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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  
- Revised Presidency compromise

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**DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (25.04.2018)**

With a view to the Aviation Working Party on 16 April 2018, delegations will find attached a further revised version of a Presidency compromise proposal on the above-mentioned Regulation.

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

Changes with respect to the previous version have been marked with **bold** and ~~striketrough~~.

All delegations have a general scrutiny reservation on the latest changes proposed by the Presidency.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004**

(Text with EEA relevance)

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 Articles 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 Committee<sup>1</sup>,

Having regard to the opinion of the Committee of the Regions<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (1) Aviation plays a crucial role in Union's economy. It is a strong driver for economic growth, jobs, trade and mobility. Over the past decades, growth in air transport services significantly contributed to improving connectivity within the Union and with third countries and has been a significant enabler of Union economy at large.
- (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 between all air carriers. This would contribute to maintaining conditions conducive to a high level of Union's connectivity.
- (3) Fair competition is an important 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 "*insure that every contracting State has a fair opportunity to operate international airlines*" and to "*avoid discrimination between contracting States*".
- (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 some third countries and the Union, principles of fair competition have not yet been defined through specific multilateral rules, notably in the context of the ICAO nor of World Trade Organization ('WTO') agreements, from the scope of which air transport services have largely been excluded<sup>3</sup>.

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<sup>3</sup> Marrakech Agreement, Annex 1B General Agreement on Trade in Services (GATS), Annex on Air Transport Services.

- (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.
- (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 corresponding rules. 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.
- (8) Fair competition between air carriers can also be ensured through appropriate Union legislation such as Council Regulation (EEC) No 95/93<sup>4</sup> and Council Directive 96/97/EC<sup>5</sup>. Insofar as fair competition supposes protection of Union air carriers from certain practices adopted by third countries or third country carriers, this issue is currently addressed in Regulation (EC) No 868/2004 of the European Parliament and of the Council<sup>6</sup>. However, Regulation (EC) No 868/2004 has proven insufficiently effective, in respect of its underlying general aim of fair competition. This is notably due to certain of its rules pertaining notably 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 fails to provide for a dedicated Union internal procedure in respect of obligations contained in air transport or air services agreements to which the Union is a party and intended to ensure fair competition. 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.

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<sup>4</sup> 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).

<sup>5</sup> Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p.36).

<sup>6</sup> 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).

- (8bis) The discrimination may include situations where a Union air carrier is subject to a differentiation of treatment without objective justification, notably concerning the prices 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 modalities for the selling and distribution of air services or any other 'doing business issues' such as burdensome customs clearance procedures.
- (9) 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 either where relevant obligations under an agreement to which the Union is a party are violated, or where practices distorting competition cause or threaten to cause injury to Union air carriers.
- (9bis) During the investigation the Commission should give consideration to the practice distorting competition in the relevant context. Given the variety of possible practices, in some cases the practice and its effects may be limited to air transport activities of a city-pair route, while in other cases it may be relevant to consider the practice and its effects on the wider air transport network.
- (10) Where the Union is party to an air transport or air services agreement with a third country, the violation of international obligations enshrined therein should be addressed within the context of this agreement, in particular through the application of the fair competition clause where it exists, and, where relevant, dispute settlement.
- (11) In order for the Commission to be adequately informed about possible elements justifying the initiation of an investigation, any Member State, Union carrier or association of Union air carriers should be entitled to lodge a complaint.

- (12) It is important to ensure that the investigation can extend to the widest possible range of pertinent elements. To this effect, and subject to the consent of the third country and third country entity concerned, the Commission should be enabled to carry out investigations in 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) 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 in 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, Member States should have the possibility to ask the Commission to suspend its investigation and 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.
- (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 not be initiated or 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<sup>7</sup>. When assessing the Union interest, consistency with other Union policy areas should also be ensured. Proceedings should also be concluded without measures where the requirements for such measures are not, or no longer met.

