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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

(Text with EEA relevance)

{SWD(2017) 182 final}
{SWD(2017) 183 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

Aviation plays a fundamental role in the European Union economy. With around 918 million passengers travelling by air in the European Union and more than 1.45 billion passengers departing or arriving at EU airports in 2015, aviation makes a vital contribution to the connectivity of the Union both internally between Member States and with third countries in the rest of world. Air transport links people, businesses and regions and it plays a crucial role in EU integration and competitiveness. It also contributes to Union's regional and social cohesion. Furthermore, aviation makes a vital contribution to economic growth and employment. In 2014, the sector supported the employment of up to 9.3 million people and accounted for over €510 billion of EU Gross Domestic Product. It also made other sectors of the economy stronger, as studies show that one euro of value added in the air transport industry creates almost three euros of value added in the overall economy. Similarly, one new job in the air transport industry creates more than three jobs across the wider economy¹.

The Union's overall connectivity relies to a great extent on air services performed by Union air carriers, with an average of 7 million flights operated by those carriers per year to or from Union airports. The corresponding figure for third country air carriers amounts to 1.3 million flights per year². However, as far as connections between the EU and the rest of the world are concerned, the market is served in nearly equal shares by Union air carriers (49.9% of flights and around 239 million passengers carried in 2015) and third country air carriers (50.1% of flights and around 240 million passengers carried in 2015)³.

The liberalisation and deregulation of international air transport has fostered unprecedented competition within the Union market and globally. Global competition is expected to further intensify in coming years with projected international aviation growth of around 5% per year until 2030⁴.

However, in the absence of an international framework that sets out the conditions governing competition among air carriers⁵, practices regarding the treatment of air carriers may differ from one country to another and affect competition. This is not the case within the Union where the EU rules ensure that all carriers, European and non-European, are granted the same rights and same opportunity of accessing air transport related services. This may however be the case in some third countries where discriminatory practices and subsidies⁶ may give unfair competitive advantages to air carriers from those third countries. The Commission has recognised that *"while EU airlines are ultimately responsible themselves for their*

¹ Communication from the Commission 'An Aviation Strategy for Europe', COM(2015)598 final, 7.12.2015.

² Source: OAG Summer schedules for the year 2016.

³ Idem.

⁴ Communication from the Commission 'The EU's External Aviation Policy - Addressing Future Challenge', COM(2012)556, 27.09.2012.

⁵ Notably, no specific multilateral rules have emerged within ICAO, and air transport services have largely been excluded from the agreements of the World Trade Organization (WTO) (cf. Marrakech Agreement, Annex 1B General Agreement on Trade in Services (GATS), Annex on Air Transport Services. The GATS does apply to measures affecting (a) aircraft repair and maintenance services; (b) the selling and marketing of air transport services; and (c) computer reservation systems.

⁶ This only refers to subsidies which are selective as defined under Article 2(h) of this proposed Regulation.

*competitiveness and must continue to adapt their products and business models to the prevailing market conditions (...) it is equally important that competition, both within the EU and externally, is based on openness, reciprocity and fairness and that it is not distorted by unfair practices"*⁷.

Indeed, unfair practices, if they are allowed to persist, may lead in the longer run to dominant or even monopolistic situations in the aviation market, meaning less choice, less connectivity and higher prices for EU citizens.

Therefore, in cases where Union connectivity and competition are put at risk, the Union must be able to act effectively to ensure an open and competitive market.

Fair competition conditions between air carriers can be addressed in the context of air transport or air services agreements. However, most air transport or air services agreements with third countries do not so far provide for corresponding rules.

