⁾ Recital 11 of the Amended Restructuring Decision.

⁽¹⁶⁾ Non-voting Core Tier 1 capital, as further described in recital 38 of the Restructuring Decision.

- (15) In August 2015, the UK Authorities sold 5,4 % of the bank ⁽¹⁷⁾, which was the first sale of the government shares in RBS group. All the B shares were converted into ordinary shares in October 2015 ⁽¹⁸⁾. Regarding the DAS, RBS paid to the UK Authorities a final dividend in March 2016 and the DAS was subsequently retired ⁽¹⁹⁾. As a consequence of those actions, the UK Authorities currently hold 8,4 billion ordinary shares in RBS, representing 71,2 % of the company's ordinary share capital ⁽²⁰⁾.

3.1.2. IMPLEMENTATION OF THE COMMITMENTS AND AMENDED COMMITMENTS

- (16) The implementation of the divestment and behavioural Commitments leading up to the Amended Restructuring Decision is described in detail in recitals 12 to 22 of the Amended Restructuring Decision.
- (17) The implementation of the Commitments included in the Amended Restructuring Decision is outlined in recitals 15 and 16 of the Opening Decision. RBS completed these divestments ahead of the committed deadlines with the exception of the commitment related to the divestment of the Rainbow business.

3.2. THE COMMITMENT TO DIVEST THE RAINBOW BUSINESS

- (18) The Commitments and Amended Commitments included the divestment of several businesses, including of the RBS branch-related Retail and SME business in England and Wales, and the NatWest branch-related Retail and SME business in Scotland, along with the Direct SME business and certain mid-corporate customers (referred to as 'the Rainbow business'). The deadline included in the Restructuring Decision was 31 December 2013 and in the Amended Restructuring Decision the deadline was extended to 31 December 2017.
- (19) In its assessment of the compatibility of the aid to RBS in the Restructuring Decision, the Commission noted that the commitment to divest the Rainbow business contributed to limiting the distortions of competition created by the aid in the SME and mid-corporate banking market in the UK.
- (20) A detailed description of the process followed by RBS and the UK authorities to divest the Rainbow business, and the related difficulties encountered, is described in recitals 19 to 25 of the Opening Decision.
- (21) By letter dated 2 March 2017, the UK authorities notified the Commission of the request to replace the commitment to divest the Rainbow business with an alternative package of commitments. By letter dated 28 July 2017, the UK authorities sent an amended notification to the Commission, reflecting an update to the alternative package proposed in the original notification.

3.3. THE UPDATED ALTERNATIVE PACKAGE PROPOSED BY THE UK AUTHORITIES

- (22) According to the UK authorities, the objective of the proposed alternative package is, given the related difficulties to divest the Rainbow business ⁽²¹⁾, to find an alternative that is at least equivalent to the original commitment to divest the Rainbow business in terms of scope and impact and that also: (i) has a faster impact and thus more effectively mitigates any distortion of competition; (ii) takes into account current market circumstances and the specific needs of challenger entities ('Challenger Entities') ⁽²²⁾ and other potential entrants in the UK SME and mid-corporate banking market; and (iii) does not jeopardise RBS's viability.
- (23) The updated alternative package includes a range of behavioural remedies and consists of two elements
- (a) The Capability and Innovation Fund ('Measure A'); and
 - (b) The Incentivised Switching Scheme ('Measure B').

⁽¹⁷⁾ HMT press release: <https://www.gov.uk/government/news/government-begins-sale-of-its-shares-in-the-royal-bank-of-scotland>

⁽¹⁸⁾ RBS press release: <http://otp.investis.com/clients/uk/rbs/RNS/regulatory-story.aspx?cid=365&newsid=580941>

⁽¹⁹⁾ RBS press release: <http://otp.investis.com/clients/uk/rbs1/rns1/regulatory-story.aspx?cid=365&newsid=687910>

⁽²⁰⁾ UK Financial Investments Ltd Annual Report and Accounts 2016/2017.

⁽²¹⁾ Described in recitals 19 to 25 of the Opening Decision.

⁽²²⁾ Non-incumbent financial entities competing for business with the 4 long-established national banks which have the highest market share (combined 82 % market share in 2015) in the UK SME and mid-corporate banking market.

- (24) An independent body ('the Body') would be established to manage and control the Capability and Innovation Fund and the Incentivised Switching Scheme ⁽²³⁾.
- (25) The updated alternative package would be funded by RBS. The UK authorities estimate the overall cost of the package to RBS will be around GBP [0,5-1,5]billion, taking into account upfront capital cost and an ongoing reduction in RBS's earnings ⁽²⁴⁾.

3.3.1. THE CAPABILITY AND INNOVATION FUND ('MEASURE A')

- (26) The Capability and Innovation Fund would have a size of GBP 425 million which would be distributed to eligible entities to (i) develop the capability to compete with RBS in the provision of banking services to SMEs; and/or (ii) develop and improve the financial products and services which are available to SMEs. The investment projects that could benefit from support need to target the Permitted Purposes ⁽²⁵⁾.
- (27) The Capability and Innovation Fund would be divided into four pools and funds would be made available as set out in Table 1:

Table 1

Grants available for the Capability and Innovation Fund

Pool	Purpose	Grants available
A. Advanced BCA ⁽¹⁾ Capability Pool (GBP 280 million)	To facilitate the development of more advanced BCA offerings and ancillary product sets by banks with an existing and substantive BCA capability	1 × GBP 120 million 1 × GBP 100 million 1 × GBP 60 million
B. BCA Capability Development Pool (GBP 80 million)	To facilitate the modernisation of existing BCA offerings or the development of new propositions	1 × GBP 50 million 2 × GBP 15 million
C. Innovative Lending and Payments Pool (GBP 40 million)	To facilitate the development of new and existing SME lending and payments businesses with a particular focus on facilitating the deployment of new technology to the relevant markets	4 × GBP 10 million
D. Business Banking Fintech Innovation Fund (GBP 25 million)	To facilitate the commercialisation of financial technology that is relevant to SMEs	5 × GBP 5 million

⁽¹⁾ Business Current Account ('BCA'): means an account marketed to businesses rather than individuals, which provides the facility to hold deposits, receive and make payments by cheque and/or debit card, use automated teller machine facilities and make regular payments by direct debit and/or standing order, but does not include (i) an account in which money is held on deposit in a currency other than the official currency of the United Kingdom; or (ii) an account in which credit funds are held and offset against mortgage debt or a loan (other than an overdraft facility).

The largest disbursements from the Capability and Innovation Fund would be targeted at entities with strong existing BCA capability. The three largest awards will be made available to entities with such capability, enhancing their ability to compete with RBS in the provision of banking services and financial products to SMEs. The eligibility criteria of the different pools are described in more detail in recitals 28 to 31.

- (28) The eligibility criteria for Pool A: This pool would be open to any deposit-taking entity:
- (a) which has a BCA offering;

⁽²³⁾ The Body will be established in order to facilitate and oversee the delivery of the alternative package. It will be governed by the 'Framework and State aid Deed' which is a deed to be entered into between HMT, the Body and RBS in respect of the commitments.

⁽²⁴⁾ Taking into account the upfront capital cost, the annual costs of operating the alternative package, and the loss of earnings associated with customers transferring as a result of Measure B, offset by the release of capital associated with such customers.

⁽²⁵⁾ Described in recitals 37 and 38 of this Decision.

- (b) which is authorised by the UK Prudential Regulation Authority to take deposits;
 - (c) whose ultimate parent entity is or is itself at the time of the application, an entity domiciled in the United Kingdom, European Union, the European Economic Area or Switzerland and is a deposit-taking entity or financial holding company;
 - (d) which has gross assets in the United Kingdom of less than GBP 350 billion shown in its latest published consolidated accounts (or interim balance sheet);
 - (e) whose income in the United Kingdom relates primarily to the provision of deposit-taking, lending or payment services to individuals and businesses in the United Kingdom; and
 - (f) which has expressed an intention to expand its business offering to SMEs through the development of new products, expansion into new geographical markets in the United Kingdom or new business segments and/or investing in its customer service levels.
- (29) The eligibility criteria for Pool B: The same eligibility criteria as set out in recital 28 in respect of Pool A would apply, except that the entity need not currently have a BCA offering (although it must have at least publicly stated its intention to launch one).
- (30) The eligibility criteria for Pool C: This pool would be open to Pool A entities, Pool B entities and any other entity:
- (a) whose ultimate parent entity is or is itself, at the time of the application, domiciled in the United Kingdom, the European Union, the European Economic Area or Switzerland;
 - (b) which derives (or if such entity is part of a group, such group derives) the majority of its revenue from the provision of financial services to individuals and businesses; and
 - (c) which offers, or has expressed an intention to expand its business offering to include, lending or payment services to SMEs in the United Kingdom or international payments services to SMEs.
- (31) The eligibility criteria for Pool D: This pool would be open to any entity:
- (a) whose ultimate parent entity is or is itself, at the time of the application, domiciled in the United Kingdom, the European Union, the European Economic Area or Switzerland;
 - (b) which either provides or develops financial products or services predominantly to or for SMEs in the United Kingdom or provides products or services to the SMEs in the United Kingdom; and
 - (c) which has raised capital of at least GBP 1 million in the three years prior to the date of submission of its business case to the Body.
- (32) The Body would manage and control the Capability and Innovation Fund. The Body is designed to be independent of both RBS and the UK authorities, and will have the necessary powers to fulfil its task of administering, or arranging for the administration of, the applications to the Capability and Innovation Fund, and for monitoring the use that is made of the funds. There will be four groups of safeguards as to the deployment of funds by the recipient entities which would operate through the lifecycle of the fund: (i) safeguards before disbursement, (ii) ongoing reporting and monitoring by the Body, (iii) the Body's right of audit and (iv) the Body's right to claw back funds.
- (33) The first group of safeguards occurs before disbursement. Applicants will be required to submit to the Body a business plan setting out, in a reasonable level of detail, how the applicant proposes to deploy any funds awarded. The Body must then consider each element of the plan under a number of pre-determined factors and whether the plan is consistent with the Permitted Purposes ⁽²⁶⁾.
- (34) The second group of safeguards consists in the ongoing reporting and monitoring by the Body: recipients will report to the Body on a quarterly basis for 18 months (the Body will produce its own annual report on its administration of the fund). The report will contain details as to how the funding received has been utilised, including the total amount spent during the last three months. In the case of Pool A entities, Pool B entities and Pool C entities the report will include:
- (a) a brief account of the developments in the entity's SME business over the preceding year;

⁽²⁶⁾ Described in recitals 37 and 38 of this Decision.

