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REPORT

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
No. Cion doc.:	10146/17
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 – Analysis of the final compromise text with a view to agreement

I. CONTEXT AND CONTENT OF THE PROPOSAL

1. 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. The legislative proposal has been assigned to the Parliament's Committee on Transport and Tourism (TRAN) which designated Markus Pieper (EPP, Germany) as rapporteur. The Economic and Monetary Affairs Committee has designated Ramon Tremosa I Balcells as rapporteur for opinion.

II. STATE OF PLAY

3. On 7 June 2018, the Council reached a General Approach on the above-mentioned proposal. On 11 January 2018, the EP rapporteur presented his draft report to the TRAN Committee. The draft report supports the Commission's proposal, but introduces some changes in order to notably involve more the European Parliament in the consultation process, or put more emphasis on the connectivity criterion in the investigations. The Committee Members discussed the amendments to the report on 20 February and adopted the draft report on 20 March 2018.
4. Four trilogues were held on 27 June, 24 September, 17 October and 20 November 2018.
5. At the last trilogue on 20 November, an agreement *at referendum* was reached, whose main elements are outlined below.

III. THE FINAL COMPROMISE TEXT

6. The essential key political concerns for the Council in this file have been the potential impact of the Regulation on *connectivity* throughout the Union, the *interaction of the Regulation with the bilateral aviation agreements* between Member States and third countries, the exclusion of *traffic rights as possible redressive measures*, and the involvement of the Member States in the *adoption of redressive measures*.
7. In the 20 November trilogue, the Parliament accepted a number of compromise texts proposed by the Presidency on the basis of the mandate granted by Coreper. However, some changes were necessary as a result of the negotiations. The tentative agreements on these issues are listed in the table below:

<i>Recital/Article</i>	<i>Tentatively agreed solution</i>
Recital 13a	Member States should endeavour to proceed expeditiously with the bilateral dispute settlement procedure
Recital 19	Redressive measures should avoid giving undue advantage to any air carrier
Recital 19a	Deleted - it reflected the Council Decision contained in the Council General Approach
Recital 19b	The exclusion of traffic rights
Article 2(1)(fa)	Definition of ' <i>threat of injury</i> '
Article 4a(2)	Suspension of the investigation + suspension in case of urgency
Article 5(4)	Where appropriate, COM is invited to dispute settlement procedures
Article 13	The adoption of redressive measures
Article 15(2a)	No opinion clause

IV. CONCLUSION

8. The Permanent Representatives Committee is invited to:
- examine and approve the final compromise text in the annex to this report with a view to reaching an agreement at first reading with the European Parliament;
 - allow the Presidency to send a letter to the European Parliament stating that if the plenary of the European Parliament were to adopt, subject to revision of the text by the legal-linguist experts, the amended text of the draft Regulation in the same form as set out in the annex to this report, the Council would adopt the Regulation in the form of the Commission proposal as thus amended by the Parliament.
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**Proposal for a
Regulation of the European Parliament and of the Council
on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Aviation plays a crucial role in the Union's economy and the everyday lives of Union citizens and is one of the best performing and most dynamic sectors of the European economy. It is a strong driver for economic growth, jobs, trade and tourism as well as connectivity and mobility for businesses and citizens alike, particularly within the Union aviation internal market. Over the past decades, growth in air transport services has significantly contributed to improving connectivity within the Union and with third countries and has been a significant enabler of the Union economy.

(1a) [...]

(1b) [...]

¹ OJ C, , p..

² OJ C, , p..

- (2) Union air carriers are at the centre of a global network connecting Europe internally and with the rest of the world. They should be enabled to compete against third countries air carriers in an environment of open and fair competition. This is necessary to bring benefits to consumers, to maintain conditions conducive to a high level of Union air connectivity and to ensure transparency, a level-playing field and continuing competitiveness of Union air carriers, as well as high levels of quality employment in the European aviation industry.
- (2a) [...]
- (3) In a context of increased competition between air transport actors at a global level, fair competition is an indispensable general principle in the operation of international air transport services. This principle is notably acknowledged by the Convention on International Civil Aviation ('the Chicago Convention') whose preamble recognises the need for international air transport services to be based on the basis of equality of opportunity. Article 44 of the Chicago Convention also states that the International Civil Aviation Organization ('ICAO') should aim to foster the development of international air transport so as to ensure "that every contracting State has a fair opportunity to operate international airlines" and to "avoid discrimination between contracting States".
- (3a) [...]
- (4) The fair competition principle is well established within the Union where market distortive practices are subject to existing Union law, which guarantees equal opportunities and fair competition conditions for all air carriers, European and non-European, operating in the Union.
- (5) However, in spite of continued efforts by the Union and some third countries, principles of fair competition have not yet been defined through specific multilateral rules, in particular, in the context of the ICAO or of World Trade Organization ('WTO') agreements, such as the Marrakech Agreement, Annex 1B General Agreement on Trade in Services (GATS), Annex on Air Transport Services, from the scope of which air transport services have been largely excluded.

