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REPORT

From:	General Secretariat of the Council
To:	Permanent Representatives Committe (Part 1)/Council
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004 – Progress report

1. Introduction

On 8 June 2017, the Commission adopted the above-mentioned proposal, together with its Communication on an Aviation Strategy for Europe. In this Communication, the Commission stated its intention to assess the effectiveness of Regulation (EC) No 868/2004 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, with a view to revising or replacing it with a more effective instrument that would ensure fair competition conditions between all air carriers and thereby safeguard connectivity to and from the Union.

2. Content of the proposal

The main objective of the proposal is to ensure fair competition between the Union air carriers and the third country air carriers, with a view to maintain conditions conducive to a high level of connectivity.

The proposal provides common rules on proceedings, namely:

- ✓ the two possible purposes for the investigation (pertaining either to the violation of applicable international obligations - the so-called 'violation' track-, or to practices adopted by a third country or third-country entity affecting competition and causing injury or threat of injury to Union air carriers - the so-called 'injury' track);
- ✓ the conditions under which an injury or a threat of injury can be found;
- ✓ the rules governing the initiation and conduct of the investigation;
- ✓ the conditions according to which the Commission may decide or refuse to open an investigation;
- ✓ the right of the Commission to seek all the information it deems necessary to conduct the investigation and to verify the accuracy of the information it has received or collected;
- ✓ the possible conclusions of the investigations, i.e. with or without redressive measures.

3. Work within the European Parliament

The European Parliament has called for the revision of Regulation 868/2004 in a number of its resolutions, particularly its resolutions of 2 July 2013, 9 September 2015, 11 November 2015 and 16 February 2017. The EP's 11 November 2015 resolution on aviation emphasised that Regulation (EC) No 868/2004 had proved inadequate and ineffective and called on the Commission to revise this Regulation. In its recent resolution of 16 February 2017 on an Aviation Strategy for Europe, the EP welcomed the Commission's proposal to revise Regulation (EC) No 868/2004 addressing unfair current practices, but also stressed that 'neither an unacceptable trend towards protectionism, nor, on their own, measures to ensure fair competition can guarantee the competitiveness of the EU aviation sector'.

The legislative proposal has been assigned to the Parliament's Committee on Transport and Tourism (TRAN) which designated Markus Pieper (EPP, Germany) as rapporteur.

4. Work within the Council bodies

The first presentation by the Commission of the new proposal on Safeguarding Competition and its impact assessment in the Aviation Working Party (AWP) took place on 14 June 2017, at the end of the MT Presidency.

General comments

Since 5 July 2017, the EE Presidency has worked intensively on this file and dedicated 11 working party meetings to it. Two meetings were dedicated to the detailed examination of the Impact Assessment (hereinafter '*IA*'). A number of delegations shared the Commission's assessment of the situation and supported the outcome of the IA (AT, BE, DE, FR, NL, RO). Other delegations (CZ, EL, FI, HU, IE, IT, LT, LV, MT, PL, PT, SE, SK, SI and UK), although sharing the objectives put forward by the Commission, expressed their concerns regarding potential gaps in the IA and questioned the necessity to address at Union level the issue of fair competition.

On 6 October 2017, the following delegations: CZ, CY, EL, HU, IE, FI, LV, MT, PL, PT and SK submitted a joint written statement to Coreper, highlighting their concerns that the IA insufficiently took into account impacts of the proposal in areas such as:

- territorial aspects including regional connectivity;
- intra-EU competition and consumers;
- interaction with Member States bilateral aviation relations as governed by existing air services agreements;
- potential retaliatory measures and
- missing a clear definition of the scope and of what constitutes the 'Union interest';

The Presidency took note of the concerns expressed in Coreper by the above-mentioned delegations and proposed - despite some of the remaining weaknesses of the IA - to start the article-by-article examination of the file, with the aim to look for solutions to the delegations' concerns in the body of the text of the proposal.

Therefore, the AWP has several times discussed the articles of the proposal, including on the basis of compromise texts proposed by the Presidency. Issues related in particular to the traffic rights, possible impacts on the bilateral air transport agreements and enhanced involvement of Member States in the whole process were also extensively discussed. Furthermore, a number of Member States sought the opinion of the Legal Service concerning several issues, for example regarding competencies or the interaction of the proposal with the bilateral agreements, including with respect to traffic rights.