- (b) an overview and quantification of investments made in the relevant business in the last three months and how such developments relate to its business case;
 - (c) details of the entity's SME business volumes, including customer numbers, BCA numbers, lending and deposit balances;
 - (d) confirmation that drawings on the SME Capability Fund have been used for the Permitted Purposes; and
 - (e) other items agreed between the Body and the recipient entity.
- (35) The third group of safeguards consists in the Body's right of audit: the Body would have the contractual ability to appoint a 'skilled person' ⁽²⁷⁾ to investigate and audit the use of funds by recipients in circumstances where the Body had cause to doubt that the recipient was properly or fully deploying funds received under Measure A.
- (36) The fourth group of safeguards consists in the Body's right to claw back funds: if the Body considers (either following an audit or otherwise) that there has been a material breach of the agreement entered into between the Body and the recipient, the former may request the clawback of the funds already disbursed to the latter. This includes any failure to use the funding amount for Permitted Purposes or any use of the funding amount for prohibited purposes ⁽²⁸⁾: in such cases, the Body may require the recipient to remedy the breach or request the repayment (in full or in part) of the funding amount.
- (37) The provisions determining the use of funds of Pool A, Pool B and Pool C shall include provisions stating that:
- (a) an entity shall use a grant for purposes which have a demonstrable link to (i) improving customer outcomes for SMEs; and/or (ii) expanding the entity's business capacity, product offering and/or target markets in order to improve its offering to SMEs (the 'Overarching Principles').
 - (b) a grant may be used by an entity to cover its capital expenditure or operating expenses in relation to the following purposes ('Permitted Purposes'):
 - (1) the development of systems and/or infrastructure required to expand either (i) in the case of a Pool A entity or Pool B entity, its SME banking business or (ii) in the case of a Pool C entity, its SME lending business and/or SME payments business ('Relevant Business(es)')
 - (2) the recruitment and payment of employees in order to expand and/or operate its Relevant Business(es);
 - (3) the marketing of products related to its Relevant Business(es);
 - (4) the acquisition or leasing of premises required to expand its Relevant Business(es); or
 - (5) any other purpose which is (in the opinion of the Body) consistent with the Overarching Principles.
 - (c) A grant may not be used by an entity for any of the following prohibited purposes:
 - (1) to subsidise temporary price cuts for banking products and/or services;
 - (2) to repay any existing liability;
 - (3) to provide financing directly to customers;
 - (4) to finance capital expenditure and/or operating expenses which the company had planned prior to the date of the application and: (a) that the company would make regardless of whether or not any amount from the Capability and Innovation Fund is received; or (b) that had been included in the company's business plan prior to the date of the application;
 - (5) to return capital by any means to existing shareholders of the company; or
 - (6) for a purpose which is inconsistent with the Overarching Principles and/or its Business Case.

⁽²⁷⁾ In a similar way to regulatory appointments under Section 166 of the Financial Services and Markets Act 2000.

⁽²⁸⁾ As described in recitals 37 and 38.

- (38) The provisions determining the use of funds of Pool D shall include provisions stating that:
- (a) the entity shall use a grant to develop improve, operate, expand and/or commercialise (or support the development, improvement, operation, expansion and/or commercialisation of) its Fintech ⁽²⁹⁾ product or service and the grant may be used by an entity to cover its capital expenditure and operating expenses in relation to the following purposes ('Permitted Purposes'):
 - (1) the development of systems and/or infrastructure required to develop, improve, operate, expand and/or commercialise the Fintech product or service;
 - (2) the recruitment and payment of employees in order to develop improve, operate, expand and/or commercialise the Fintech product or service;
 - (3) the marketing of the Fintech product or service; or
 - (4) any other purpose which (in the opinion of the Body) furthers the development, improvement, operation, expansion and/or commercialisation of the Fintech Product or Service.
 - (b) a grant may not be used by an entity for the following prohibited purposes:
 - (1) to repay any existing liability;
 - (2) to provide financing directly to customers;
 - (3) to return capital by any means to existing shareholders of the company; or
 - (4) for a purpose which is inconsistent with its Business Case.
- (39) The funding for Pools A, B and C entities would be phased so that any entities that do not win an application for Pool A would be eligible to apply for funding from Pool B, and any entities that do not win an application for Pool B would be eligible to apply for funding from Pool C. The Pool D funding process will run concurrently with the phased funding process for Pools A, B and C.
- (40) The Body will market the Capability & Innovation Fund to Pools A and D entities as soon as reasonably practicable following its establishment and signature of the Framework and State aid Deed ⁽³⁰⁾. Marketing to Pools B and C bodies will follow 3 and 6 months (respectively) after the Capability & innovation Fund is marketed to Pool A entities.
- (41) The application period for Pool A funds will end within 2 months after the Body first starts marketing the fund, whilst the Pool B application period will end within 5 months after this date and the Pool C period will end within 8 months after this date. The Pool D application period will run concurrently with the application periods for Pool A-C funds, and will end up to 6 months after the Body first starts marketing the fund.
- (42) The fund is intended to terminate after the end of the Incentivised Switching Scheme (although may be extended under predetermined criteria depending on the amount of undistributed funds remaining). The rights and obligations of the Body as regards reporting would however continue for three months after the termination of the last agreement between the Body and any recipient participating in the Capability and Innovation Fund.
- (43) The cost to RBS of Measure A comprises the GBP 425 million upfront capital cost plus the Body's operating costs ⁽³¹⁾, which would be paid for by RBS.

3.3.2. INCENTIVISED SWITCHING SCHEME ('MEASURE B')

- (44) Entities which are eligible to participate in the Incentivised Switching Scheme ('Eligible Entities') are those deposit-taking entities which fulfil the following criteria:
- (a) they have, or have publicly stated an intention to launch, a business current account offering;
 - (b) they meet the criteria set out in recital 28 paragraphs (b) to (f) for a Pool A entity; and
 - (c) they participate in the UK Current Account Switching Service ('CASS') ⁽³²⁾.

⁽²⁹⁾ Financial technology or Fintech is a line of business based on using software to provide financial services, such as peer-to-peer, crowdsourced services, etc.

⁽³⁰⁾ See footnote 23.

⁽³¹⁾ The total funding for establishment and operation of the Body will amount to GBP 20 million.

⁽³²⁾ A service supported by Bacs Payment Schemes Limited that allows to automatically transfer all payment arrangements to a new bank and to close an existing account. See: <https://www.currentaccountswitch.co.uk>

- (45) The Incentivised Switching Scheme funded by RBS would provide funding to the Body to distribute funds to Eligible Entities as they successfully switch customers. This is to enable Eligible Entities to offer incentives to RBS's SME banking customers to encourage them to switch their BCAs, deposit accounts and loans to the Eligible Entities. This would take the form of a commitment by RBS to:
- (a) pay up to GBP 225 million in dowries (i.e. a monetary incentive) to Eligible Entities in relation to any customers that agree to transfer their BCAs ('BCA dowries');
 - (b) pay up to an additional GBP 50 million for loan related dowries ('loan dowries') for those customers who move a loan-product alongside their BCA;
 - (c) ear-mark an additional GBP 75 million of its costs which would also be available to help facilitate switching (compensation for break fees related to the transfer of loan balances or other third party costs such as legal fees).
- (46) The BCA dowries and loan dowries will enable Eligible Entities to fund attractive price offers or other incentives to RBS's customers within the Williams & Glyn ('W&G') perimeter ⁽³³⁾ and attract those customers to switch.
- (47) BCA dowries paid to recipient entities would be steeply tiered so that they have sufficient resources to provide compelling incentives for both smaller and larger SME customers to switch to them. The BCA dowry amounts proposed to be offered at the commencement of the scheme are set out in the table below.

Table 2

Proposed initial BCA dowry amounts of Incentivised Switching Scheme

Turnover band of SME customer	BCA dowry amount (GBP)
< GBP 15 000	750
GBP 15 000-GBP 100 000	1 000
GBP 100 001-GBP 1 000 000	3 000
GBP 1 000 001-GBP 1 500 000	6 250
GBP 1 500 001-GBP 2 000 000	13 125
GBP 2 000 001-GBP 2 500 000	16 875
GBP 2 500 001-GBP 7 500 000	25 000
> GBP 7 500 000	50 000

- (48) Loan dowries will enable Eligible Entities to reduce the rates of interest charged on loans to customers, making their offers more competitive while maintaining adequate returns on capital. Where a customer switches its primary BCA and a loan product from RBS, the Body will pay to the recipient entity an additional dowry of 2,5 % of the drawn loan balance transferred.
- (49) RBS would target its customers within the W&G perimeter (which contains roughly 200 000 SME banking customers) who would be provided with information on the benefits of switching and potential alternative Challenger Entities that they may wish to consider.