Regulation (EC) No 868/2004⁸ was intended to address these issues through unilateral Union action. However, this instrument has never been applied, and some of its features make it very unlikely that it ever be (concretely) applied. This therefore leaves the Union without an effective instrument to ensure fair competition between Union air carriers and third country air carriers. Indeed, outside subsidisation, Regulation (EC) No 868/2004 exclusively applies to so-called unfair pricing practices. These can only be found to exist where a third country carrier charges "*air fares which are sufficiently below those offered by competing Community air carriers to cause injury*", evidence of which is difficult to administer. While the finding of "unfair pricing practices" also requires that the third country carrier has received a non-commercial advantage, the existence of such advantage alone is not sufficient to trigger Union action. Moreover, Regulation (EC) No 868/2004 fails to provide for a dedicated EU internal procedure in respect of obligations contained in air transport or air services agreements, to which the Union is a party, and that are intended to ensure fair competition, i.e. where such obligations have been violated. Lastly, the rules regarding the opening of an investigation are quite restrictive. Notably, a proper right to complain to the Commission is confined to the "Community industry", defined as "*the Community air carriers supplying like air services as a whole or those of them whose collective share constitutes a major proportion of the total Community supply of those services*". Neither Member States nor individual air carriers are conferred a position as complainants in their own right.

In its Communication on an Aviation Strategy for Europe⁹, the Commission stated its intention to assess the effectiveness of Regulation (EC) No 868/2004 with a view to revising or replacing it with a more effective instrument that would ensure fair competition conditions between all carriers and thereby safeguard connectivity to and from the Union. The Aviation Strategy also underlines the importance of pursuing the negotiation of fair competition clauses in EU and Member States' bilateral aviation agreements and making progress at the multilateral level in parallel to improving the effectiveness of this instrument.

The objective to revise or replace Regulation (EC) No 868/2004 is shared by the Council which, in its Conclusions of 20 December 2012¹⁰, acknowledged that "*Regulation (EC) No 868/2004 has proven not to address adequately the specific characteristics of the aviation*

⁷ Commission Communication 'The EU's External Aviation Policy - Addressing Future Challenge'.

⁸ 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 Commission Communication 'An Aviation Strategy for Europe'.

¹⁰ Council Conclusions on the EU's External Aviation Policy 'Addressing Future Challenges', 20.12.2012.

services sector" and supported *"the Commission's intention to analyse (...) possible options for a more effective instrument to safeguard open and fair competition and its intention, on that basis, to present a proposal for a revision or replacement of Regulation (EC) No 868/2004"*.

This approach is equally shared by the European Parliament, which called upon *"the revision of the current Regulation 868/2004 in order to safeguard fair competition in EU external aviation relations and reinforce the competitive position of the EU aviation industry, ensure reciprocity and eliminate unfair practices (...)"*¹¹.

- **Consistency with existing policy provisions in the policy area**

This initiative is consistent with the Commission Communication on the Union's External Aviation Policy which states that *"it is both important and legitimate that the EU is able to act effectively internationally to safeguard the competitiveness of EU airlines against unfair competition and/or practices wherever they may come from"*.

This initiative is listed among the actions presented in the Commission's Communication on an Aviation Strategy for Europe and is consistent with the EU's policy of fair competition.

This initiative is based on considerations similar to those of Article 12 of Council Regulation (EEC) No 95/93¹² on common rules for the allocation of slots at Community airports and of Article 20 of Council Directive 96/67/EC¹³ on access to the groundhandling market at Community airports. Both of those rules provide that actions can be taken when third countries grant preferential treatment to their air carriers compared to Union air carriers with respect to the allocation of slots at airports or with respect to access to the groundhandling or self-handling markets.

This initiative is without prejudice to the division of competencies between the Union and Member States, in accordance with Union law as interpreted by the Court of Justice.

- **Consistency with other Union policies**

This initiative is intended to ensure that aviation takes place under conditions of fair competition and therefore adds to the contribution this sector can make to the fulfilment of the Commission's priority objectives in respect of supporting job creation and sustainable growth.