To conclude, a solid progress at working party level has been made on the file. The Presidency has proposed compromises which address most of the concerns expressed by the delegations , such as a new article on *scope*, new definitions for *'threat of injury'* and *'Member States concerned*', a new article for *'Union interest'*, an enhanced *role of the Member States* concerned in the investigation and throughout the whole proceedings, a new wording for Article 7 on '*non-cooperation'*, a shorter *time limit* for the Commission's investigation, as well as clarifications regarding the potential use of *traffic rights as redressive measures*.

Comments on specific issues

- **Scope of the Regulation**

As regards the scope of the Regulation**,** the majority of delegations considered that the proposal was not clear as regards its scope of application and therefore proposed to circumscribe it and to make better fit for purpose by including a specific article on scope. Therefore, the Presidency proposed a new Article 2a which clarifies that the Regulation applies either to a violation of international obligations under an existing comprehensive agreement (i.e. Union and Member States) with a third country, or to practices affecting competition between the Union and the third country air carriers. Moreover, the new Presidency proposed article contains an additional safeguard paragraph specifying that the Regulation can only apply if it does not conflict with the existing settlement procedures included in the Union or in the bilateral agreements, or in the trade agreements containing air transport provisions.

A majority of Member States welcomed and expressed their support to the idea of introducing a new article on scope. However, several Member States expressed some concerns, namely that the Presidency proposal on scope was still too broad and as a result might hamper legal certainty, and therefore needed to be further clarified. One Member State, for better comprehension, proposed to link the new Article 2a with certain elements in Chapters III and IV.

- **Threat of injury**

Several Member States opposed the Commission proposal regarding the definition of "threat of injury" and requested to delete it. They argued that the concept of "threat of injury" was too broad and was hard to be determined. In addition, these same Member States questioned how to impose redressive measures in a case of "threat of injury", since a measurable injury had not yet materialised into an actual injury at that point.

Other delegations had an opposite view, emphasising that the proposal would be seriously weakened if the 'threat of injury' was to be deleted. They argued that there are situations when waiting for the threat to materialise into an actual injury might cause irreversible harm, which could have been avoided if measures had been taken in advance. Furthermore, these Member States emphasised that Article 11(2) imposes the obligation of a substantiated threat of injury, which needed to be based on clear evidence and thus would avoid the risk of misuse.

In order to bridge the above different views and to find a solution to address the concerns on both sides, the Presidency introduced a new paragraph 1a in Article 1 stating that redressive measures could only be imposed where the applicable international obligation have been violated and where practices affecting competition between the Union air carriers and the third country air carriers have caused injury to the Union air carriers.

This clarification was generally welcomed. However several Member States still remain cautious, which is why the Presidency believes that further clarification is necessary in order to reach an overall compromise.

- **Union interest**

Concerning the 'Union interest', the Commission proposal provides that investigations cannot be launched or should be concluded without redressive measures if the adoption of such measures would be against the Union interest. Several delegations proposed that this concept should be defined, while the others did not see the merits for further clarification. The concept is linked to the underlying concerns related to the impact that redressive measures could have on 1) the connectivity of some Member States, especially of those in the periphery of the Union, 2) the possibility of retaliatory measures by the third country air carrier(s) concerned, or on 3) the relations with the third country concerned in general. Those delegations also expressed concerns as to how the Union interest could be prioritised, whether it would take into account the interests of a majority of Member States, or only of the Member States concerned by the practices, or of the Union air carrier concerned by the practices, or of consumers in general.

In order to address the above-mentioned concerns, and similarly to such articles in existing Union trade defence instruments, the Presidency proposed a new Article 4bis to clarify how the Union interest could be determined.

The Member States who had expressed concerns regarding the need to further define the Union interest welcomed the new article. Some still considered the article too general and proposed the inclusion of more specific and precise criteria. Others emphasised that it would be counterproductive to try to create too prescriptive an article, since it would be difficult to foresee all the details or the prevailing interests in a specific situation. In the views of the latter group of delegations, the analysis of the Union interest test should be carried out on a case-by-case basis and therefore a more general article would be more appropriate, allowing the flexibility to adapt to each situation and avoiding the risk of missing out concerns which had not been foreseen in advance. Overall, many Member States supported the Presidency approach.

- **The possible conflict between the Commission investigation and the existing dispute settlement mechanisms**

From the beginning, a large number of Member States have expressed concerns about the possible conflict which might exist between the Commission investigation under the Regulation and the existing dispute settlement mechanisms contained in bilateral air transport or air services agreements, or in trade agreements with the third country concerned. The Member States who have raised the issue, fear that two parallel procedures, one of a Member State already addressing the practice affecting competition and, at the same time, a Commission investigation under the Regulation, might lead to the breach of its bilateral agreements with the third country concerned.