⁽³³⁾ The term 'Rainbow' and 'W&G' refer to the same business perimeter as set out in Schedule 2 to the Revised Term Sheet annexed to the Amended Restructuring Decision.

- (50) RBS would start communicating the Incentivised Switching Scheme to customers around three months after launch of the package, and dowries would be available as early as Q2 2018 (around three months from when RBS starts communicating to its customers). The process of distributing dowries for the Incentivised Switching Scheme would be repeated quarterly for as long as dowries are available. Dowries would cease when a maximum of GBP 225 million has been paid in respect of BCA dowries or, in the event that this has not occurred earlier, 18 months after RBS's communication of the Incentivised Switching Scheme (subject to an extension of up to 12 months, see recital 51(d)).
- (51) The Body would be responsible for managing and controlling the Incentivised Switching Scheme, in addition to the Capability and Innovation Fund, and would monitor RBS's behaviour towards and interaction with customers on an ongoing basis. This would include enabling the Body, subject to applicable laws and data protection requirements, to:
- (a) make changes to the amount of dowries paid to ensure they are as effective as possible;
 - (b) approve the communication materials to be sent by RBS to its SME customers in relation to the Incentivised Switching Scheme;
 - (c) require RBS to increase the frequency of such communications;
 - (d) extend the period for which dowries are available by up to 12 months if fewer than [...] Eligible Customers ⁽³⁴⁾ have switched (or commenced the switching process) within [...] months of the Incentivised Switching Scheme commencement date (the 'Extended Incentivised Switching Date'); and
 - (e) require RBS to extend the customer base to which it sends such communications beyond the W&G perimeter if a given volume of switchers is not achieved in a given timeframe. If the perimeter is extended, the scheme will target switching offers at SMEs representing around [...] of UK BCA market share. The perimeter will be extended where:
 - (1) [...] ⁽³⁵⁾;
 - (2) [...]
 - (3) [...]
- (52) In order to ensure that RBS has the appropriate incentives to implement the Incentivised Switching Scheme effectively, in the event that fewer than [...] customers have switched and there is an underspend in the dowries by the end of the [...] month period (or, in the event the Body decides to extend the relevant period, the date when the extended period ends), RBS would be required to transfer a pre-defined additional multiple (the 'Multiplier') of this underspend to the Body, subject to a cap of GBP 50 million.
- (53) The Multiplier has been set at [...] of the underspend. This penalty is subject to the following conditions:
- (a) as the success of the Incentivised Switching Scheme will be dependent on the ability of Eligible Entities to build attractive propositions for RBS's SME customers, the Body would have the power to reduce the Multiplier to the extent that it was reasonably satisfied that any underspend was a result of factors beyond the control of RBS;
 - (b) with the consent of the Body, RBS may be allowed to restructure the dowries after a period of time in order to improve the efficacy of the scheme and reduce the probability of it incurring a penalty; and
 - (c) if (i) the Body has extended the perimeter by the incentivised switching termination date; (ii) there are fewer than [...] switched customers; and (iii) the Body considers that RBS did not actively communicate incentivised switching to customers in the wider pool, the Body may increase the Multiplier to such percentage as it considers appropriate, subject to a cap of GBP 50 million.
- (54) [...]
- (55) Where the sum of the underspend and Multiplier (together with any amounts clawed back and any amounts not distributed out of the Capability and Innovation Fund) amounts to less than GBP 5 million, the Body will distribute the funds to charities.

⁽³⁴⁾ Eligible Customer means a customer of the division of RBS known as W&G which is an SME.

⁽³⁵⁾ [...] Business secret.

- (56) RBS will agree to non-solicitation arrangements under the Incentivised Switching Scheme, which will prohibit RBS and members of its group from (i) taking certain actions which may have an adverse effect on the Incentivised Switching Scheme; and (ii) soliciting, inducing or encouraging Eligible Customers (or customers who have switched to an Incentivised Switching Eligible Entity) to remain a customer of the group in respect of any BCA or relevant loan product, or to transfer any BCA or relevant loan product from Incentivised Switching Eligible Entities to any member of the group within certain prescribed time periods.
- (57) In order to support the success of the Incentivised Switching Scheme, RBS will offer to entities participating in the Incentivised Switching Scheme the option of entering into an Inter-Bank Agency Deed allowing customers they attract under the Incentivised Switching Scheme the option of continuing to use cash and cheque handling services in RBS branches (the 'Branch Access Scheme'). This branch access will be available for Eligible Customers for a minimum of three years from the launch of the Incentivised Switching Scheme on reasonable and non-discriminatory commercial terms, at the expense of the entity concerned.
- (58) The upfront capital cost of Measure B is GBP 350 million plus the implementation cost for RBS and RBS's ongoing loss of future earnings ⁽³⁶⁾.

4. COMMENTS FROM INTERESTED PARTIES AND UK AUTHORITIES

4.1. OVERALL COMMENTS ON THE ALTERNATIVE PACKAGE

- (59) The Opening Decision gave interested parties the opportunity to comment on the proposal of the UK authorities. A large number of comments have been received during the consultation phase. The comments received were on the initial alternative package as described in recitals 28 to 68 of the Opening Decision ('Initial Alternative Package'). Reflecting the comments from interested parties and their own market study ⁽³⁷⁾, the UK authorities have updated the alternative package, as described in Section 2.3.
- (60) Given the large number of comments ⁽³⁸⁾, the main comments that were shared by several interested parties to help assess the equivalence of the alternative package with the divestment of the Rainbow business are outlined in this section.

4.1.1. OVERALL COMMENTS FROM INTERESTED PARTIES ON THE ALTERNATIVE PACKAGE

- (61) The majority of comments received indicate that the Initial Alternative Package has a number of features that could enhance competition in the UK SME markets. Some indicate that the alternative package would have a faster impact on competition with less execution risk and has the capacity to strengthen not just one Challenger Entity (as with the divestment of the Rainbow business).
- (62) Some interested parties suggest on the overall Initial Alternative Package that
 - (a) the overall size of the Initial Alternative Package is insufficient to drive structural change in the UK SME market, which has high barriers to switching;
 - (b) a transfer of business current accounts equivalent to a market share of 2 % of the SME market is not equivalent to the divestment of the Rainbow business (representing roughly a 5 % SME market share in terms of the number of SME customers);
 - (c) a transfer of BCAs does not address a transfer of assets; and
 - (d) the Body and its decisions will be central to the success (or otherwise) of the Alternative Measures. It will be difficult to ensure the Body has the requisite degree of impartiality.

⁽³⁶⁾ The UK authorities estimated an implementation cost of GBP 38 million for RBS and an additional ongoing cost in reduced profit of about GBP [...] per annum.

⁽³⁷⁾ See footnote 11.

⁽³⁸⁾ Comments have been received from Santander UK plc, CYBG plc, Metro Bank PLC, Aldermore Bank plc, Masthaven Bank Ltd, Paragon Bank plc, Secure Trust Bank plc, Shawbrook Bank Ltd, Virgin Money plc, OakNorth Bank Ltd, Cumberland Building Society, Tide and RBS.

4.1.2. OVERALL COMMENTS FROM UK AUTHORITIES ON THE ALTERNATIVE PACKAGE AND ON COMMENTS FROM INTERESTED PARTIES

- (63) The UK authorities consider that the alternative package is at least equivalent to a divestment of the Rainbow business in terms of its impact on limiting potential distortions of competition, and can be implemented with more certainty and more quickly than a divestment.
- (64) The UK authorities consider that the alternative package as a whole is designed to build the capacity in the market to drive higher ongoing levels of market-wide switching in the SME and mid-corporate banking markets. As the largest player, the burden of this will fall most heavily on RBS. Although less easily quantifiable than the benefits of the Incentivised Switching Scheme, the Capability and Innovation Fund will strengthen multiple banks' SME banking offerings, bringing more choice to the market, creating a diversity of business models and driving switching. It will also accelerate the development of new businesses and new technologies that would weaken SMEs' dependence on their banks.
- (65) The UK authorities submit that the alternative package has been designed to meet the same objectives as the original divestment of the Rainbow business:
- (a) Reduce RBS's market share: The implementation of the Incentivised Switching Scheme and the provision of funds to develop SME banking capability will strengthen smaller competitors and allow them to exert a greater competitive constraint on RBS;
 - (b) Reduce the commercial gain from having received the aid: The alternative package has a significant upfront cost with an additional ongoing impact through reduced turnover from a reduction in SME customers through the Incentivised Switching Scheme;
 - (c) Transfer of SME customers: Unlike a divestment, which would involve the forced transfer of SME customers who have not chosen to move bank, the Incentivised Switching Scheme encourages customers to make their own decision to switch. Empowered customers should be more likely to engage with their new bank, and switch again in the future if they can obtain a better deal with another bank; and
 - (d) Access to branches to cater for SME customers: The Branch Access Scheme supports the switching of customers away from RBS to Challenger Entities under the Incentivised Switching Scheme, as these customers will not need to change their day to day cash handling arrangements.
- (66) In terms of impact of the alternative package on the mid-corporate segment, the UK authorities also consider that:
- (a) RBS has lost [5-10] % of market share in the corporate segment since Q4 2010, moving from a [30-35] % to a [20-25] % share. It is no longer the largest bank for serving mid-corporate customers in the UK. This reduction in market share also substantially exceeds the reduction in market share envisaged by the divestment of the Rainbow business ⁽³⁹⁾.
 - (b) The Capability & Innovation Fund includes a number of very significant grants to help banks with an established SME banking franchise enhance and extend their existing business banking propositions for large SMEs and mid-corporates. The UK authorities anticipate that many of these developments will enhance certain banks' ability to serve mid-corporate customers and will increase the total number of banks able to consequently develop and offer propositions for mid-corporates.
 - (c) The Incentivised Switching Scheme is targeted to deliver a movement of large SME customers from RBS to other banks. For recipient banks the increased number of large SME customers will incentivise the development of services for larger firms including mid-corporates. In addition, over time, some of the large SME customers can be expected to grow to being mid-corporate firms, which will further incentivise the development of relevant offerings.