(6) Efforts should therefore be strengthened in the context of ICAO and of WTO to actively support the development of international rules guaranteeing fair competition conditions between all air carriers.

(6a) [...]

(7) Fair competition between air carriers should preferably be addressed in the context of air transport or air services agreements with third countries. However, most air transport or air services agreements concluded between the Union or its Member States or both, on the one hand, and third countries on the other do not so far provide for adequate rules for fair competition. Efforts should therefore be strengthened to negotiate the inclusion of fair competition clauses in existing and future air transport or air services agreements with third countries.

(7a) [...]

(7b) [...]

(7c) [...]

(8) Fair competition between air carriers can also be ensured through appropriate Union legislation such as Council Regulation (EEC) No 95/93³ and Council Directive 96/97/EC⁴. Insofar as fair competition supposes protection of Union air carriers from certain practices adopted by third countries or third country carriers, this issue was previously addressed in Regulation (EC) No 868/2004 of the European Parliament and of the Council⁵. However, Regulation (EC) No 868/2004 proved to be ineffective, in respect of its underlying general aim of fair competition. This is particularly the case in respect of some of its rules pertaining to the definition of the practices concerned, other than subsidisation, and to the requirements regarding the initiation and conduct of investigations. In addition, Regulation (EC) No 868/2004 has failed to provide complementarity with air transport or air services agreements to which the Union is a party. Given the number and importance of the amendments that would be necessary to address these issues, it is appropriate to replace Regulation (EC) No 868/2004 by a new act.

(8bis) (*moved to 9ter*)

³ Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p.1).

⁴ Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports (OJ L 272, 25.10.1996, p.36).

⁵ Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 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 (OJ L 162, 30.04.2004, p.1).

(9) The competitiveness of the Union aviation sector depends on the competitiveness of each part of the aviation value chain and it can only be maintained through a complementary set of policies. The Union should engage in constructive dialogue with third countries to find a basis for fair competition. In this respect, effective, proportionate and dissuasive legislation remains necessary in order to maintain conditions conducive to a high level of Union connectivity and to ensure fair competition with third countries air carriers. To that end, the Commission should be entrusted with the power to conduct an investigation and to take measures where necessary. Such measures should be available where practices distorting competition cause injury to Union air carriers.

(9bis) During the investigation the Commission should give consideration to the practices distorting competition in the relevant context. Given the variety of possible practices, in some cases the practice and its effects could be limited to air transport activities of a city-pair route, while in other cases it could be relevant to consider the practice and its effects on the wider air transport network.

(9ter) The discrimination might include situations where a Union air carrier is subject to differential treatment without objective justification, in particular differential treatment concerning the prices of and access to ground handling services, airport infrastructure, air navigation services, the allocation of slots, the administrative procedures such as allocation of visas for foreign carrier's staff, the detailed arrangements for the selling and distribution of air services or any other 'doing business issues' such as burdensome customs clearance procedures, or any other unfair practice of financial or operational nature.

(10) During the investigation, the Commission might consider whether the practice distorting competition also constitutes a violation of an international air transport or air services agreements to which the Union is a party. In such a case, the Commission might consider that the practice distorting competition, which also constitutes a violation of an international air transport or air services agreement to which the Union is a party, would be more appropriately addressed through the application of the rules and procedures established by that agreement. In such a case, the Commission should be entitled to suspend the investigation initiated under this Regulation. Where the application of the rules and procedures established by the international air transport or air services agreement to which the Union is a party fail to sufficiently remedy the situation, it should be possible for the Commission to resume the investigation.

- (10a) Findings acquired during the application of rules and procedures under an international air transport or an air services agreement to which the Union or a Member State is a party should be taken into account.
- (11) In order for the Commission to be adequately informed about possible elements justifying the initiation of an investigation, any Member State, Union air carrier or association of Union air carriers should be entitled to lodge a complaint, which should be addressed within a reasonable time.
- (11a) In the interest of an effective Regulation, it is essential that the Commission is able to initiate proceedings on the basis of a complaint presenting prima facie evidence of a threat of injury.
- (12) It is important to ensure that the investigation can extend to the widest possible range of pertinent elements. To this effect, the Commission should be enabled to carry out investigations in third countries, subject to the consent of the third country entities concerned and in the absence of the objection of those third countries. For the same reasons and to the same end, Member States should be obliged to support the Commission to the best of their abilities. The Commission should conclude the investigation on the basis of best available evidence.
- (13) Aviation agreements and this Regulation should facilitate dialogue with the third country concerned in order to efficiently resolve disputes and restore fair competition. Where the investigation conducted by the Commission concerns operations covered by an air transport or air services agreement with a third country to which the Union is not a party, it should be ensured that the Commission acts with full knowledge of any proceedings intended or conducted by the Member State concerned under such agreement and pertaining to the situation subject to the Commission's investigation. Member States should therefore be obliged to keep the Commission informed accordingly. In that case, all Member States concerned should have the right to notify the Commission of their intention to address the practice distorting competition exclusively under the dispute settlement mechanisms contained in their air transport or air services agreements with a third country to which the Union is not a party. If all Member States concerned notify the Commission and no objection has been raised, the Commission should temporarily suspend its investigation.