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**DELETED**

- (16) Where applicable international obligations have been violated, any redressive measures would by nature need to be based on the act containing such obligations or on rules and principles of public international law. In order to preserve the integrity of those acts, any such measures should only be adopted following discharge of the procedures provided for therein.
- (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.
- (17a) A threat of injury may consist of situations including where a third country or a third country entity adopts measures applicable in the near future which will discriminate against Union air carriers (such as preferential airport charges), or limits in a discriminatory way the access to certain airport infrastructure or services to Union air carriers.
- (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 or is threatening to occur 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. This may include measures consisting in the suspension of concessions, of services owed or of other rights of the third country air carrier, provided that this does not lead to a violation of an air transport or air services agreement concluded with the third country concerned. In order to comply with the principle of proportionality, measures of any kind should be confined to what is necessary to offset the injury or threat of injury identified.

- (20) In line with the same principle, 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 or threat of 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 may differ according to the circumstances. Redressive measures may therefore apply, according to the case, to one or more Member States or be limited to a specific geographical area.
- (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 Council<sup>8</sup>.
- (23) Since the objective of this Regulation, namely the efficient protection, equal for all Union carriers and based on uniform criteria and procedures, against violation of applicable international obligations and 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 Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (24) Since this Regulation replaces Regulation (EC) No 868/2004, that Regulation should therefore be repealed,

HAVE ADOPTED THIS REGULATION:

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<sup>8</sup> 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 relating to violation of applicable international obligations ~~or~~ **and** to practices distorting competition between Union air carriers and third country air carriers and causing [or threatening to cause]<sup>9</sup> injury to Union air carriers.

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<sup>9</sup>

**DELETED**

1a. This Regulation also lays down rules on the adoption of redressive measures <sup>10</sup>[by the Council]<sup>11</sup>, where the applicable international obligations have been violated ~~or~~ ~~and~~ where practices distorting competition between Union air carriers and third country air carriers have caused injury to Union air carriers.

2. [...]

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**DELETED**

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According to 291 TFEU Council Decision can only occur in duly justified cases. In the C-440/14 P NIOC case the Court recalled its jurisprudence and certain yardsticks as regards reserving implementing powers for the Council (see notably pp 48-59 of the judgement):

"48 As is clear from paragraph 59 of the judgment under appeal, the Council, in order to justify the implementing power which it reserved to itself under Article 46(2) of Regulation No 267/2012, relied exclusively on the fact that the present situation is one of the 'duly justified specific cases'. It made no mention of the existence of a situation provided for in Articles 24 TEU and 26 TEU.

49 As regards the case, provided for in Article 291(2) TFEU, whereby the Council may reserve the implementing power to itself 'in duly justified specific cases', it must be recalled that the Court interpreted the third indent of Article 145 of the EEC Treaty — which corresponds to Article 291(2) TFEU — as requiring the Council to state in detail the grounds for the decision to reserve the implementing powers to itself (judgment in *Commission v Council*, 16/88, EU:C:1989:397, paragraph 10).

50 , The third indent of Article 202 EC, which replaced the third indent of Article 145 of the EC Treaty, was also the subject of interpretation in the judgments in *Commission v Council* (C-257/01, EU:C:2005:25, paragraph 51) and *Parliament v Council* (C-133/06, EU:C:2008:257, paragraph 47), in which the Court stated that the Council must properly explain, by reference to the nature and content of the basic instrument to be implemented or amended, why exception is being made to the rule that, under the system established by that treaty, when measures implementing a basic instrument need to be taken at Community level, it is the Commission which, in the normal course of events, is responsible for exercising that power."

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**DELETED**

**2a. This Regulation shall apply:**

- a) **to a violation of applicable international obligations between the Union and a third country and;**
- b) **to practices distorting competition between Union air carriers and third country air carriers.**

**2b. This Regulation applies without prejudice to Article 12 of Regulation (EEC) No 95/93 and Article 20 of Directive 96/67/EC.**

**~~This Regulation applies without prejudice to dispute settlement procedures contained in air transport or air services agreements to which the Union is a party, or concluded between a Member State and a third country, or to dispute settlement procedures contained in a trade agreement covering air transport services to which the Union is a party or concluded between a Member State and a third country.~~**

*(moved from Article 2a "Scope")*

## *Article 2*

### **Definitions**

For the purposes of this Regulation:

- (a) 'air carrier' means an air carrier as defined in Regulation (EC) No 1008/2008 of the European Parliament and of the Council<sup>13</sup>;
- (b) 'air transport service' means a flight or a series of flights carrying passengers, cargo or mail for remuneration or hire;

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<sup>13</sup> 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).