⁽³⁹⁾ Charterhouse Research supplied to RBS measuring market share for businesses with turnover in excess of GBP 25 million.

- (d) The CMA ⁽⁴⁰⁾ found that SMEs with turnover above GBP 2 million were generally able to negotiate pricing and service terms with their banks. For this to be an effective means of generating competition it is critical that these customers have viable alternative providers. By enabling additional banks to build mid-corporate capabilities competition will be materially enhanced.
- (e) Due to the complexity of handling mid-corporate customers, the proposals RBS had received when attempting to sell the Rainbow business ⁽⁴¹⁾ in the past envisaged [...].
- (67) Furthermore, the UK authorities consider additional advantages of the alternative package over the divestment of the Rainbow business.
- (a) Geographic scope: The alternative package would impact competition throughout the UK, without any geographic limitation
- (b) Broad market impact: The alternative package would help to bring about a systemic and long lasting change on the market by assisting a number of Challenger Entities to compete with the incumbent banks more effectively. More specifically:
- (i) The Capability and Innovation Fund will assist entities to develop their capacity to service SMEs and mid-corporates, whilst also increasing their liquidity and financial standing. It will also encourage the development of new technologies to be used by Challenger Entities;
- (ii) The Incentivised Switching Scheme will help the Incentivised Switching Eligible Entities to become established, by growing their customer-bases;
- (iii) The Branch Access Scheme will enable Eligible Entities to physically service newly acquired SME customers under the Incentivised Switching Scheme e.g. by providing cash and cheque handling services.
- (c) Addresses market issues identified by the UK Competition and Markets Authority ('CMA'): The alternative package also addresses some key market issues identified by the CMA in its recent review of the UK SME banking market. These issues include:
- (i) Low levels of customer engagement with their banking services, weak responses to variations in price and quality and a lack of trigger points to prompt switching;
- (ii) A lack of incentives for banks to invest in attracting customers to switch;
- (iii) High customer acquisition costs for new entry and expansion by Challenger Entities;
- (iv) The lack of product and technical innovation in SME banking
- (v) Concerns from Challenger Entities about the cost of building and running a branch network.
- (d) Timing and certainty of execution: The alternative package can be implemented in a more timely and certain manner. It would avoid the risks and uncertainties of a capital transaction, as experienced in previous attempts to sell the Rainbow business.
- (e) Removing barriers to the UK Authorities' exit from RBS: The UK Authorities has publicly expressed its intention to progress with the sale of its stake in RBS and thereby return RBS to private ownership. The prevailing difficulties and delays to the divestment of the Rainbow business, which is the only one of the divestment Commitments remaining to be satisfied, have led to uncertainties which have affected the attractiveness of RBS as an investment proposition. The alternative package would remove these uncertainties.
- (68) On the comments from interested parties, the UK authorities mention that
- (a) RBS's market share decreased from [25-30] % in Q4 2010 to [20-25] % in Q4 2016 ⁽⁴²⁾, representing a decrease of [3-7] % for the period. The 5 % decrease expected from the divestment of the Rainbow business is therefore exceeded when the market share loss expected from the Incentivised Switching Scheme alone is aggregated with the observed organic RBS market share loss since 2010.

⁽⁴⁰⁾ CMA Retail Banking market Investigation main report appendix A8.1-16, figure 12.

⁽⁴¹⁾ See also recital 25 of the Opening Decision.

⁽⁴²⁾ Source: Charterhouse Research Business Banking Survey Q4 2016 for SMEs with turnover from GBP 0-25 million. 12 month rolling data. Data weighed by region and turnover to be representative of businesses in Great Britain. Estimated total market size of [...].

- (b) The UK Authorities have made a number of changes to the proposed package to address the key points made by interested parties. The UK authorities consider that the updated alternative package addresses the third party concerns, will be equivalent to the divestment of the Rainbow business (in terms of its impact both on RBS and the market as a whole) and will be effective in boosting competition in SME banking in the UK.
- (c) Regarding the comment on the need to ensure the independence of the Body, the UK authorities note that the Body will be bound by the Framework and State aid Deed ⁽⁴³⁾ which specify the functions and duties of the Body, and which determine the obligations and restrictions of the Body. Furthermore, an individual shall not be permitted to take up office as a director of the Body if that individual concurrently holds any office (other than any non-executive office which is not as the chair or equivalent position) or a senior management position in any public sector body or is a director or senior manager of the RBS Group or is a related party (or an associate of a related party) of RBS.

4.2. COMMENTS ON THE SME CAPABILITY FUND

4.2.1. COMMENTS FROM INTERESTED PARTIES ON THE SME CAPABILITY FUND

- (69) A number of comments from interested parties mentioned that the size of the SME Capability Fund should be increased, as this would lead to a greater impact on competition in the SME banking market.
- (70) Other comments from interested parties mentioned that fragmenting funds between a large number of banks, such that none can make meaningful investment, will have no material effect on competition or concentration. Rather than there being equal disbursements within the respective pools, the size of the disbursements should vary to take into account the applicant's actual needs and investment plans.
- (71) A number of parties also submitted that the SME Capability Fund should be opened up further to those institutions without existing strong BCA capability and that non-banks (e.g. building societies) should be able to benefit from the Capability Fund.

4.2.2. COMMENTS FROM UK AUTHORITIES ON THE SME CAPABILITY FUND AND ON COMMENTS FROM INTERESTED PARTIES

- (72) The UK authorities consider that it is reasonable to expect that the SME Capability Fund, especially when combined with the Incentivised Switching Scheme, will increase the market shares of Challenger Entities, and therefore result in a corresponding decrease in RBS's market share.
- (73) The UK authorities consider that the Capability Fund will increase the Challenger Entities' market shares as it will materially improve the economics of banks entering the SME (and, if they so wish, mid-corporate) banking market and/or further developing existing capabilities. By way of illustrating the underlying concept, a GBP 3 million grant from the fund might make a borderline GBP 10 million project economic, by increasing the return on investment on a project from a return below the cost of capital to a viable and sustainable level.
- (74) In response to the comments from interested parties, the UK authorities have made the following changes to the alternative package:
 - (a) the size of the SME Capability Fund that the Challenger Entities have access to will be increased. The largest disbursements of the Capability and Innovation Fund will be targeted at those Challenger Entities with strong existing BCA capability. This is likely to lead to the largest impact on competition in the SME banking market and in the shortest time period, since these banks have already spent time and money developing their BCA products and the associated distribution infrastructure.
 - (b) the SME Capability Fund will be combined with the Innovation Fund. The distinction in pool 1 and 2 will be removed. The flexibility will be increased to improve opportunities for banks without strong existing BCA capability and for non-banks to access sizeable disbursements from the Capability and Innovation Fund.

⁽⁴³⁾ See footnote 23.

4.3. COMMENTS ON THE INCENTIVISED SWITCHING SCHEME

4.3.1. COMMENTS FROM INTERESTED PARTIES ON THE INCENTIVISED SWITCHING SCHEME

- (75) Some interested parties questioned whether enough customers would be sufficiently incentivised by the proposed size of the dowries to overcome the efforts involved in switching. Customers have historically proven to be inert and there should be a clear, seamless process for customers to switch. To facilitate switching RBS should also share information on their customers with the Challenger Entities (incl. credit track record). Some interested parties also indicated the need to provide historical track records of customers for creditworthiness assessment.
- (76) A number of comments indicated that the size of the dowries should be increased to enable switching (and linked to the complexity and size of the customer), which would require the overall size of the Incentivised Switching Scheme to be significantly increased.
- (77) Some comments indicated that the duration of the Incentivised Switching Scheme should be sufficient to ensure time is not a significant constraint. Furthermore, an automatic extension of the customer perimeter (if the desired level of switching is not reached) was put forward.
- (78) Several comments suggested that the alternative package should also focus on transferring loans next to transferring BCAs, as the focus on BCAs ignores the need for greater competition in the SME lending market. The package would be too focussed on BCA providers. The SME lending market is viewed as significantly more profitable than BCAs and competition distortion needs to be remedied in the SME lending market as well. The comments also outline that currently Challenger Entities are disadvantaged, as the largest 4 banks are allowed to use an Advanced Internal Ratings Based model rather than standardised capital model: this allows the four banks to offer better pricing for loans than the Challenger Entities.
- (79) Some comments suggested that RBS should be forced to divest customers (including forced sales of BCAs and/or loans), rather than giving customers the opportunity to switch banks. Other comments suggest that RBS should commit to transfer a minimum number of net BCAs and have a penalty for non-performance.
- (80) A number of comments also suggest that the Incentivised Switching Scheme should only start after they have been able to implement the investments enabled through the SME Capability Fund.