- (13a) If the Member States concerned intend to address the practice distorting competition exclusively under the dispute settlement procedures applicable under the air transport agreements, air services agreements or any other agreement which contains provisions on air transport services that they have concluded with the third country concerned in order to fulfil their obligations under these agreements, the Member States should endeavour to proceed expeditiously with the bilateral dispute settlement procedures and they should fully inform the Commission. Where the practice distorting competition persists and the Commission resumes the investigation, the findings acquired during the application of such an air transport or air services agreement should be taken into account in order to ensure that fair competition is restored as soon as possible.
- (14) It is necessary to lay down the conditions under which proceedings should be concluded, with or without the imposition of redressive measures.
- (15) Proceedings should be concluded without redressive measures under this Regulation where the adoption of the latter would be against the Union interest, giving special consideration to their impact on other persons, notably consumers or undertakings in the Union, as well as on high levels of connectivity throughout the Union. When assessing the Union interest, special attention should be given to the situation of Member States who rely exclusively or significantly on air transport for their connectivity with the rest of the world and consistency with other Union policy areas should be ensured. Proceedings should also be concluded without measures where the requirements for such measures are not, or no longer met.
- (15a) When determining whether it is in the interest of the Union to call for the adoption of redressive measures, the Commission should take into account the views of all interested parties. In order to organise consultations with all interested parties and to give them the opportunity to be heard, time limits for providing information or for requesting a hearing should be specified in the notice of initiation of the investigation. Interested parties should be aware of the conditions of disclosure for the information they provide and should be entitled to respond to other parties' comments.
- (16) [...]

- (17) Findings in respect of injury or threat of injury to the Union air carrier(s) concerned should reflect a realistic assessment of the situation and should therefore be based on all relevant factors, in particular pertaining to the situation of those carrier(s) and to the general situation of the affected air transport market.
- (18) For reasons of administrative efficiency and in view of a possible termination without measures, it should be possible to suspend the proceedings where the third country or third country entity concerned has taken decisive steps to eliminate the relevant practice distorting competition or the ensuing injury or threat of injury.
- (19) Redressive measures in respect of practices distorting competition are aimed at offsetting the injury that occurs due to those practices. They should therefore take the form of financial duties or of other measures which, representing a measurable pecuniary value, are capable of achieving the same effect. In order to comply with the principle of proportionality, measures of any kind should be confined to what is necessary to offset the injury identified. The redressive measure should have regard to the proper functioning of the Union air market and should not result in an undue advantage being given to any air carrier or group of air carriers.
- (19a) [...]
- (19b) Redressive measures should not consist of suspension or limitation of traffic rights which are granted by a Member State to a third country.
- (20) In line with the same principle of proportionality, redressive measures in respect of practices distorting competition should remain in force only as long as, and to the extent that, it is necessary in view of such practice and the ensuing injury. Consequently, a review should be provided for where circumstances so warrant.
- (21) Situations investigated under this Regulation and their potential impact on Member States might differ according to the circumstances. It should therefore be possible to apply redressive measures, depending on the case, to one or more third country air carriers, to a specific geographical area or a specific period of time, or to set a date in the future from which they are to apply.

- (22) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council⁶.
- (22a) The Commission should inform the European Parliament and the Council of the implementation of this Regulation on a regular basis. This report should include information about the application of redressive measures, the termination of investigations without redressive measures, reviews and cooperation with Member States, interested parties and third countries. This report should be drafted and treated with the appropriate level of confidentiality.
- (23) Since the objective of this Regulation, namely the efficient protection, equal for all Union carriers and based on uniform criteria and procedures, against injury or threat of injury to one or more Union air carriers caused by practices distorting competition, adopted by third countries or third country entities cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives. This Regulation does not aim to impose any standards on third country air carriers, for instance with regards to Subsidies, by introducing more restrictive obligations than those applying to Union carriers.
- (23a) [...]
- (24) Since this Regulation replaces Regulation (EC) No 868/2004, that Regulation should therefore be repealed,

HAVE ADOPTED THIS REGULATION:

⁶ Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

CHAPTER I GENERAL PROVISIONS

Article 1

Subject matter

1. This Regulation lays down rules on the conduct of investigations by the Commission and on the adoption of redressive measures, relating to practices distorting competition between Union air carriers and third country air carriers and causing or threatening to cause injury to Union air carriers.
 - 1a. [...]
2. This Regulation applies without prejudice to Article 12 of Regulation (EEC) No 95/93 and Article 20 of Directive 96/67/EC.