The initiative also contributes to reinforcing Union's influence in the world and thus to the fulfilment of corresponding strategic objectives, namely of the Union being a stronger global actor and developing freer trade without sacrificing Europe's standards. It is notably consistent with the Commission's approach in respect of negotiations on air transport or air services agreements with third countries, favouring fair competition, as well as high levels of protection in the labour and social domain.

This initiative is consistent with the relevant Union policies, including trade and competition policies.

¹¹ European Parliament Resolution of 9 September 2015 on the implementation of the 2011 White Paper on Transport: Taking stock and the way forward towards sustainable mobility (2015/2005(INI)).

¹² 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).

¹³ 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).

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

• Legal basis

This initiative is based on Article 100(2) of the Treaty on the Functioning of the European Union. That provision permits the adoption of all appropriate provisions for air transport and already served as a basis for the adoption of Regulation (EC) No 868/2004¹⁴.

• Subsidiarity

Compatibility with the principle of subsidiarity was recognised in the 26th recital of Regulation (EC) No 868/2004, insofar as it concerned the terms of that Regulation.

The new central element contained in the proposed Regulation is action in cases of 'violation of applicable international obligations'. The proposed Regulation defines 'applicable international obligations' as obligations contained in an agreement to which the Union is a party. Rights vis-à-vis third countries, under agreements to which the Union is a party, cannot be exercised separately by individual Member States.

Since the objectives sought could not be achieved without action at Union level, such action is necessary to this effect and provides an added value compared to actions at national level.

• Proportionality

The proposed policy choices do not go beyond what is needed to achieve the objective of the proposal, namely to ensure fair competition between Union air carriers and third country air carriers, in the interest of maintaining conditions conducive to a high level of Union connectivity.

The practices in question are all capable of undermining fair competition. They are either identified as such in the relevant international agreements or consist in subsidies¹⁵ or discrimination which, in addition, can lead to the imposition of measures only in case of injury or threat of injury to Union carriers.

The measures to be adopted under this instrument are also themselves proportionate. Where international obligations have been violated, measures are confined to what is available under the agreement in question and/or public international law.

Where measures are imposed in view of subsidies or discrimination causing injury or threat of injury to Union carriers, they may not go beyond what is necessary to offset such injury or threat of injury.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

• Stakeholder consultations

In accordance with the Commission's standards on public consultation, stakeholders were consulted through an online public consultation on a "*proposal for improved protection against subsidisation and unfair pricing practices*" from 29 October 2013 to 21 January 2014. Twenty entities took part in the public consultation, representing airlines (Union and non-

¹⁴ Then Article 80(2) EC.

¹⁵ This only refers to subsidies which are selective as defined under Article 2(h) of this proposed Regulation.

Union ones), airports and industry associations (Union and non-Union ones), EU trade unions, Member States and citizens. The limited response to the public consultation should be taken into account when interpreting the data. Nevertheless, it provided a picture of the position of various key stakeholders.

In addition, stakeholders were consulted in the context of the public consultation for the preparation of the Commission Aviation Strategy, which took place between 19 March and 10 June 2015. The Commission received 233 full questionnaire responses and 41 position papers from stakeholders, representing Member States and third countries, airlines, airports, groundhandling companies, pilots, aircraft suppliers and manufacturers, industry and employees' associations, consultancies, academia and citizens.

The information gathered in the stakeholders' consultations was complemented by studies in which stakeholders were also consulted.

Finally, the Commission held a number of informal meetings with the Member States and with relevant stakeholders (Union and non-Union ones).

The Impact Assessment includes summaries of the public consultations that were carried out.

- **Impact assessment**

The summary sheet of the impact assessment is available at: *(to be included when published on SG website)*.

The Impact Assessment Report and an Executive Summary Sheet were submitted to the Regulatory Scrutiny Board. The Board initially issued a negative opinion on 8 April 2016, followed by a positive opinion on 29 July 2016. The report was adjusted in accordance with the recommendations from the Board. In particular, the report better substantiates the problem to be addressed and more clearly explains how the current rules failed to address this problem. The problem identified is better supported with examples of alleged discriminatory practices. The report also better explains the legal compatibility with international law and air transport agreements with third countries. In addition it focuses more on the impacts on consumers, and better assesses the impacts of each policy options. Moreover, the report better presents the views of stakeholders.