4.3.2. COMMENTS FROM UK AUTHORITIES ON THE INCENTIVISED SWITCHING SCHEME AND ON COMMENTS FROM INTERESTED PARTIES

- (81) Regarding the Incentivised Switching Scheme included in the Initial Alternative Package, the UK authorities consider that:
 - (a) the current size of fund has capacity to result in more than a 2 % reduction in RBS's current market share. The targeted two percentage point reduction was specifically structured in order to incentivise a greater number of large SME customers to switch. There is nothing to stop RBS customers from continuing to switch to Challenger Entities (without dowries being given) and therefore continuing to reduce RBS's market share further. Indeed, they are much more likely to do so after being exposed to Challenger Entity marketing;
 - (b) the Incentivised Switching Scheme involves incentives to switch that are themselves likely to be much greater than those currently in the market. Further, these are expected to be paid in addition to those incentives already available;
 - (c) Challenger Entities will compete hard for customers and create sufficiently attractive offers to entice customers to switch. There is clearly demand in the market for these customers;
 - (d) switching to a Challenger Entity in the UK has been made easier for many customers following the introduction of CASS in 2013. BCA customers already use CASS to switch away from RBS to Challenger Entities;

- (e) RBS intends to mitigate/counter any resistance by customers from switching by committing to measures identified by the CMA ⁽⁴⁴⁾ as competitive, including informing eligible customers about CASS and assisting customers with on-boarding data requests;
 - (f) RBS would be required to engage with a defined pool of its customers (including through the provision of marketing materials) on behalf of Challenger Entities on the benefits of switching; and
 - (g) the Incentivised Switching Scheme has various built-in safety mechanisms to ensure that sufficient switching occurs. For example: The Body overseeing the scheme would have the ability (i) to require RBS to increase the frequency of the communications or (ii) to extend the period for which dowries are available by up to 12 months or (iii) to restructure the dowry formula, after a period of time, in order to improve the efficacy of the scheme and (iv) if there is an underspend in the dowries, RBS would have to transfer the Multiplier as outlined in recitals 52 and 53.
- (82) In response to the comments from interested parties, the UK authorities state that they are confident that enough SME customers would switch with the financial incentives on offer as:
- (a) incentives have historically induced customer switching as reflected also in the CMA Retail Banking Investigation Final Report and the RBS-commissioned Charterhouse research ⁽⁴⁵⁾ '[...]' ⁽⁴⁶⁾;
 - (b) the switching process is likely to be smooth for customers with most customers taking advantage of the Incentivised Switching Scheme to make their transfer through CASS. However, sharing customer financial records or other information on customers will likely be restricted by data protection legislation;
 - (c) customers in the W&G perimeter are not less likely to switch. RBS states that the switching and customer attrition rates of those customers within the W&G perimeter are broadly in line with RBS's 'core' customers and that W&G customers have been expected to leave the RBS group since 2010;
 - (d) protection and anti-avoidance mechanisms are in place to ensure customer switching. The Body has the power to impose a financial penalty on RBS if the BCA dowries have not been used up within the term of the scheme's operation (i.e. the Multiplier). Furthermore, the Body will be able to make changes to the amount of the dowries paid to ensure they are as effective as possible, force RBS to increase its frequency of marketing of the scheme. Furthermore, the perimeter and the length of the scheme will be increased if certain switching levels are not reached.
- (83) Further, in response to the comments from interested parties, the UK authorities consider that:
- (a) customers would transfer their other banking products (e.g. loans) in addition to their BCAs. The CMA have found that 'the vast majority of SMEs seeking finance go to their BCA bank...over 90 % of SMEs in UK went to their main bank for overdrafts, loans and credit cards' ⁽⁴⁷⁾; and
 - (b) empowering customers to make their own decision to switch is preferable to forced divestments, since empowered customers should be more likely to engage with their new bank and switch again in the future if they can obtain a better deal with another bank. This approach also has support in the CMA's Retail Banking Investigation Final Report, which states that 'divestment might induce some additional customer engagement on a temporary transitional basis, particularly among customers who saw themselves as having been transferred against their will to a 'new' bank, but this is clearly not a desirable way of inducing greater sustained customer engagement' ⁽⁴⁸⁾. Instead, the CMA found that non-structural remedies 'directly targeting the underlying causes of the AEC — i.e. by improving customer engagement and facilitating switching — are much more likely to be effective in addressing the competition issues we had identified...' ⁽⁴⁹⁾.

⁽⁴⁴⁾ The CMA retail Banking Investigation Final report (9 August 2016): <https://www.gov.uk/cma-cases/review-of-banking-for-small-and-medium-sized-businesses-smes-in-the-uk>

⁽⁴⁵⁾ RBS commissioned Charterhouse to undertake research with eligible SME customers within the W&G perimeter to explore their attitudes to switching and the impact of incentives on their likelihood to do so. The research focused on business banking customers, who account for [...] of the [...] customers in the W&G perimeter. The research was both quantitative (with a representative sample of [...] customers interviewed) and qualitative ([...] in-depth interviews).

⁽⁴⁶⁾ RBS response to the Opening Decision, paragraph 4.12.

⁽⁴⁷⁾ CMA's retail Banking Investigation Final Report, paragraph 8.169.

⁽⁴⁸⁾ CMA retail Banking Investigation Final Report, paragraph 17.19.

⁽⁴⁹⁾ CMA retail Banking Investigation Final Report, paragraph 17.14.

The Incentivised Switching Scheme will build up SME customer awareness of a large number of Challenger Entity brands through the targeted marketing, encouraging the customer to engage with the Challenger Entity options and brands before deciding which one to choose.

- (84) In response to the comments from interested parties and to its own market study, the UK authorities have also made the following changes to the Incentivised Switching Scheme:
- (a) the total size of the scheme will increase from GBP 175 million to GBP 350 million of which GBP 225 million will be available for BCA dowries. GBP 50 million will be available for loan-related dowries to accommodate the comment that the scheme should also focus on transferring loans next to transferring BCAs. GBP 75 million would also still be available to help facilitate switching (compensation for break fees related to the transfer of loan balances or other third party costs such as legal fees);
 - (b) with the increase in size, the Incentivised Switching Scheme will also target a transfer of 3 % market share instead of the initial 2 %; and
 - (c) RBS would start communicating the Incentivised Switching Scheme to customers around three months after launch of the package and after the first awards of the capability fund are granted.

4.4. COMMENTS ON THE BRANCH ACCESS SCHEME

4.4.1. COMMENTS FROM INTERESTED PARTIES ON THE BRANCH ACCESS SCHEME

- (85) A number of interested parties questioned the benefits that the Branch Access Scheme would have on competition in the SME banking market and that the administration and funding of the scheme would be burdensome on the customers and Challenger Entities involved, and may be an unfruitful distraction for the Body.
- (86) A small number of interested parties were supportive of the Branch Access Scheme, and believed that they would take advantage of it.

4.4.2. COMMENTS FROM UK AUTHORITIES ON THE BRANCH ACCESS SCHEME AND ON COMMENTS FROM INTERESTED PARTIES

- (87) Reflecting the comments received that the Branch Access Scheme is likely to be of limited interest to Challenger Entities, although important to a few, the Branch Access Scheme will be retained, but with the following revisions:
- (a) the Branch Access Scheme will only be open to those customers that have switched under the Incentivised Switching Scheme (and where the relevant bank participating in the Incentivised Switching Scheme has entered into an Inter-Bank Agency Deed with RBS).
 - (b) banks will no longer have access to branches for free, but branch access will be provided for their eligible customers on reasonable and non-discriminatory commercial terms. Banks will be able to use money from the Capability and Innovation Fund and/or dowries received under the Incentivised Switching Scheme to cover this cost. The money saved has been reallocated to other aspects of the alternative package.

4.5. COMMENTS ON THE INNOVATION FUND

4.5.1. COMMENTS FROM INTERESTED PARTIES ON THE INNOVATION FUND

- (88) Some interested parties were critical of the proposed Innovation Fund, considering it to be unnecessary and, given its long term nature, believing that it would not have a meaningful impact on competition and will have no effect on RBS's position in the UK SME market. They argued that funding from the Innovation Fund would be better diverted to other elements of the package.
- (89) A few comments about the Innovation Fund were positive and this would help to speed up innovation in the SME banking sector. Some also argued that banks and building societies should also be able to access the benefits of this funding.

4.5.2. COMMENTS FROM UK AUTHORITIES ON THE INNOVATION FUND AND ON COMMENTS FROM INTERESTED PARTIES

- (90) In response to comments received, the Innovation Fund will be merged with the SME Capability Fund to create a Capability and Innovation Fund. This is intended to address concerns about having two distinct funds by allowing more flexibility in who may apply and how the funds are allocated, whilst maintaining the benefits of funding for innovations relevant to SMEs.