Article 2

Definitions

For the purposes of this Regulation, the following definitions apply:

- (a) 'air carrier' means an air carrier as defined in Regulation (EC) No 1008/2008 of the European Parliament and of the Council⁷;
- (b) 'air transport service' means a flight or a series of flights carrying passengers, cargo or mail for remuneration or hire;
- (c) [...]
- (d) 'interested party' means any natural or legal person or any official body, whether or not it has its own legal personality, that is likely to have a significant interest in the result of proceedings, including but not limited to air carriers;

⁷ 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).

- (da) 'Member State(s) concerned' means the Member State(s):
- (i) which granted the operating licence to the Union air carrier(s) concerned pursuant to Regulation (EC) No 1008/2008; or
 - (ii) under whose air transport agreement, air services agreement or any agreement containing provisions on air transport services with the third country concerned, the Union air carrier(s) concerned operate(s);
- (e) 'third country entity' means any natural or legal person, whether profit-making or not, or any official body whether or not it has its own legal personality, which is under the jurisdiction of a third country, whether controlled by a third country government or not, and is directly or indirectly involved in air transport services or related services or in providing infrastructure or services used to provide air transport services or related services;
- (f) 'practices distorting competition' means discrimination and subsidies;
- (fa) 'threat of injury' means a threat for which development into injury is clearly foreseeable, imminent and very likely, and which can be attributed beyond reasonable doubt to an action or decision by a third country or a third country entity.
- (fb) [...]
- (g) 'discrimination' means differentiation of any kind without objective justification in respect of the supply of goods or services, including public services, employed for the operation of air transport services, or in respect of their treatment by public authorities relevant to such services (including practices relating to air navigation or airport facilities and services, fuel, ground handling, security, computer reservation systems, slot allocation, charges, and the use of other facilities or services employed for the operation of air transport services);
- (h) 'subsidy' means a financial contribution:
- (i) granted by a government or other public organisation of a third country in any of the following forms:

- (1) a practice of a government or other public organisation involving a direct transfer of funds, potential direct transfer of funds or liabilities (such as grants, loans, equity infusion, loan guarantees, setting-off of operational losses, or compensation for financial burdens imposed by public authorities);
 - (2) revenue of a government or other public organisation that is otherwise due is foregone or not collected (such as preferential tax treatment or fiscal incentives such as tax credits);
 - (3) a government or other public organisation, including publicly controlled undertakings, provides goods or services, or purchases goods or services;
 - (4) a government or other public organisation makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the type of functions referred to in points (1), (2) and (3) which would normally be vested in the government and, in practice, in no real sense differs from practices normally followed by governments;
- (ii) conferring a benefit;
- (iii) limited, in law or in fact, to an entity or industry or group of entities or industries within the jurisdiction of the granting authority;
- (i) ‘Union air carrier’ means an air carrier with a valid operating licence granted by a Member State in accordance with Regulation (EC) No 1008/2008.
- (i ter) ‘Union air carrier concerned’ means the air carrier which is allegedly subject to an injury or a threat of injury pursuant to Article 3(1)b.

Article 2a

Union Interest

1. A determination of the Union interest for the purpose of Article 12(2)(b) shall be made by the Commission based on an appreciation of all the various interests, which are relevant in the particular situation and taken as a whole. When determining the Union interest, priority shall be given to the need to protect consumer interests and to maintain a high level of connectivity for passengers and for the Union. In the context of the whole aviation chain, the Commission may also take into account the relevant social factors. The need to eliminate the practice distorting competition, to restore effective and fair competition, and to avoid any distortion to the internal market shall be considered.
2. The Union interest shall be determined on the basis of an economic analysis by the Commission. The Commission shall base its analysis on information collected from the interested parties. In its determination, it shall also seek any other relevant-information it deems necessary and shall take into consideration notably the factors set out in Article 11(1) This information shall be taken into account only where it is supported by actual evidence which substantiates its validity.
3. A determination of the Union interest for the purpose of Article 12(2)(b) shall only be made where all interested parties have been given the opportunity to make themselves known, to present their views in writing, to submit information to the Commission or to apply to be heard by the Commission, in accordance with and in the time limits specified in Article 3(7)(b). Requests for a hearing shall outline the reasons pertaining to the Union interest for which the parties should be heard.
4. The interested parties referred to in paragraphs 2 and 3 may request that the facts and considerations on which decisions are likely to be taken be made available to them. Such information shall be made available to the extent possible and in accordance with Article 6, and without prejudice to any subsequent decision taken by the Commission.
5. [...]
6. The economic analysis referred to in paragraph 2 shall be transmitted to the Council and to the European Parliament for information.