The positive opinion of the Regulatory Scrutiny Board is available here: <http://www.cc.cec/iab/download?attachmentId=10024>.

The impact assessment examines four policy options, including the baseline scenario. An option combining limited revision of the Regulation (EC) No 868/2004 and the adoption of interpretative guidelines has been discarded.

Option A (baseline scenario) consists in maintaining Regulation (EC) No 868/2004 without repealing it.

Option B combines increased international efforts at WTO and ICAO level with a view to promoting the adoption of a multilateral legal framework for fair competition and negotiations aiming at the inclusion of expanded fair competition clauses in air transport or services agreements.

Option C provides for repealing Regulation (EC) No 868/2004 and replacing it with a new comprehensive and effective Regulation, inspired by the Trade Barrier Regulation and taking into account the specificities of the aviation sector.

Finally, option D combines options B and C and therefore consists in both replacing Regulation (EC) No 868/2004 with a new instrument and increased efforts on the

international scene including as regards the negotiation of air transport or services agreements.

Option D offers an integrated approach, which is considered to be the most appropriate to address the problems identified. The inclusion of the three complementary building blocks (international, fair competition clauses in agreements, revision of Regulation (EC) No 868/2004) reinforcing each other creates synergies, allows to efficiently safeguarding EU's connectivity and supports an open competition between all air carriers. For these reasons, option D is retained as the best policy choice.

The economic, social and environmental impacts of option D are analysed in the Impact Assessment. Whereas it is not possible to precisely quantify its economic impact, option D is expected to bring the greatest economic benefit as it allows EU to compete fairly with third countries air carriers. This option also benefits to EU airports and passengers through increased traffic and choice. Overall, the European air connectivity is improved, therefore allowing aviation to continue contributing to Union's growth and employment and positively benefiting to passengers, businesses and EU's economy as a whole. On social aspects, option D is expected to contribute positively to direct employment of EU workers, especially at airports and in associated industries. The impact on indirect employment is expected to be even more beneficial. Although certain environmental benefits can be expected from option D in terms of reduced noise pollution and greenhouse emission thanks to a possible increase in direct flights operated by EU carriers, these are generally offset by other factors such as the forecast growth of air traffic in the future. Therefore, the environmental impact of option is expected to be neutral.

This proposed Regulation contributes to the implementation of policy option D while further refining its relevant aspects. This refinement leads to the development of two possible tracks: the so-called 'violation' track and the so-called 'injury' track.

4. BUDGETARY IMPLICATIONS

The budgetary implications are related to the initiation and conduct of investigations by the European Commission, and to financial duties.

Based on experience with similar types of investigations conducted by the Commission, the necessary resources have been assessed to be between three and four full time officers per investigation, for two to three investigations per year. Therefore, this instrument is expected to require nine officers for its implementation. The costs of missions, including on-site investigations, should also be anticipated. The appropriations required for human resources and missions costs are expected to be met through allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Revenues are expected to be induced through the payment of financial duties. Quantification is very difficult since any revenue depends on the circumstances of each individual case.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The monitoring, evaluation and reporting framework for this initiative is described in Chapter 7 of the accompanying Impact Assessment Report.

- **Presentation of the proposal**

The Recitals set out the objective of the Regulation which is to ensure fair competition between Union air carriers and third country air carriers, with a view to maintain conditions conducive to a high level of connectivity.

Chapter I of the proposal includes general provisions. This Chapter sets out the scope of the Regulation and includes a number of definitions that are relevant in order to correctly understand the Regulation, notably the practices addressed by this Regulation.