5. ASSESSMENT OF THE MEASURE/AID

5.1. EXISTENCE OF STATE AID

- (91) According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts, or threatens to distort, competition by favouring certain undertakings, in so far as it affects trade between Member States, is prohibited. The Commission observes that the UK authorities consider that no additional State aid would be granted as part of the updated alternative package.
- (92) The qualification of a measure as State aid within the meaning of that provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

5.1.1. POTENTIAL AID TO RBS

- (93) The updated alternative package described in Section 2.3 represents a financial cost to RBS. Based on the data provided by the UK authorities, the alternative package would have an estimated upfront cost to RBS of around GBP 833 million ⁽⁵⁰⁾, with an additional ongoing cost in lost profits ⁽⁵¹⁾. There will be no State resource flowing from the State to RBS to finance those Measures. The cost of the updated alternative package will be borne entirely by RBS.
- (94) Given that the updated alternative package does not involve State resources with respect to RBS, there is no need to assess the other cumulative conditions for a measure to qualify as State aid. Hence, the alternative package does not involve new aid to RBS.

5.1.2. POTENTIAL AID TO BENEFICIARIES OF ALTERNATIVE PACKAGE

- (95) The Commission observes that there is no direct link between the State aid granted to RBS in 2008 and 2009 and the updated alternative package described in Section 2.3. Indeed, in the procedure leading to the Restructuring Decision, the UK authorities committed to divest the Rainbow business and the approval of the aid was based on that commitment. The alternative package has been proposed eight years after the granting of the last capital aid to RBS. Therefore, it can be excluded that the alternative package is directly linked or funded by the 2008 and 2009 aid to RBS.
- (96) It should however be noted that, as indicated in recital 15, the State still owns 71,2 % of RBS's shares. This suggests that the financial burden of the alternative package is indirectly but largely borne by the State, as the majority shareholder of RBS. In addition, the UK authorities have been closely involved in the design of the alternative package which could suggest that the design of the package is imputable to the State. Moreover, the alternative package could give a selective advantage to the undertakings that are entitled to benefit from it. The measure is also designed in such a way as to channel its effects towards the Challenger Entities.
- (97) However, even if the alternative package was considered to constitute State aid to the banks which would benefit from it, the Commission considers that it is compatible as a necessary part of the Commitments on the basis of which the aid measures in favour of RBS are considered compatible on the basis of the Restructuring Decision, the Amended Restructuring Decision and the present Decision ⁽⁵²⁾.

5.1.3. CONCLUSION ON THE EXISTENCE OF NEW AID

- (98) In view of the elements discussed in Section 5.1.1, the Commission concludes that the updated alternative package does not qualify as new State aid to RBS.

⁽⁵⁰⁾ Includes the upfront capital cost of GBP 425 million of the Capability and Innovation Fund (recital 43), the funding for the establishment and operation of the Body of GBP 20 million (footnote 31), the upfront capital cost of the Incentivised Switching Scheme of GBP 350 million (recital 13) and the estimated operating expenses for implementation by RBS of GBP 38 million (footnote 36).

⁽⁵¹⁾ The UK authorities estimate ongoing cost in reduced profit of about GBP [...] per annum (footnote 36).

⁽⁵²⁾ As analysed in Section 5.2 of the present Decision.

- (99) As analysed in Section 5.1.2, to the extent the alternative package qualifies as State aid to the banks which benefit from it, such aid is considered compatible on the basis of Article 107(3)(b) TFEU as necessary part of the Commitments on the basis of which the initial aid measures in favour of RBS are considered compatible in the present case. The compatibility of the existing aid to RBS in view of the replacement of the divestment commitment by the alternative package is analysed in Section 5.2 of the present Decision.

5.2. COMPATIBILITY

- (100) Whilst the updated alternative package does not appear to contain new State aid to RBS, the existing aid was authorised, *inter alia*, on the basis of the commitment to sell the Rainbow business. The UK authorities now request to replace this commitment with a commitment to implement the updated alternative package. Therefore, the Commission has to assess whether the proposed replacement would alter the conclusion that the existing aid to RBS is compatible with the internal market.
- (101) A restructuring decision, such as the Amended Restructuring Decision, can in principle be amended by the Commission where the modification is based on new commitments which can be considered equivalent to those originally provided ⁽⁵³⁾. In that situation, the existing aid measures would remain compatible on the basis of Article 107(3)(b) TFEU if the overall balance of the original decision remains intact. In order to preserve the original balance, the replacement of the divestment commitment by the alternative package should not negatively affect the viability of the aid beneficiary, with the overall set of commitments remaining equivalent in terms of burden-sharing and compensatory measures taking into account the requirements of the Restructuring Communication ⁽⁵⁴⁾.

5.2.1. VIABILITY

- (102) The Commission has to assess whether the modifications to the Amended Commitments call into question the conclusion reached in the Amended Restructuring Decision as to RBS's ability to restore its viability without requiring further State aid.
- (103) According to the estimation provided by the UK authorities (see Table 3), the cost of the alternative package is not higher than the costs of continuing with the divestment of the Rainbow business. The Commission therefore considers that switching to the alternative package would not significantly affect RBS's viability.
- (104) It should also be noted that the Rainbow business itself is not a loss-making entity ⁽⁵⁵⁾. Consequently, the modifications to the Amended Commitments to allow RBS to retain the Rainbow business would not negatively impact the profitability of RBS.
- (105) The Commission preliminarily concludes that the amendments proposed by the UK authorities do not endanger the viability of RBS.
- (106) RBS has had significant losses attributable to the ordinary shareholders since 2008 ⁽⁵⁶⁾, which are mainly a result of the accumulation of large one-off items as fines and settlements for past misconduct and mis-selling of certain products, restructuring costs and higher than expected losses on non-core assets. The Commission has therefore to assess whether its conclusion that RBS will be able to restore its profitability and viability without further State aid is still valid.
- (107) The Commission notes that the H1 2017 results of RBS indicate improved profitability ⁽⁵⁷⁾. RBS reported an operating profit to ordinary shareholders of GBP 939 million for 1H 2017.
- (108) The Core Tier 1 capital ratios have improved further since 2013 and the core operating profit has continued to be positive as described in recital 11 of the Opening Decision.
- (109) The Commission therefore considers that the proposed amendments do not call into question the conclusion reached in the Amended Restructuring Decision as to RBS's ability to restore its viability.

⁽⁵³⁾ Recital 65 of the Amended Restructuring Decision.

⁽⁵⁴⁾ Commission communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules (OJ C 195, 19.8.2009, p. 9).

⁽⁵⁵⁾ W&G's operating profit amounted to GBP 345 million in 2016, GBP 431 million in 2015, GBP 467 million in 2014 (source: segmental analysis RBS annual reports).

⁽⁵⁶⁾ Recital 10 of the Opening Decision.

⁽⁵⁷⁾ <http://investors.rbs.com/~media/Files/R/RBS-IR/results-center/rbs-group-announcement-04-08-2017.pdf>

5.2.2. BURDEN SHARING

- (110) The Amended Restructuring Decision indicates that the divestment of the Rainbow business was taken into account as a measure to limit distortions of competition and it was neither a burden-sharing measure nor a measure to limit restructuring costs ⁽⁵⁸⁾. As such, the proposed updated alternative package does not affect the burden-sharing assessment previously carried out by the Commission.
- (111) The notified changes therefore do not affect the assessment of burden sharing made in the Restructuring Decision and the Amended Restructuring Decision.

5.2.3. MEASURES TO LIMIT DISTORTIONS OF COMPETITION

- (112) Pursuant to the Amended Restructuring Decision ⁽⁵⁹⁾, the primary purpose of the commitment to divest the Rainbow business was to limit the distortion of competition that the aid to RBS could have created. More precisely, the commitment to divest the Rainbow business aimed at avoiding that the very large amount of State aid granted to RBS in 2008 and 2009 resulted in undue distortion of competition in the UK market for banking services to SME and mid-corporate customers, where RBS was the market leader ⁽⁶⁰⁾. To avoid strengthening RBS's position in that market and thereby decreasing competition in it, the UK authorities committed that RBS would divest an entity having a market share of 5 % in the UK SME customers and mid-corporate customers market ⁽⁶¹⁾.
- (113) The purpose of the alternative package as described in Section 3.3 is to address distortion of competition in the same way as the divestment commitment of the Rainbow business it is replacing.
- (114) The Commission therefore has to assess whether the updated alternative package is equivalent to the divestment commitment it will replace.

5.2.3.1. *Design of individual measures*

- (115) The alternative package consists of largely two individual measures. The Commission intends to assess the equivalence both on an individual level and on the level of the package.

Capability and Innovation Fund

- (116) The Commission observes that the provision of funds from the Capability and Innovation Fund ⁽⁶²⁾ to Challenger Entities to increase their capacity to offer SME banking services will likely increase competition in the SME banking market.
- (117) Based on the comments of interested parties received by the Commission as a result of the Opening Decision, the Commission finds that the distribution of the funds in different awards sizing up to GBP 120 million allows it to strengthen multiple entities' banking offerings and bring more choice to the market.
- (118) Interest shown and feedback received from interested parties on how they would use the funds they may receive from the Capability and Innovation Fund provides further comfort that the Capability Fund will have a positive impact on competition in the market.
- (119) Based on the comments received from interested parties, the size of the awards corresponds largely to the size which some of the interested parties indicated they would need to be incentivised to invest in their SME banking capabilities. Disbursements from the funds will be competed for, with most funding being directed to those entities that are able to make the strongest pro-competitive case to the Body. The Commission believes that the size of the awards of the Capability and Innovation Fund is appropriate and the competition will result in a larger impact on the market.

⁽⁵⁸⁾ Recital 78 of the Amended Restructuring Decision.

⁽⁵⁹⁾ Recital 82 of the Amended Restructuring Decision.

⁽⁶⁰⁾ Recital 238 of the Restructuring Decision.

⁽⁶¹⁾ Recital 29 of the Amended Restructuring Decision.