- (c) 'applicable international obligations' means any obligations that are contained in 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, and which relate to practices that may distort competition or other conduct relevant to competition between air carriers;
- (d) 'interested party' means any natural or legal person or any official body, whether or not having its own legal personality, that is likely to have a significant interest in the result of proceedings;
- (e) 'third country entity' means any natural or legal person, whether profit-making or not, or any official body with or without 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;
- (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;
- (iv) distorting competition.**
- (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 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 **agreement**, air services agreement or any agreement containing provisions on air transport services with the ~~contracting~~ third country **concerned**, the Union air carrier (s) concerned operate(s);
  - d) [...] <sup>14</sup>.
- (i ter) ‘Union air carrier concerned’ means the air carrier which is allegedly subject to an injury [or the threat of injury] pursuant to Article 3(1)b.

*Article 2a*

Scope

[...]

*(moved to Article 1)*

**Chapter II**

**COMMON PROVISIONS REGARDING PROCEEDINGS**

*Article 3*

**Initiation of proceedings**

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<sup>14</sup>

**DELETED**

1. An investigation shall be initiated following a written complaint submitted by a Member State, ~~one or more~~ a Union air carriers or an association of Union air carriers in accordance with paragraph 2, or on the Commission's own initiative, if there is prima facie<sup>15</sup> evidence of either of the following:
  - (a) violation of applicable international obligations;
  - (b) 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. A complaint shall include prima facie evidence of one of the cases referred to in paragraph 1.
- 2a. When receiving a complaint pursuant to paragraph 1, the Commission shall inform all Member States.<sup>16</sup>
3. The Commission shall examine the accuracy and adequacy of the elements provided in the complaint or at the disposal of the Commission, in order to determine whether there is sufficient evidence to justify the initiation of an investigation in accordance with paragraph 1.

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<sup>15</sup> **DELETED**

<sup>16</sup> **DELETED**

4. The Commission shall decide not to proceed to the initiation of an investigation where the adoption of measures in accordance with Articles 10 or 13 would be against the Union interest or where the Commission considers that the facts put forward in the complaint neither raise a systemic issue, nor have a significant impact on one or more Union air carriers.
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 30 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. The Commission shall decide<sup>17</sup> on the initiation of an investigation in accordance with paragraph 1 within a maximum period of 6 months of the lodging of the complaint.
- 6a. The Commission shall inform the complainant and all Member States where it has decided not to initiate the investigation. This information shall contain the reasons for the decision thereof.
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 ~~concerned~~ thereof;

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<sup>17</sup>

**DELETED**



- (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 applicable international obligations that are allegedly violated or the third country or third country entity who 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.
  - (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

- 0) [...] (*moved to paragraph 2a*)
- 1. Following the initiation of proceedings, the Commission shall begin an investigation.
- 2. The investigation shall aim to determine either of the following:
  - (a) whether the applicable international obligations have been violated;

- (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. When the investigation is initiated in respect with paragraph 2(b) thereof, the Commission <sup>18</sup>shall<sup>19</sup> suspend the investigation, if **all** the Member State(s) concerned notifies the Commission, within [15 working]<sup>20</sup> days as from the date of the notification of initiation of the investigation referred to in Article 3 paragraph 7 (a)~~2a~~, of their intention to address the practice distorting competition exclusively under the procedure for dispute settlement contained in the air transport, air services agreements or any provision on air transport services included in any other agreement that it has concluded with the third country concerned. *(former paragraph 0)*

2b. The Commission shall resume the investigation when:

- a) the Member State(s) concerned notifies the Commission that the outcome of the dispute settlement procedure referred to in paragraph 2a has not been enforced;
- b) the Member State(s) concerned has not initiated the dispute settlement procedure within 3 months from the date of the notification set out in paragraph 2a.
- c) the Member State(s) concerned asks the Commission to resume the investigation;