Chapter II contains common rules on proceedings. Those rules govern the initiation and conduct of the investigation. It provides that an investigation may be opened on the basis of a complaint from a Member State, an EU air carrier or an association of EU air carriers, or on the Commission's own initiative. It sets out the conditions according to which the Commission may decide or refuse to open an investigation and specifies the procedure to be followed when announcing that an investigation is being opened. It determines the right of the Commission to seek all the information it deems necessary to conduct the investigation and to verify the accuracy of the information it has received or collected¹⁶. It also defines the two possible purposes of the investigation, pertaining either to the violation of applicable international obligations (the so-called 'violation' track), or to practices adopted by a third country or third-country entity affecting competition and causing injury or threat of injury to Union air carriers (the so-called 'injury' track). In addition this Chapter sets out the rules according to which an investigation shall be conducted and those under which interested parties can access information relating to the investigation. It also includes provisions related to cooperation with Member States, to confidentiality and to disclosure.

Chapter III describes the acts through which proceedings regarding the violation of applicable international obligations are concluded, i.e. with or without the adoption of redressive measures. Measures available in this respect are notably those provided for in the act containing the applicable international obligations.

Chapter IV governs cases regarding practices affecting competition. To this effect, it establishes first under which conditions the existence of injury or threat of injury may be found. It also sets out the conditions according to which proceedings may be suspended or concluded, with or without the adoption of redressive measures. It provides for the possibility to adopt financial or operational measures intended to offset injury or threat of injury and requires that the measures must not exceed what is necessary for such offsetting bearing in mind that the objective of such measures does not consist in punishing the third country air carrier concerned but in restoring fair competition. This Chapter also defines the conditions under which the redressive measures may be reviewed.

Finally, Chapter V includes provisions relating to the Committee procedure, to the repeal of Regulation (EC) No 868/2004 and to the entry into force of this Regulation.

¹⁶ This aims at addressing an identified lack of transparency and information about the practices that allegedly impact competition conditions on the market.

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 Committee¹⁷,
Having regard to the opinion of the Committee of the Regions¹⁸,
Acting in accordance with the ordinary legislative procedure,
Whereas:

- (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.

¹⁷ OJ C , , p. .

¹⁸ OJ C , , p. .

- (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 excluded¹⁹.
- (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 95/93²⁰ and Council Directive 96/97/EC²¹. 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 Council²². 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.
- (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 affecting competition cause or threaten to cause injury to Union air carriers.
- (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

¹⁹ Marrakech Agreement, Annex 1B General Agreement on Trade in Services (GATS), Annex on Air Transport Services.

²⁰ 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).

²¹ 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).

²² 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).

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.
- (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, having regard to their impact on other persons, notably consumers or undertakings in the Union. Proceedings should also be concluded without measures where the requirements for such measures are not, or no longer met.
- (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.
- (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 affecting competition or the ensuing injury or threat of injury.
- (19) Redressive measures in respect of practices affecting 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 affecting 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 Council²³.
- (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 affecting 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:

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 violation of applicable international obligations and to practices affecting competition between Union air carriers and other air carriers and causing or threatening to cause injury to Union air carriers.
- 2. This Regulation applies without prejudice to Article 12 of Regulation (EEC) No 95/93 and Article 20 of Directive 96/67/EC.

²³ 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).

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 Council²⁴;
- (b) 'air transport service' means a flight or a series of flights carrying passengers, cargo or mail for remuneration or hire;
- (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 relates to practices that may affect 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 affecting 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);

²⁴

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).

- (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.

