

Proposal for improved protection against subsidisation and unfair pricing practices causing injury to EU air carriers in the supply of air services from non-EU countries

Policy context

[Regulation \(EC\) No 868/2004](#) of the European Parliament and the Council concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community ("the Regulation") was adopted amid concerns about unfair pricing practices by certain air carriers on the transatlantic market. The regulation allows redressive measures to be imposed when non-EU air carriers are subsidised directly or indirectly or when they carry out unfair pricing practices on one or more routes to or from the EU, thereby causing injury to the EU industry. These measures preferably take the form of duties and are imposed by regulation and enforced by the EU Member States.

Before proceedings are initiated, the complainant must provide a written complaint containing prima facie evidence of subsidisation or unfair practices that cause injury. An investigation may also be initiated on the European Commission's own initiative. During the investigation, the determination of subsidisation/unfair pricing and injury must be based on positive evidence. Issues to be examined include the existence of subsidisation/unfair pricing, the level of fares charged, their effect on EU fares and the impact of the air services concerned on the EU industry. The broader interest of the Union in regard to the possible imposition of measures is also examined. Interested parties may be granted a hearing.

Four possible scenarios may be the result of an investigation:

- **provisional measures**: these may be imposed for a maximum period of six months if it is determined that injury is being caused by subsidies/unfair pricing and that the EU interest calls for intervention to prevent further such injury;
- **termination of the proceedings without measures being imposed**: this happens when the complaint is withdrawn, a satisfactory remedy is obtained or redressive measures are unnecessary;
- **definitive measures**: these are imposed, normally after the six month period for the application of provisional measures has expired, when it is established that unfair pricing practices or subsidies which cause injury still exist. The level of measures imposed must not exceed the level of the subsidies or the difference between the fares charged by the air carriers concerned (EU and non-EU) but could be set at a lower level if that would be adequate to remove the injury to EU air carriers;

- undertakings: an investigation may be concluded with measures being imposed in another form if the third country's public authorities or non-EU air carrier(s) concerned undertake to eliminate the subsidies and revise prices/fares in order to prevent further injury. In the event of an undertaking being breached, the definitive measures will be imposed instead.

However, the Regulation 868/2004 has never been used: no official complaint has ever been lodged, and hence no investigation has been launched, and no redressive measures have ever been taken.

It should be noted that international air transport services are not covered by the WTO/GATS¹ framework. Defence instruments exist under national laws of certain states such as the Regulation and the US International Air Transportation Competition Act (1979)². Besides, in bilateral air services agreements "fair competition" or similar articles are extremely rare. They have been included, however, in EU comprehensive air transport agreements such as with the US and Canada.

Furthermore, the EU and its Member States have been actively engaged in discussions within the International Civil Aviation Organisation (ICAO) aiming to modernise the global framework for international air transport including the development of basic principles for fair competition and instruments to establish and maintain it.

The European Commission's Communication COM(2012) 556 on "The EU External Aviation Policy - Addressing Future Challenges" presented in September 2012 addresses the challenges facing the EU aviation industry in the global aviation market. The Communication, inter alia, considers how best to ensure fair competition in international air transport including through the revision of the Regulation. The Council, in its conclusions on EU external aviation policy adopted on 20 December 2012, supported the European Commission to present a proposal for revision or replacement of the Regulation in order to develop a more effective EU defence instrument in the aviation sector to safeguard fair competition.

Clarification of certain concepts from the Regulation

- "Like air service" shall mean air services which are supplied on the same route or routes as the air services under consideration or such air services that are supplied on a route or routes closely resembling the route or routes on which the air service under consideration is supplied
- "Community industry" shall mean the Community air carriers supplying like air services as a whole or those of them whose collective share constitutes a major proportion of the total Community supply of those services
- "Injury" shall mean material injury to the Community industry, or threat of material injury to the Community industry. The determination of injury shall be based on positive evidence and shall involve an objective examination of both: (a) the level of fares of the air services under

¹ WTO: World Trade Organisation; GATS: General Agreement on Trade in Services

² Under the International Air Transportation Competition Act, the US Department of Transport has wide powers and discretion to introduce sanctions against foreign airlines if US airlines suffer from discrimination or other unfair practices in foreign countries.

consideration and the effect of such air services on fares offered by Community air carriers; and (b) the impact of those air services on the Community industry, as indicated by trends in a number of economic indicators such as number of flights, utilisation of capacity, passenger bookings, market share, profits, return on capital, investment, employment. A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstance, which would create a situation in which the subsidy would cause injury, must be clearly foreseeable and imminent.

- "Community air carrier" shall mean an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers
- "Community interest": A determination as to whether the Community interest calls for intervention shall be based on an appraisal of all the various interests taken as a whole. Measures may not be applied where it can be clearly concluded that this is not in the Community interest. The assessment of the Community interest involves the identification of any compelling reasons which would lead to the clear conclusion that the taking of measures would not be in the overall interest of the Community. Such compelling reasons could, for example, include cases where the disadvantage to consumers or other interested parties would be clearly disproportionate to any advantages given to the Community industry by the imposition of measures.