In order to solve the above-mentioned potential conflict, the Presidency has introduced new paragraphs in Article 4 ("The investigation") which gives the Member States the possibility to address the practice affecting competition exclusively under the procedure for dispute settlement agreement contained in bilateral air transport or air services agreements, or in trade agreements with the third country concerned. If a Member State decides to do so, it has to notify the Commission of its decision. In such case, the Commission has a legal obligation to suspend the investigation until the Member State notifies that the procedure for dispute settlement has not been enforced, or the Member State asks the Commission to resume the investigation. Therefore, the Presidency compromise proposal leaves the decision whether or not to apply this Regulation entirely in the hands of the Member State concerned.

However, since not all Member States expressed concerns regarding the potential conflict between the Commission investigation and the dispute settlement procedures under the bilateral agreements, the proposal also maintains the possibility for the Commission to launch an investigation in parallel, but only in those cases where a Member State has not notified of its intent to address the practice affecting competition exclusively under the procedure for dispute settlement agreement contained in its bilateral agreements.

The above described Presidency compromise proposal allowing for two different approaches received broad support and was considered as a big step forward by the delegations.

- **Member States' role and involvement during the different phases of the investigation**

Given the already mentioned potential consequences on regional connectivity, or on the general relations with the third countries concerned, a large number of Member States stressed the importance of being in control of the adoption and review of redressive measures, or of the decision to terminate the investigation without the adoption of redressive measures. On the other hand, other Member States opposed the idea of giving the control to the Member States, stating that it would complicate the procedures and would not be in line with the horizontal Union approach regarding Council decisions.

The Commission proposal foresees implementing acts adopted by the Commission for the adoption and the review of the redressive measures. The Presidency compromise text introduces an alternative option, of adoption and review of the redressive measures by the Member States by means of a Council Implementing Regulation. The choice between these two options is still under discussion in the AWP. However, it is worth recalling that according to Article 291 TFEU, Council Implementing Regulations can only be adopted in duly justified cases, and have to be properly explained in a recital.

- **Questions addressed to the Council Legal Service**

The latest discussion of the AWP on this file was held on 17 November 2017, which was dedicated to a session of questions and answers on the basis of questions previously addressed by a group of delegations to the Council Legal Service. The questions of the Member States focused on two main issues:

- the issue of Member States competence on traffic rights,
- the interaction between Member States' bilateral agreements and the application of the Regulation

Following this discussion, the Presidency underlined that the current Presidency compromise proposals are already attempting to find solutions for the above-mentioned issues. The Presidency highlighted that it was the political choice of the Member States whether they want the traffic rights to be part of the redressive measures proposed by the Regulation.

Possible way forward

With regard to the traffic rights, on the one hand, these rights could be explicitly excluded the traffic from the possible redressive measure, thus avoiding the thorny issue of the exercise of competence over traffic rights at Union level. However, in that case, the Regulation will lose an important and powerful instrument of dissuasion against the use of discriminatory practices. This option is already now reflected in the new paragraph 3bis of Article 13 (*'Redressive measures'*) proposed by the Presidency.

On the other hand, Member States could decide that, in order to strengthen the Regulation, the use of traffic rights as possible redressive measures could be maintained. In that case, a new recital could be proposed in order to explain the use of traffic rights in this context, including the Council's understanding that the competence over traffic rights remains in the hands of the Member States.

Therefore, it is obvious that even though many of the Member States' concerns and doubts have been addressed by the current Presidency compromise text, the discussions need to continue to clarify the remaining questions of the delegations, which would then be reflected in the text of the Regulation accordingly.

All delegations, as well as the Commission, have a general scrutiny reservation on the latest version of text (doc. 12810/2/17 REV 2). Changes with respect to the previous version of the text are marked with **bold** and ~~strikethrough~~.

DK, MT and UK have a parliamentary scrutiny reservation on the proposal.

5. Conclusions

Coreper and Council are invited to take note of the substantial progress achieved under the Estonian Presidency and the few issues (scope, threat of injury, comitology *vs* Council decision) to be further clarified. Therefore, the competent Council preparatory bodies should be invited to pursue the examination of the proposal in order to achieve an agreement on it at the next TTE Council.