CHAPTER II
COMMON PROVISIONS REGARDING PROCEEDINGS

Article 3

Initiation of proceedings

1. An investigation shall be initiated following a written complaint submitted by a Member State, one or more Union air carriers or an association of Union air carriers or on the Commission's own initiative, if there is prima facie evidence of the existence of all the following circumstances:
 - (i) a practice distorting competition, adopted by a third country or a third country entity;
 - (ii) injury or threat of injury to one or more Union air carriers;
 - (iii) a causal link between the alleged practice and the alleged injury or threat of injury.
2. [...]
- 2a. When receiving a complaint pursuant to paragraph 1, the Commission shall inform all Member States.
3. The Commission shall examine the accuracy and adequacy of the elements provided in the complaint or at the disposal of the Commission in a timely manner, in order to determine whether there is sufficient evidence to justify the initiation of an investigation in accordance with paragraph 1.
4. The Commission shall decide not to initiate an investigation where the facts put forward in the complaint neither raise a systemic issue, nor have a significant impact on one or more Union air carriers;

- 4a. The Commission shall inform the complainant and all Member States where it has decided not to initiate an investigation. This information shall contain the reasons for the decision. This information shall also be transmitted to the European Parliament, in accordance with Article 15b.
5. Where the evidence presented is insufficient for the purposes of paragraph 1, the Commission shall inform the complainant about the insufficiency within 60 days of the date on which the complaint was lodged. The complainant shall be given 45 days to provide additional evidence. Where the complainant fails to do so within that time limit, the Commission may decide not to initiate the investigation.
6. Subject to paragraphs 4 and 5, the Commission shall decide on the initiation of an investigation in accordance with paragraph 1 within a maximum period of five months of the lodging of the complaint.
7. Subject to paragraph 4, when the Commission considers that there is sufficient evidence to justify initiating an investigation, the Commission shall take the following steps:
 - (a) initiate the proceedings and notify the Member States and the European Parliament thereof;
 - (b) publish a notice in the *Official Journal of the European Union*; the notice shall announce the initiation of the investigation, indicate the scope of the investigation, the third country or third country entity which has allegedly been engaged in practices distorting competition and the alleged injury or threat of injury, the Union air carrier(s) concerned, and state the period within which interested parties may make themselves known, present their views in writing, submit information or may apply to be heard by the Commission. That period shall not be shorter than 30 days.
 - (c) officially notify the representatives of the third country and third country entity concerned of the initiation of the investigation;
 - (d) inform the complainant and the Committee provided for under Article 15 of the initiation of the investigation.

8. Where the complaint is withdrawn prior to the initiation of the investigation, the complaint is considered not to have been lodged. This is without prejudice to the right of the Commission to proceed to the initiation of an investigation on its own initiative in accordance with paragraph 1.

Article 4

The investigation

1. Following the initiation of proceedings, the Commission shall begin an investigation.
2. The investigation shall aim to determine:
 - (a) [...]
 - (b) whether a practice distorting competition, adopted by a third country or a third country entity, has caused injury or threat of injury to the Union air carrier(s) concerned.
- 2a. If during the course of the investigation, the Commission gathers evidence as to whether the cases referred to in paragraph 2 might lead to a negative impact on air connectivity of a particular region, of a Member State or a group of Member States, and thus to passengers, this evidence shall be taken into account in the determination of the Union Interest as referred to in Article 2a.
3. The Commission shall seek all the information it deems necessary to conduct the investigation and verify the accuracy of the information it has received or collected with the Union air carrier(s) concerned, or with the third country, an interested party, or the third country entity concerned.
- 3a. Where the information submitted pursuant to paragraph 3 is incomplete, it shall be taken into account provided that it is neither false nor misleading.
- 3b. If evidence or information is not accepted, the supplying party shall be informed immediately of the reasons thereof and shall be granted an opportunity to provide further explanations within the specified time limit.

4. The Commission may request Member State(s) concerned to support it in the investigation. Upon request, Member States concerned shall take the necessary steps to support the Commission in the investigation by supplying relevant and available information. Upon request, any Member State shall endeavour to contribute to relevant verification and analyses.
5. If it appears necessary, the Commission may carry out investigations in the territory of a third country, provided that the third country entity concerned has given its consent and the government of the third country has been officially notified and has not raised any objection.
6. Parties which have made themselves known within the time limits set out in the notice of initiation, shall be heard if they have made a request for a hearing showing that they are an interested party.
7. Complainants, interested parties, the Member State(s) and the representatives of the third country or third country entity concerned may consult all information made available to the Commission, except for internal documents that are for the use of the Commission and the administrations of the Union and of the Member States(s) concerned, provided that such information is not confidential within the meaning of Article 6 and provided that it has addressed a request in writing to the Commission.