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, a Union air carrier or an association of Union air carriers in accordance with paragraph 2, or on the Commission's own initiative, if there is *prima facie* evidence of either of the following:
 - (a) violation of applicable international obligations;
 - (b) the existence of all the following circumstances:
 - (i) a practice affecting 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.
3. The Commission shall, as far as possible, 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.
4. The Commission may decide not to initiate 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 on the initiation of an investigation in accordance with paragraph 1 within 6 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;
 - (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 affecting 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 initiate 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 either of the following:
 - (a) whether the applicable international obligations have been violated;
 - (b) whether a practice affecting 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.
3. The Commission may seek all the information it deems necessary to conduct the investigation and may 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 States to support it in the investigation and Member States shall take whatever steps are necessary in order to give effect to such requests. The support requested from the Member States may cover information

supply and information analysis as well as contribution to checks, inspections and investigations.

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.
7. Complainants, interested parties, the Member State(s) concerned 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, 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 5

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

1. When the Commission intends to initiate proceedings in accordance with Article 3 and where the air transport services concerned are regulated by an air transport or air services agreement concluded between one or more Member States and a third country and to which the Union is not a party, the Commission shall inform the Member State(s) concerned.
2. Where a Member State is informed by the Commission in accordance with paragraph 1, that Member State shall inform the Commission without undue delay of its intention to resort to procedures for dispute settlement or any other relevant procedure provided for in the air transport or air services agreement with the third country concerned, with a view to addressing the situation covered by the investigation.
3. The Member State 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 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 may, 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 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

Basis of findings in case of non-cooperation

In cases where access to the necessary information is refused or is otherwise not provided within the appropriate time limits, or where the investigation is significantly impeded, findings shall be made on the basis of the available facts. Where the Commission finds that false or misleading information has been submitted, such information shall be disregarded.

Article 8

Disclosure

1. The third country, the third country entity and the third air carrier concerned, as well as the complainant and interested parties 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 seized in accordance with Articles 10(2), 10(3), 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. Representations made after disclosure is given 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 10 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 two years. That period may be prolonged in duly justified cases.
2. In case of urgency, such as in situations where there is a risk of immediate and irreversible injury to Union air carrier(s), the proceedings may be shortened to one year.
3. The Commission may suspend the proceedings 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 affecting 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 affecting 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.

CHAPTER III

VIOLATION OF APPLICABLE INTERNATIONAL OBLIGATIONS

Article 10

Conclusion of proceedings

1. Where the complaint is withdrawn, the Commission may 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;
 - (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 advisory 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 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 procedure referred to in Article 15(2).
4. Where the act containing the applicable international obligations requires, before the adoption of any measure, the prior discharge of an international procedure for consultation or for the settlement of disputes, that procedure shall be first discharged and any decision taken in accordance with paragraph 3 shall take account of its results.
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.

CHAPTER IV

PRACTICES AFFECTING 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 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.
2. A finding of a threat of injury requires that it be clearly foreseeable that a particular situation is likely to develop into actual injury. Any such determination shall be based on evidence and take account of all relevant factors, in particular:
 - (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.
3. The Commission shall select an investigation period and analyse the relevant evidence over that period.
4. Injury or threat of injury caused by factors other than the practice affecting competition and which are also negatively affecting the Union air carrier(s) concerned shall not be attributed to the practice under scrutiny.

Article 12

Termination of proceedings without redressive measures

1. The Commission may 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:
 - (a) the Commission concludes that either of the following is not established:
 - (i) the existence of a practice affecting 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 advisory 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(1) and except in the case referred to in point (b) of Article 12(2) the Commission shall, by means of implementing acts, adopt redressive measures if the investigation conducted under Article 4 determines that a practice affecting 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.

Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 15(2).
2. The redressive measures referred to in paragraph 1 shall be imposed on the third country air carriers(s) benefiting from the practice affecting competition and may take the form of either of the following:
 - (a) financial duties;
 - (b) any measure of equivalent or lesser value.
3. The redressive measures referred to in paragraph 1 shall not exceed what is necessary to offset the injury or threat of injury to the Union air carrier(s) concerned. To this effect measures referred to in point (b) of paragraph 2 may be limited to a specific geographic area.
4. 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.
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*.

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 affecting 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.
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 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 affecting 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 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 advisory 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 4 of Regulation (EU) No 182/2011 shall apply.