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**DELETED**

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**DELETED**

d) the Commission comes to the conclusion that the practice distorting competition has not been eliminated within 12<sup>21</sup> months as from the date of the notification by the Member State(s) concerned referred to in paragraph 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 or third country entity concerned.
4. The Commission may request Member State(s) concerned to support it in the investigation. ~~and Member State(s) concerned shall take the necessary steps in order to give effect to such requests.~~ **Upon request, Member States concerned shall take the necessary steps to support the Commission in the investigation by supplying relevant and available information.**
5. If it appears necessary, the Commission may carry out investigations in the territory of the third country concerned, provided that the government of the third country concerned and the third country entity concerned have been officially notified and have given their consent.
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.

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<sup>21</sup>

**DELETED**

7. Complainants, interested parties, Member States 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.
- 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.

*Article 4 bis<sup>22</sup>*

**Union Interest**

1. A determination as to whether the Union's interest calls for intervention shall be based on an appreciation of all the various interests that are relevant in the particular situation and taken as a whole, prioritising the interests of consumers and connectivity. In such an examination, the need to eliminate the practices affecting competition or the violation of applicable international obligations shall be given special consideration.

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<sup>22</sup>

**DELETED**

2. The Union's interest shall be assessed by the Commission on the basis of a questionnaire sent out to the interested parties, and on an economic analysis by the Commission. The assessment shall take into consideration notably those factors set out in Article 11(1)<sup>23</sup>. A determination pursuant to this Article in application of Articles 10 and 12 shall only be made where interested parties have been given the opportunity to make their views known pursuant to Article 4(6).
3. In determining the Union interest, the Commission shall examine the information provided by the interested parties which have made themselves known, presented their views in writing on the basis of the questionnaire referred to in paragraph 2, submitted information, or applied to be heard by the Commission in accordance with Article 3(7b).
4. The interested parties referred to in paragraph 3 may request that the fact 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. Information shall be taken into account only where it is supported by actual evidence which substantiates its validity.
6. **The economic analysis referred to in paragraph 2 shall be transmitted to the Council for consideration.**

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<sup>23</sup>

**DELETED**

*Article 5*

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

1. [...]
2. Where the Member State(s) concerned intends to resort to procedures for dispute settlement provided in an air transport or air services agreement with the third country concerned and has not notified the Commission of its intention to resort to it exclusively in accordance with Article 4(2a), that Member State shall inform the Commission without undue delay of its intention.
3. <sup>24</sup>The Member State(s) concerned referred to in paragraph 2 shall also inform the Commission of all relevant meetings scheduled in the framework of the air transport or air services agreement with the third country concerned to discuss the issue covered by the investigation. The Member State(s) 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(s) concerned shall keep the Commission informed of the conduct of any procedure as referred to in paragraph 2 and may, where appropriate, invite the Commission to attend those procedures. The Commission may request further information from the Member State(s) concerned.

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<sup>24</sup>

**DELETED**

## 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 in sufficient detail 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 provision 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.

### *Article 7*

#### **Non-cooperation**

1. In cases in which any interested party, **a third country or a third country entity concerned** refuses access to, or otherwise does not provide the necessary information within the time limits provided for in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

Where it is found that any interested party, a third country or a third country entity has supplied false or misleading information, that information shall be disregarded.

2. Where the information submitted by an interested party, **a third country or a third country entity concerned** is not ideal in all respects, it shall nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.



3. If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons thereof and shall be granted an opportunity to provide further explanations within the specified time limit. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.
4. [...].

### *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, 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 Articles 10(2), 10(3) or [before the Council/Committee is convened in accordance with Articles] 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 arguments 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 Commission shall terminate the investigation within a maximum of one year. In case of a suspension of the investigation as set out in Article 4(2a), that period of suspension shall not be counted within the one year duration for the investigation.~~
  - 1a. ~~The entire proceedings shall be concluded within a maximum of **eighteen months** ~~two years~~. The period necessary for the proceedings may be prolonged in duly justified cases. **In case of a suspension of the investigation as set out in Article 4(2a), that period of suspension shall not be counted within the duration of the proceedings.**~~
2. [...]
3. The Commission shall suspend the proceedings<sup>25</sup> where the third country or the third country entity concerned has taken decisive steps to eliminate, as the case may be:
  - (a) in case of violation of applicable international obligation, that violation;
  - (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. If the violation of applicable international obligations or the practice distorting competition, the injury [or the threat of injury] to the Union air carrier(s) concerned has not been eliminated following a reasonable period of time, the Commission may resume the proceedings.