Article 4a

Suspension

1. The Commission may suspend the investigation, if it appears more appropriate to address the practice distorting competition exclusively under the dispute settlement procedures established by an applicable air transport or air services agreements to which the Union is a party or to any other agreement which contains provisions on the air transport services to which the Union is a party. The Commission shall notify the Member States of the suspension of the investigation.

The Commission may resume the investigation in any of the following cases:

- (a) the procedure conducted under the applicable air transport or air services agreement has led to a finding of an infringement by the other party or parties to the agreement and which has become final and binding upon such other parties or parties, but corrective action has not been taken promptly, or within the period fixed as a result of the relevant procedures;
- (b) [...]
- (c) the practice distorting competition has not been eliminated within 12 months as from the date of suspension of the investigation.

2. The Commission shall suspend the investigation, if within 15 days as from the date of the notification of the initiation of the investigation:

- (a) all the Member State(s) concerned referred to in Article 2(1)(da)(ii) have notified the Commission of their intention to address the practice distorting competition exclusively under the procedures for dispute settlement applicable under the air transport, air services agreements or any other agreement which contains provisions on air transport services that they have concluded with the third country concerned, and
- (b) none of the Member State(s) concerned referred to in Article 2(1)(da)(i) has objected.

In such cases, Articles 5(3) and 5(4) shall apply.

3. The Commission may resume the investigation in any of the following cases:

- (a) the Member State(s) concerned referred to in Article 2(1)(da)(ii) have not initiated the dispute settlement procedure under the relevant international agreement within 3 months from the date of the notification set out;
- (b) the Member State(s) concerned referred to in Article 2(1)(da)(ii) notify the Commission that the outcome of the dispute settlement procedures referred to in paragraph 2 has not been enforced correctly and expeditiously;

- (c) all the Member State(s) concerned referred to in Article 2(1)(da) ask the Commission to resume the investigation;
- (d) the Commission comes to the conclusion that the practice distorting competition has not been eliminated within 12 months as from the date of the notification by the Member State(s) concerned as referred to in paragraph 2;
- (e) in the cases of urgency foreseen in Article 9(2), if the practice distorting competition has not been eliminated within nine months as from the date of notification by the Member State(s) concerned referred to in Article 2(1)(da)(ii). At the request of a Member State, that period may be prolonged by the Commission in duly justified cases by a maximum of three months.

Article 5

**Cooperation with the Member States in respect of proceedings relevant to cases falling under
Chapter IV**

1. [...]
2. [...]
3. The Member State concerned shall inform the Commission of all relevant meetings scheduled in the framework of the air transport or air services agreement or any provision on air transport services included in any other agreement with the third country concerned to discuss the issue covered by the investigation. The Member State concerned shall provide the Commission with the agenda and all relevant information permitting an understanding of the topics to be discussed at those meetings.
4. The Member State concerned shall keep the Commission informed of the conduct of any procedure as referred to in paragraph 2 and shall, where appropriate, invite the Commission to attend those procedures. The Commission may request further information from the Member State concerned.

Article 6

Confidentiality

1. Any information which is by nature confidential, including but not limited to information the disclosure of which would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom the person supplying the information has acquired the information, or which is provided on a confidential basis by parties to an investigation shall, if good cause is shown, be treated as such by the Commission.
2. Interested parties providing confidential information shall be required to provide non-confidential summaries thereof. Those summaries shall be sufficiently detailed as to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, the interested parties may indicate that the confidential information cannot be summarised. In such exceptional circumstances, a statement of the reasons why summarisation is not possible shall be provided.
3. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested. This paragraph shall not preclude the use of information received in the context of one investigation for the purpose of initiating another investigation in accordance with this Regulation.
4. The Commission and the Member States, including the officials of either, shall not reveal any information of a confidential nature received pursuant to this Regulation, or any information provided on a confidential basis by a party to an investigation, without specific permission from the party submitting such information. Exchanges of information between the Commission and Member States, or any internal document prepared by the authorities of the Union or the Member States, shall not be divulged except where specifically provided for in this Regulation.
5. Where it appears that a request for confidentiality is not warranted and if the supplier is unwilling either to make the information public or to authorise its disclosure in generalised or summary form, the information concerned may be disregarded.

6. This Article shall not preclude the disclosure of general information by the Union authorities and in particular the disclosure of the reasons on which decisions taken pursuant to this Regulation are based or the disclosure of the evidence relied on by the Union authorities in so far as is necessary to explain those reasons in court proceedings. Such disclosure shall take into account the legitimate interest of the parties concerned that their business or government secrets shall not be divulged.
- 6a. Member States shall take any necessary and appropriate measures intended to ensure the confidentiality of the information relevant to the application of this Regulation and compatible with its terms.