⁽⁶²⁾ As described in detail in recitals 26 to 43 of this Decision.

- (120) The Commission notes that, out of a total of GBP 425 million, the resources of the Capability and Innovation Fund are concentrated around four large awards which jointly account for GBP 330 million. Indeed, there is a large gap between the market share of the four leading UK SME banks ⁽⁶³⁾ and the Challenger Entities. Further, among the Challenger Entities, there is large difference between those entities having established SME banking operations and those just entering the market or offering a limited range of products, often targeting the smallest of the SMEs. The purpose of the divestment of the Rainbow business was to create a SME and mid-corporate bank which, even if smaller than the four leading SME banks, would nevertheless be sufficiently large to challenge them. Targeting most of the funds at those few Challenger Entities with strong existing SME BCA capability is likely to lead to the largest impact on competition in the market and results with more certainty in significantly strengthening the position of one or more entities. This would therefore increase the equivalence with the impact which the divestment of the Rainbow business would have had, compared to an alternative package which would have been focused on the new entrants or banks offering only a limited range of SME banking products, often targeting only the smallest SMEs.
- (121) According to the comments received from interested parties, it is important for Challenger Entities to first build extra capabilities to support the effort to convince W&G's customers to switch with the Incentivised switching. The Commission believes that providing a period of three months after the granting of an award by the Capability and Innovation Fund enables the Challenger Entities to plan and implement additional investments without unnecessarily delaying the implementation of the Incentivised Switching Scheme.

Incentivised Switching

- (122) The Commission observes that the Incentivised Switching Scheme ⁽⁶⁴⁾ will increase competition in the SME banking market, by transferring customers from RBS to Challenger Entities. The implementation of the Incentivised Switching Scheme aims at transferring customers amounting to 3 percentage points of market share of RBS in the UK SME banking market (calculated based on the number of SMEs).
- (123) In terms of the number of SMEs transferred, the Incentivised Switching Scheme could lead to a reduction in the market share of RBS larger than 3 percentage points, but in this case the portfolio of customers switching would have a higher proportion of smaller SMEs. Indeed, as the amount of funding available for Measure B is capped, switching more customers necessarily implies that the dowries have to be smaller on average, which entails that the transferred customers would have to be very small SMEs, which was not the target of the divestment of the Rainbow business. In conclusion, when assessing the equivalence, it should be considered that the Incentivised Switching Scheme will allow that the transfer of market share of RBS is limited to 3 percentage points.
- (124) Regarding the likelihood that the 3 percentage point reduction will be reached, the Commission observes that the offers made by the Challenger Entities will need to be attractive enough to convince the maximum number of customers to switch. Considering the comments received from interested parties, the dowry size mentioned in RBS-commissioned Charterhouse research ⁽⁶⁵⁾, and the increased funding available for Measure B, the Commission considers that it is now large enough to incentivise the transfer of customers equivalent to a market share of 3 percentage points.
- (125) The Commission considers the duration extension, perimeter extension and the Multiplier as described in recitals 52 and 53 to be important safeguards which deliver additional comfort that a market share transfer of 3 percentage points of RBS can be reached.
- (126) The Commission also considers that BCAs are a 'gateway' product for SMEs and will generally consider their BCA provider when they seek other banking services such as loans ⁽⁶⁶⁾. The Commission therefore considers that the incentives to switch BCAs also incentivise customers to switch loan products.

⁽⁶³⁾ RBS, Lloyds Banking Group, HSBC and Barclays.

⁽⁶⁴⁾ The Incentivised Switching Scheme is described in detail in recitals 44 to 58 of this Decision.

⁽⁶⁵⁾ As described in recital 82(a) and footnote 45.

⁽⁶⁶⁾ As described in recital 83(a).

- (127) The Commission observes that the loan dowries described in recital 48 would allow the Challenger Entities to further incentivise SME customers to transfer other products along their BCAs. The loan dowry size also reduces the disadvantage interested parties have mentioned in using the standardised capital model ⁽⁶⁷⁾. The Commission considers that this provides more comfort that the alternative package is equivalent with the divestment of the Rainbow business in which those loans would have been transferred to a potential buyer.
- (128) The Commission also notes that the GBP 75 million earmarked to help facilitate switching (compensation for break fees related to the transfer of loan balances or other third party costs such as legal fees) and the Current Account Switching Service will reduce barriers for customers to switch to the Challenger Entities.
- (129) The Commission also considers that the powers and oversight of the Body ⁽⁶⁸⁾ ensures that the Incentivised Switching Scheme can be further adapted to market signals after the scheme has been launched.
- (130) The Commission does not find problematic that the access to RBS branches (as described in recital 57) is no longer proposed to be offered for free, as envisaged in the initial version of the alternative package. Indeed, the established SME Challenger Entities commented that they do not need such access to be able to compete with the four leading SME banks. By using the funds that were initially allocated to the (initially free) Branch Access Scheme for Measures A and B, the funds of the alternative package are allocated more effectively to reach equivalence with the effect of the divestment of the Rainbow business.
- (131) Based on the changes that have been introduced to the Incentivised Switching Scheme and the safeguards that are included in the scheme and the comments received from interested parties, the Commission concludes that the Incentivised Switching Scheme would have a high likelihood of delivering on a 3 percentage point RBS market share transfer.

5.2.3.2. *Overall equivalence of the package to the commitment to divest the Rainbow business*

- (132) As stated in the Opening Decision ⁽⁶⁹⁾, there are different ways to assess the equivalence of the alternative package. In terms of counterfactual scenario, the impact of the alternative package can be compared to the impact which a sale of the Rainbow business to a trade buyer would be expected to have if implemented now ('Rainbow divestment' in Table 3) or to the impact which the divestment of the Rainbow business was expected to have according to the Restructuring Decision ('Objective 2009 Decision' in Table 3). In terms of indicator used, one can measure the equivalence using different indicators, such as the evolution of the SME market share of RBS, the financial costs on RBS, and the size of the transferred assets and liabilities.
- (133) Table 3 compares the three scenarios along different indicators.

Table 3

Comparison 3 scenarios along different indicators

	Objective 2009 Decision	Rainbow divestment	Updated alternative package
Motivation commitment	Limitation of distortion of competition in UK SME market	Limitation of distortion of competition in UK SME market	Limitation of distortion of competition in UK SME market
Market Share Loss RBS in UK SME market ⁽¹⁾	5 %	[0-5] % [[5-10]]	3 % [[5-10]]
Total Capital Loss ⁽²⁾	GBP [...]	GBP [...] [GBP [...]]	GBP [...] [GBP [...]]

⁽⁶⁷⁾ As described in recital 78.

⁽⁶⁸⁾ As described in recital 51.

⁽⁶⁹⁾ As described in recitals 122 and 123 of the Opening Decision.

	Objective 2009 Decision	Rainbow divestment	Updated alternative package
CET1 Ratio Impact	N.A.	[...] %	[...] %
Total Asset Transfer	GBP 20 billion	GBP [15-25] billion	GBP [0-5] billion

(¹) Numbers in brackets for Rainbow divestment and updated alternative package includes market share loss since Q4 2011.

(²) Numbers in brackets for Rainbow divestment and updated alternative package includes GBP [1-3] billion of already incurred costs.

- (134) The motivation behind the divestment of the Rainbow business in the Restructuring Decision and the Amended Restructuring Decision is to limit the distortion of competition in the UK SME and mid-corporate banking market. The UK authorities have designed the alternative package with the aim to accomplish the same underlying objective.
- (135) The alternatives can be compared using the impact on the market share of RBS in the UK SME market. According to the Restructuring Decision, the divestment of the Rainbow business was expected to result in a market share loss of 5 %, as described in recital 112 of the Opening decision. The alternative package should also result in a market share loss. It would amount to up to 3 %, if one takes into account only the Incentivised Switching Scheme. The Commission considers that the impact of the Capability and Innovation Fund will also be significant enough to enable SMEs switching from RBS and from other banks. However, this is difficult to quantify.
- (136) As indicated by the UK authorities (⁷⁰), it is reasonable to take into account the fact that RBS has lost market share in the UK SME banking market since the Restructuring Decision. The UK authorities referred to a data provider. Unfortunately, the data provider started to produce market share calculations only as of Q4 2010. As a result, there is no consistent time series covering the period from 2008 or 2009 to date. According to the data calculated by the provider, RBS's market share was as high as [25-30] % in the 4th quarter of 2010 (first data point) in the market for SMEs with a turnover up to GBP 25 million. According to those data, RBS lost [3-7] % of market share between the 4th quarter of 2010 and the 4th quarter of 2016 in the market for SMEs with a turnover up to GBP 25 million (⁷¹). The Commission considers that using the market share loss since Q4 2011 ([0-5] %) is more prudent versus using the market share loss since Q4 2010 ([3-7] %), because the first data point (Q4 2010) gives a market share higher than what was communicated from other sources at the time of the Restructuring Decision and it can therefore not be excluded that it is a one-off peak not reflecting correctly the starting point in 2008-2009. The Commission therefore considers that the market share in the UK SME market segment which has already been lost can be prudently quantified at [0-5] %.
- (137) The 5 % decrease in market share of RBS expected in the Restructuring Decision is exceeded when one aggregates the market share loss expected from the alternative package (up to 3 % resulting from Measure B alone) with the observed market share loss of [0-5] %.
- (138) Based on the analysis in recitals 122 to 131 the Commission assesses that there is a high likelihood a 3 % market share transfer in SME customers will be achieved by the alternative package.
- (139) In conclusion, the Commission considers that the market share loss for SMEs anticipated in 2009 at the time of the Restructuring Decision would be met by the alternative package.
- (140) The Commission observes that Measure A is targeted to SME customers, but it does not exclude mid-corporates from benefiting from the alternative package. The Capability & Innovation Fund will enable banks to enhance and extend their existing business banking propositions for larger SMEs and therefore also for mid-corporates. For example, one of the banks indicated in their submission following the Opening Decision that it would invest up to GBP 25 million in a sophisticated internet Banking for Business platform that would provide sophisticated digital capabilities (including FX and international payment capabilities) to small, medium and large corporates. This bank also anticipated that up to GBP 50 million of other investments plans would help it to address all market segments.

