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WORKING DOCUMENT

From:	General Secretariat of the Council
To:	Working Party on Aviation
N° prev. doc.:	ST 6118/1/18 REV 1 AVIATION 26 CODEC 187 ST 12810/3/17 REV 3 AVIATION 124 CODEC 1502
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 - Comments from Member States

With a view to the Aviation Working Party on 19 March 2018, delegations will find, attached, comments from MT concerning the Presidency compromise text on the above-mentioned proposal.

MALTA COMMENTS

Based on ST-6118-2018-REV-1.docx

Article 2

Definitions

(i bis) 'Member State concerned' means

- a) the Member State(s) which granted the operating licence to the Union air carrier(s) concerned pursuant to Regulation (EC) No 1008/2008;
- b) [...];
- c) the Member State(s) under whose air transport, air services agreement or any ~~trade~~ agreement containing provisions on air transport services with the contracting third country, the Union air carrier (s) concerned operate(s);
- d) [...] ¹.

Justification: Malta can be removed from the footnote

Article 4

The investigation

- 7a. The Commission shall terminate the ~~investigation without adopting redressive measures~~ in accordance with Article 12, where it comes to the conclusion that the practice distorting competition has been eliminated.

Justification: Since we are proposing that the Council would be adopting the redressive measures, the CION would not be able to adopt redressive measures in any case.

¹ EE, MT would like to reinstate this point, linked to the potential loss of connectivity for other Member States.

Chapter III
VIOLATION OF APPLICABLE INTERNATIONAL OBLIGATIONS

Article 10

Conclusion of proceedings

- O bis. Where the act containing the applicable international obligations requires the prior discharge of an international procedure for consultation or for the settlement of disputes, that procedure shall be discharged before the Commission² adopts redressive measures in accordance with paragraph 3. The decision taken in accordance with paragraph 3 shall be taken only where the results of international procedure for consultation or for the settlement of disputes were in favour of the Union and not enforced.
1. Where the complaint is withdrawn and unless the Commission continues the investigation on its own initiative, the Commission shall terminate the investigation conducted under Article 4 ~~without adopting redressive measures~~.
 2. The Commission shall, by means of implementing acts, terminate the investigation conducted under Article 4 ~~without adopting redressive measures~~ in any of the following cases:

Justification: Since we are proposing that the Council would be adopting the redressive measures, the CION would not be able to adopt redressive measures in any case.

² CZ, DK, EL, FI, IE, LV, HU, SK, PL, PT propose that the redressive measures should be adopted by means of a Council Decision. AT, BE, DE, FR, HR, IT, NL, RO, SI support adoption by means of an implementing act proposed by the Commission. ES is flexible on this issue.

Article 10

Conclusion of proceedings

3. Without prejudice to the relevant provisions of the Treaty on the Functioning of the European Union and subject to paragraphs 1 and 2, on the basis of a proposal from the Commission, the Council shall ~~by means of implementing acts~~ adopt redressive measures if the investigation determines that the applicable international obligations have been violated.

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

- 3a. The redressive measures referred to in paragraph 3 shall be imposed on the third country air carriers(s) that violated the applicable international obligations and may take the form of either of the following:

- (a) financial duties;
- (b) any measure of equivalent or lesser value, such as suspension of concessions of services owed or of other rights of the third country air carrier.

- (2) 3b. The redressive measures referred to in paragraph 3 shall not exceed what is necessary to offset the injury to the Union air carrier(s) concerned.

Justification: The same rules should apply for this as do for the redressive measures under Article 13.

- (3) 3c. The redressive measures pursuant to paragraph 3a(b) shall neither consist of suspension or limitation of traffic rights granted through an international air transport or air services agreement to which the Union is a party or any provision on air transport services included in a trade agreement to which the Union is a party nor slots.

Justification: The same rules should apply for this as do for the redressive measures under Article 13. Another possible option would be to specify in an exhaustive way, what measures may be used, rather than specifying those which cannot be used.

5. The redressive measures referred to in paragraph 3 shall be the measures provided for by the act containing the applicable international obligations or available under relevant rules and principles of public international law

Justification: This would need to be deleted as the it is now covered by paragraphs 3a, 3b and 3c.

CHAPTER IV

PRACTICES DISTORTING COMPETITION

Article 11

Determination of injury

2. [A determination of a threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which could create a situation in which the practice distorting competition would cause injury must have been clearly foreseen and must be imminent³.]

In making a determination regarding the existence of a threat of injury, consideration shall be given to factors such as:

- 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;
- the foreseeable evolution of the general situation of the potentially distorting 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 above by itself 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.]

2a — Where the 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.

3. The Commission shall select an investigation period during which the injury or [the threat of injury] has allegedly taken place and analyse the relevant evidence over that period.

Justification: This should be deleted as it relates solely to the “threat of injury”. Therefore, with the deletion of the “threat of injury”, these paragraphs would not be needed.

Article 12

Termination of proceedings ⁴without redressive measures

1. Unless the Commission continues the investigation on its own initiative, the Commission shall terminate the investigation without adopting redressive measures where the complaint is withdrawn.
2. The Commission shall, by means of implementing acts, terminate the investigation conducted in accordance with Article 4 without adopting redressive measures where:

Justification: Since we are proposing that the Council would be adopting the redressive measures, the CION would not be able to adopt redressive measures in any case.

Article 13

Redressive measures

- 3(bis) The redressive measures pursuant to paragraph 2(b) shall not neither consist of suspension or limitation of traffic rights⁵ 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 nor slots.

Justification: to clarify that redressive measures cannot take the form of matters where Member State competence applies.

⁴ FI, LV, MT, PT, SK propose to delete the rest of the title. PCY draws attention to the fact that there proceedings may also be terminated WITH redressive measures as is Article 13, so it would be worth keeping the wording as it stands.

⁵ FI and MT propose to also exclude slots as a possible redressive measure.

CHAPTER IV bis

REVIEW

Article 14

Review of redressive measures

1. The redressive measures referred to in Articles **10 and** 13 shall remain in force only as long as, and to the extent that, it is necessary in view of, the persistence of the **violation of the applicable international obligation and the** practice distorting competition and the ensuing injury **or threat of injury**. To this end, the review procedure set out in paragraphs 2, 3 and 4 shall apply. The Commission shall regularly provide a written report to the Council on the effectiveness and impact of redressive measures.

Justification – Adding of chapter title and in article since at the moment the review occurs only for redressive measures applied under Chapter IV (bilateral agreements). By introducing a new chapter, we reference both Articles 10 and 13 under the review procedure. Deleted “threat of injury” as noted before.