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**DELETED**

## 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 Commission<sup>26</sup> adopts redressive measures in accordance with paragraph 3. The decision taken in accordance with paragraph 3 shall be taken only where<sup>27</sup> the results of international procedure for consultation or for the settlement of disputes <sup>28</sup>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:
    - (a) the Commission concludes that applicable international obligations have not been violated;
    - (b) the Commission concludes that adopting redressive measures would be against Union interest;

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- (c) a satisfactory remedy has been obtained between the Union and the third country concerned in accordance with the relevant mechanisms provided for in the applicable agreement or arrangement or under relevant public international law.

The implementing acts referred to in the first subparagraph shall be adopted in accordance with the examination<sup>29</sup> procedure referred to in Article 15(2).

3. Without prejudice to the relevant provisions of the Treaty on the Functioning of the European Union and subject to paragraphs 1 and 2, the Commission<sup>30</sup> shall, by means of implementing acts adopt redressive measures if the investigation determines that the applicable international obligations have been violated<sup>31</sup>.

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

4. [...]

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.

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## 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 ~~all~~ **the** relevant factors, in particular:
  - (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.

Where the 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.

- <sup>32</sup>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 imminent<sup>33</sup>.

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

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- (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 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<sup>34</sup> 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.
- 4. [...]

#### *Article 12*

#### **Termination of proceedings without redressive measures**

- 1. Unless the Commission continues the investigation on its own initiative, the Commission shall terminate the investigation without ~~adopting~~ redressive measures **being adopted** where the complaint is withdrawn.

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2. The Commission shall, by means of implementing acts, terminate the investigation conducted in accordance with Article 4 without ~~adopting~~ redressive measures **being adopted** 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 distorting 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<sup>35</sup> 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*.

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<sup>35</sup>

**DELETED**

*Article 13*

**Redressive measures**

1. Without prejudice to Article 12, ~~[the Commission]~~<sup>36</sup> on the basis of a proposal from the Commission, the Council<sup>37</sup> 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.

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

- 1(bis) The redressive measures referred to in paragraph 1 shall not direct 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.

2. The redressive measures referred to in paragraph 1 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:

- (e) <sup>38</sup>financial duties;
- (f) 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.

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<sup>36</sup> **DELETED**

<sup>37</sup> A recital is required by the case-law to explain the choice of a Council Decision instead of an implementing act adopted by the Commission.

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3. The redressive measures referred to in paragraph 1 shall not exceed what is necessary to offset the injury to the Union air carrier(s) concerned.
- 3(bis) [The redressive measures pursuant to paragraph 2(b) shall not consist of suspension or limitation of traffic rights<sup>39</sup> 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. [...]
5. The decision to conclude the investigation with the adoption of redressive measures referred to in paragraph 1 shall be accompanied by a statement of the reasons thereof and shall be published in the *Official Journal of the European Union*.

## CHAPTER IVBIS

### *Article 14*

#### **Review of redressive measures**

1. The redressive measures referred to in Article **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 applicable international obligations or 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.

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<sup>39</sup> **DELETED**

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 ~~[or threat of injury]~~ and of the causal link between the practice and the injury ~~[or threat of injury]~~.
4. **[The Commission]** [On the basis of a proposal from the Commission, Council] shall, by means of implementing acts, repeal, amend or maintain, as appropriate, the redressive measures. [Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).]

## **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<sup>40</sup> of Regulation (EU) No 182/2011 shall apply.]

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<sup>40</sup> If advisory procedure is envisaged for termination of investigation without redressive measures, a reference to Article 4 of Regulation (EU) No 182/2011 needs to be added.

*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.

Done at Brussels,

*For the European Parliament*

*For the Council*

*The President*

*The President*

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