Article 7

Basis of findings in case of non-cooperation

1. In cases where access to the necessary information is refused or is otherwise not provided within the time limits provided for in this Regulation, or where the investigation is significantly impeded, provisional or final findings, affirmative or negative, may be made on the basis of the facts and evidence available. Where the Commission finds that false or misleading information has been submitted, such information shall be disregarded.
2. [...]
3. [...]

Article 8

Disclosure

1. The third country, the third country entity and the third country air carrier concerned, as well as the complainant, the interested parties, the Member States and the Union air carrier(s) concerned shall receive disclosure of the essential facts and considerations on the basis of which it is intended to adopt redressive measures, or to terminate proceedings without adopting redressive measures, no later than one month before the Committee referred to in Article 15 is convened in accordance with Article 12(2) or 13(1).

2. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission. Where the Commission intends to base such a decision on any additional or different facts and considerations, they shall be disclosed as soon as possible.
3. Additional information provided after disclosure shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 14 days, due consideration being given to the urgency of the matter. A shorter period may be set whenever an additional final disclosure has to be made.

Article 9

Duration of proceedings and suspension

1. The proceedings shall be concluded within 20 months. That period may be prolonged in duly justified cases.
 - 1a. The investigation shall be concluded within twelve months. That period may be prolonged in duly justified cases. In the case of a suspension of the investigation as set out in Articles 4a and 9(3), that period of suspension shall not be counted within the duration of the investigation. Where the period for the investigation is prolonged, the duration of the prolongation shall be added to the total duration of the proceedings as defined in paragraph 1.
2. In the case of urgency, that is in situations where following clear evidence submitted by the complainant or the interested parties, the injury to Union air carrier(s) may be irreversible, the proceedings may be shortened to nine months.
3. The Commission shall suspend the proceedings where the third country or the third country entity concerned has taken decisive steps to eliminate:
 - (a) [...]
 - (b) in case of practice distorting competition, either that practice or the injury or threat of injury to the Union air carrier(s) concerned.
4. In the cases referred to in paragraph 3, the Commission shall resume the proceedings if the practice distorting competition, threat of injury or the injury to the Union air carrier(s) concerned has not been eliminated following a reasonable period of time, but no longer than six months.

CHAPTER III
VIOLATION OF APPLICABLE INTERNATIONAL OBLIGATIONS

Article 10

Conclusion of proceedings

[...]

CHAPTER IV
PRACTICES DISTORTING COMPETITION

Article 11

Determination of injury

1. A finding of injury for the purposes of this Chapter shall be based on evidence and shall take account of the relevant factors, in particular: the situation of the Union air carrier(s) concerned, notably in terms of aspects such as frequency of services, utilisation of capacity, network effect, sales, market share, profits, return on capital, investment and employment;
 - (a) the situation of the Union air carrier(s) concerned, notably in terms of aspects such as frequency of services, utilisation of capacity, network effect, sales, market share, profits, return on capital, investment and employment;
 - (b) the general situation on the affected air transport services market(s), notably in terms of level of fares or rates, capacity and frequency of air transport services or use of the network.
- 2a. A determination of a threat of injury shall be based on clear evidence and not merely on allegation, conjecture or remote possibility. The development into injury must be clearly foreseeable, imminent, very likely and can be attributed beyond any reasonable doubt to an action or decision by a third country or a third country entity.
2. In making a determination regarding the existence of a threat of injury, consideration shall be given to factors such as:

- (a) the foreseeable evolution of the situation of the Union air carrier(s) concerned notably in terms of frequency of services, utilisation of capacity, network effect, sales, market share, profits, return on capital, investment and employment;
- (b) the foreseeable evolution of the general situation of the potentially affected air transport services market(s), notably in terms of level of fares or rates, capacity and frequency of air transport services or use of the network;

None of the factors listed in points (a) and (b), by themselves, can necessarily give decisive guidance, but the totality of the factors considered shall be such as to lead to the conclusion that further practice distorting competition is imminent and that, unless action is taken, injury will occur.

- 2. The Commission shall select an investigation period which includes but is not limited to the period during which the injury has allegedly taken place and analyse the relevant evidence over that period.
- 3. Where the injury or threat of injury to the Union air carrier(s) concerned is caused by factors other than the practice distorting competition, they shall not be attributed to the practice under scrutiny and shall be disregarded.