(⁷⁰) See recital 68.

(⁷¹) Based on Charterhouse Research data provided by the UK authorities (see footnote 42).

- (141) The Commission also considers that the Incentivised Switching Scheme (with large dowries for the larger, more complex SME's) will further incentivise Challenger Entities to further enhance the products and services for those larger SME's. Therefore those Challenger Entities will also enhance the capability to serve mid-corporate customers.
- (142) The Commission also observes that the grants and dowries of Measures A and B are concentrated with those few Challenger Entities with strong existing SME BCA capability. Those Challenger Entities will also be the ones which are likely to try to compete for the mid-corporates.
- (143) According to the data calculated by the provider, RBS's market share segment was as high as [30-35] % in the 4th quarter of 2010 (first data point) in the market for corporates with a turnover above GBP 25 million ⁽⁷²⁾. According to those data, RBS lost [5-10] % of market share between the 4th quarter of 2010 and the 2nd quarter of 2017 in the market for SMEs with a turnover up to GBP 25 million ⁽⁷³⁾. Similar to the SME market segment, the Commission considers that using the market share loss from Q4 2011 is more prudent versus using the market share loss since Q4 2010. The Commission notes that the observed market loss of RBS for corporates from Q4 2011 to Q4 2016 ([0-5] %) is in line with the market loss for the SME's ([0-5] %). The observed market loss is even larger when considering the market loss from Q4 2011 to Q2 2017 ([5-10] %).
- (144) The Commission also notes that the mid-corporates often require more complex and more varied banking products. Only a very limited number of Challenger Entities have shown real interest in those customers ⁽⁷⁴⁾, as most entities do not have the capacity to develop those products in a profitable way. The Commission also thinks it is reasonable to consider the UK comments in recital 66(e), outlining that the divestment of the Rainbow business would have had a smaller and/or more uncertain impact on competition in the mid-corporate segment compared to the SME segment.
- (145) Although the distortion of competition is more difficult to quantify due to the indirect impact of the alternative package on the mid-corporate segment, the Commission considers that, together with the observed market loss, the alternative package will likely achieve a competition impact for mid-corporates at least equivalent to the divestment of the Rainbow business. Therefore, the Commission concludes that the distortion of competition is also addressed for the mid-corporates by Measures A and B.
- (146) With respect to both mid-corporates and SME clients, the estimated total capital loss of the different scenarios may also be used to compare the equivalence between the divestment of the Rainbow business and the alternative package.
- (147) The Restructuring Decision did not contain an estimation of the capital cost of the divestment of the Rainbow business. However, it is reasonable to use the estimation of the capital cost which the Rainbow business sale would generate if it is pursued, which has been quantified by the UK authorities.
- (148) The cost that RBS has incurred since 2009 to comply with the divestment commitment stands at GBP [1-3]billion ⁽⁷⁵⁾. This covers several types of costs, the biggest of which are technology costs to create a separate IT platform for the Rainbow business.
- (149) The direct capital loss ⁽⁷⁶⁾ of the alternative package is lower than if the divestment of the Rainbow business is continued. In addition, when adding the costs already incurred by RBS, the alternative package is clearly more costly than what was implicitly envisaged in the Restructuring Decision ⁽⁷⁷⁾.

⁽⁷²⁾ The Commission notes no separate data is available for the mid-corporate segment and therefore the market share of customers above GBP 25 million is used as market share indicator.

⁽⁷³⁾ Based on Charterhouse Research data provided by the UK authorities.

⁽⁷⁴⁾ As part of the feedback received following the opening decision.

⁽⁷⁵⁾ The amount of GBP [1-3]billion was reconciled with the actual costs booked under the W&G programme by an external consultant.

⁽⁷⁶⁾ Table 3 indicates the direct total capital loss of the different alternatives. The total capital loss when adding the GBP [1-3]billion cost already incurred by RBS is indicated within brackets.

⁽⁷⁷⁾ The Restructuring Decision did not contain an estimation of the capital cost of the Rainbow divestment. However, it seems a reasonable estimation to use the estimation of the capital cost which the Rainbow sale would generate if it is pursued, which has been quantified by the UK authorities. The cost that RBS has incurred since 2009 to comply with the divestment commitment is standing at GBP [1-3]billion. Including the total cost of GBP [1-3]billion, the total capital loss of GBP [...] to GBP [...] significantly exceeds the GBP [...] capital cost which the Rainbow loss would have generated.

- (150) In conclusion, using that indicator, the alternative package, as claimed by the UK authorities, does not lighten the financial burden of RBS compared to what was envisaged in the Restructuring Decision; it is actually significantly more costly.
- (151) The CET1 ratio impact may also be used to compare the different scenarios. The difference between the CET1 ratio indicator and the capital loss indicator is that the former also takes into account the reduction in RWA: if a scenario generates a larger reduction in risk weighted assets, it has — for a given capital loss — a less negative effect on the CET1 ratio.
- (152) The CET1 figures were provided by the UK authorities. Table 3 illustrates that the CET1 impact of the alternative package is more significant. This seems to be the consequence of the fact that it involves a smaller loss of assets. Hence, even if the capital loss is slightly smaller, it has a slightly more negative effect on the CET1 ratio.
- (153) The alternative scenarios can be compared across total assets as well. The total asset impact of the alternative package is significantly smaller than under the commitment to divest the Rainbow business.
- (154) The commitment to divest the Rainbow business aimed at divesting a viable entity. In order to be a viable entity, the Rainbow business needed to have enough income-generating assets and customers to bear the costs of its large branch network and infrastructure. Therefore, besides SME loans and deposits which were the focus of the measure targeted at increasing competition on the SME market, the Rainbow business' perimeter also included a large amount of retail loans and deposits.
- (155) The alternative package does not envisage the transfer of the retail and other non-SME assets and liabilities. It is focused on achieving a transfer of part of the SME customers, with their assets (loans) and liabilities (deposits). The alternative package is therefore much smaller in terms of amounts of assets transferred, but attempts to deliver a similar outcome on the UK SME banking market.

5.2.3.3. *Conclusion on equivalence of the updated alternative package*

- (156) From the date of the Restructuring Decision (14 December 2009), RBS has genuinely tried to divest the Rainbow business as evidenced by the successive procedures launched, the significant amount of resources involved and manpower dedicated to the divestment of the Rainbow business.
- (157) In doing so, RBS has incurred significant costs (notably, the estimated costs of attempting to divest the Rainbow business, as described in recital 148).
- (158) The Commission also notes that the alternative package does not seem to lighten the requirements on RBS. In terms of costs, besides the cost already incurred by RBS in the past, the implementation of the alternative package would impose an additional cost burden on RBS. The cumulative costs since 2009 would be significantly higher than what was implicitly expected by the Restructuring Decision.
- (159) The alternative package, in combination with the lost market shares, will result in total decrease of RBS market share in the SME market which is at least equivalent to what was envisaged in the Restructuring Decision. The concern that the very large 2008-2009 aid is used by RBS to consolidate or grow its market share in the already concentrated SME market would therefore be as much allayed as it would have been if the divestment of the Rainbow business had been implemented as envisaged by the Restructuring Decision.
- (160) The Commission therefore considers that, in order to achieve the intended effect on competition, the alternative package is equivalent to the divestment of the Rainbow business.
- (161) The Commission also notes that RBS has implemented all Commitments and Amended Commitments (other than the divestment of the Rainbow business) from the Restructuring Decision and the Amended Restructuring Decision. The notified replacement of a single divestment commitment is therefore taking place in the context of a correct implementation of the rest of the restructuring plan.

6. CONCLUSION

- (162) On the basis of the foregoing assessment, the Commission's doubts on the equivalence of the alternative package expressed in the Opening Decision have been dispelled. The amendment in commitments does not affect the conclusion reached in the Restructuring Decision and the Amended Restructuring Decision and the State aid provided to RBS should therefore be declared compatible with the internal market on the basis of Article 107(3)(b) TFEU.

- (163) Furthermore, the Commission concludes that the potential State aid to beneficiaries from the alternative package should be declared compatible as a necessary part of the commitments on the basis of which the aid measures in favour of RBS are declared compatible,

HAS ADOPTED THIS DECISION:

Article 1

The replacement of the commitment to divest the Rainbow business with the alternative package notified by the United Kingdom regarding RBS is compatible with the internal market within the meaning of Article 107(3)(b) of the Treaty. The replacement of the commitment to divest the Rainbow business by the alternative package is accordingly authorised.

Article 2

The potential State aid to beneficiaries of the alternative package is compatible with the internal market within the meaning of Article 107(3)(b) of the Treaty.

Article 3

This Decision is addressed to the United Kingdom of Great Britain and Northern Ireland.

Done at Brussels, 18 September 2017.

For the Commission
Margrethe VESTAGER
Member of the Commission