Article 12

Termination of proceedings without redressive measures

- 1. The Commission shall terminate the investigation without redressive measures being adopted where the complaint is withdrawn, unless the Commission continues the investigation on its own initiative.
- 2. The Commission shall, by means of implementing acts, terminate the investigation conducted in accordance with Article 4 without adopting redressive measures where:
 - (a) the Commission concludes that either of the following is not established:
 - (i) the existence of a practice distorting competition, adopted by a third country or a third country entity;
 - (ii) the existence of injury or threat of injury to the Union air carrier(s) concerned;

- (iii) the existence of a causal link between the injury or threat of injury and the practice considered;
- (b) the Commission concludes that adopting redressive measures in accordance with Article 13 would be against Union interest;
- (c) the third country or third country entity concerned has eliminated the practice affecting competition;
- (d) the third country or third country entity concerned has eliminated the injury or threat of injury to the Union air carrier(s) concerned.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).

3. The decision to terminate the investigation in accordance with paragraph 2 shall be accompanied by a statement of the reasons thereof and shall be published in the *Official Journal of the European Union*.

Article 13

Redressive measures

1. Without prejudice to Article 12, the Commission shall, by means of implementing acts, adopt redressive measures if the investigation conducted under Article 4 determines that a practice distorting competition, adopted by a third country or a third country entity, has caused injury to the Union air carrier(s) concerned.
 - 1a. Without prejudice to Article 12, the Commission may, by means of implementing acts, adopt redressive measures if the investigation conducted under Article 4 determines that a practice distorting competition, adopted by a third country or a third country entity, causes a threat of injury, within the meaning of Article 11 paragraph 2, to the Union air carriers concerned. These redressive measures shall not enter into force before the threat of injury has developed into actual injury.

The implementing acts referred to in Article 13(2)(a) shall be adopted in accordance with the examination procedure referred to in Article 15(2).

The implementing acts referred to in Article 13(2)(b) shall be adopted in accordance with the examination procedure referred to in Article 15(2) and (2a).

1b. [...]

2. The redressive measures referred to in paragraphs 1 and 1a shall be imposed on the third country air carriers(s) benefiting from the practice distorting competition and may take the form of either of the following:
 - (a) financial duties;
 - (b) any operational measure of equivalent or lesser value, such as the suspension of concessions, of services owed or of other rights of the third country air carrier. Priority shall be given to reciprocal operational measures, provided that they are not contrary to the Union interest, or incompatible with Union law, or international obligations;
3. The redressive measures referred to in paragraphs 1 and 1a shall not exceed what is necessary to offset the injury to the Union air carrier(s) concerned. To this end, those redressive measures may be limited to a specific geographic area or may be limited in time.
- 3(b) The redressive measures shall not consist of suspension or limitation of traffic rights granted by a Member State to a third country under an air transport, an air service agreement or any provision on air transport services included in any other agreement concluded with that third country.
4. The redressive measures referred to in paragraphs 1 and 1a shall not lead the Union or the Member State(s) concerned to violating air transport, air services agreements or any provision on air transport services included in a trade agreement concluded with the third country concerned.

- 4a. [...]
- 4b. [...]
5. The decision to conclude the investigation with the adoption of redressive measures referred to in paragraphs 1 and 1a shall be accompanied by a statement of the reasons thereof and shall be published in the *Official Journal of the European Union*.

Article 14

Review of redressive measures

1. The redressive measures referred to in Article 13 shall remain in force only as long as, and to the extent that, it is necessary in view of, the persistence of the practice distorting competition and the ensuing injury. To that end, the review procedure set out in paragraphs 2, 3 and 4 of this Article shall apply. The Commission shall regularly provide a written report to the European Parliament and to the Council on the effectiveness and impact of redressive measures.
 2. Where circumstances so warrant, the need for the continued imposition of redressive measures in their initial form may be reviewed, either on the initiative of the Commission or of the complainant or upon a reasoned request by the Member State(s) concerned, the third country or the third country entity concerned.
 3. In the course of its review, the Commission shall assess the continued existence of the practice distorting competition, of the injury and of the causal link between the practice and the injury.
 4. The Commission shall, by means of implementing acts, repeal, amend or maintain, as appropriate, the redressive measures set out in Article 13. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).
- 4a. [...]

CHAPTER V
FINAL PROVISIONS

Article 15

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
- 2a. Where the Committee delivers no opinion, the Commission shall not adopt the draft implementing act and the third subparagraph of Article 5(4) of Regulation (EU) No 182/2011 shall apply.

Article 15a

Exercise of the delegation

[...]

Article 15b

Report and information

1. On a regular basis, the Commission shall report to the European Parliament and to the Council on the application and implementation of this Regulation. With due regard to the protection of confidential information within the meaning of Article 6, the report shall include information about the application of the redressive measures, the termination of investigations without redressive measures, reviews and cooperation with Member States, interested parties and third countries.
2. The European Parliament and the Council may invite the Commission to present and explain any issues related to the application of this Regulation.

Article 16

Repeal

Regulation (EC) No 868/2004 is repealed. References to the repealed Regulation shall be construed as references to this Regulation.

Article 17

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.