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

The President

For the Council

The President

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

- 1.1. Title of the proposal/initiative
- 1.2. Policy area(s) concerned in the ABM/ABB structure
- 1.3. Nature of the proposal/initiative
- 1.4. Objective(s)
- 1.5. Grounds for the proposal/initiative
- 1.6. Duration and financial impact
- 1.7. Management mode(s) planned

2. MANAGEMENT MEASURES

- 2.1. Monitoring and reporting rules
- 2.2. Management and control system
- 2.3. Measures to prevent fraud and irregularities

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

- 3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected
- 3.2. Estimated impact on expenditure
 - 3.2.1. *Summary of estimated impact on expenditure*
 - 3.2.2. *Estimated impact on operational appropriations*
 - 3.2.3. *Estimated impact on appropriations of an administrative nature*
 - 3.2.4. *Compatibility with the current multiannual financial framework*
 - 3.2.5. *Third-party contributions*
- 3.3. Estimated impact on revenue

LEGISLATIVE FINANCIAL STATEMENT

1. FRAMEWORK OF THE PROPOSAL/INITIATIVE

1.1. Title of the proposal/initiative

Regulation of the European Parliament and of the Council on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004 of the European Parliament and of the Council

1.2. Policy area(s) concerned in the ABM/ABB structure²⁵

06 - Mobility and Transport

1.3. Nature of the proposal/initiative

- ☐ The proposal/initiative relates to a **new action**
- ☐ The proposal/initiative relates to a **new action following a pilot project/preparatory action**²⁶
- ☐ The proposal/initiative relates to **the extension of an existing action**
- ☒ The proposal/initiative relates to **an action redirected towards a new action**

1.4. Objective(s)

1.4.1. *The Commission's multiannual strategic objective(s) targeted by the proposal/initiative*

Jobs and growth: The initiative aims to contribute to a competitive European aviation industry that generates sustainable growth and high-value jobs, and drives technological innovation.

A deeper and fairer internal market with a strengthened industrial base: a competitive single European transport area provides citizens and businesses with a framework for safe, efficient and high-quality transport.

EU action is capable of ensuring fair competition between Union carriers and third countries carriers i.e. a level playing field between them. This contributes to conditions conducive to a high level of connectivity.

Finally, the proposed Regulation contributes to strengthening the EU's role as a global actor.

1.4.2. *Specific objective(s) and ABM/ABB activity(ies) concerned*

Specific objective

DG MOVE Specific Objective 1: An efficient, sustainable, safe and secure Single European Transport Area: Improve regulation, ensure a high degree of implementation of EU legislation in the transport area and open and fair competition both in the EU and in relations with key partner countries.

ABM/ABB activity(ies) concerned

06 02 - European Transport Policy

²⁵ ABM: activity-based management; ABB: activity-based budgeting.

²⁶ As referred to in Article 54(2)(a) or (b) of the Financial Regulation.

1.4.3. *Expected result(s) and impact*

Specify the effects which the proposal/initiative should have on the beneficiaries/groups targeted.

The proposed Regulation is expected to guarantee fair competition between Union carriers and third country carriers which should contribute to a high level of connectivity between the EU and third countries.

To achieve this objective, the proposed Regulation sets a framework within which practices affecting competition, adopted by third countries or third country entities and causing injury or threat of injury to EU air carriers are addressed, and where relevant redressive measures are adopted to compensate the injury and restore fair competition.

The Regulation also provides for a framework for the adoption of measures where applicable international obligations have (allegedly) been violated.

It is expected that the EU airline industry will benefit from this Regulation.

It is also expected that EU passengers will benefit from the Regulation as it contributes to preserving a broad access to air transport services across the EU

Finally, it is expected that the overall EU economy will benefit from this Regulation through the aviation industry's continued contribution to the objective of jobs and growth.

Expected economic consequences include an increase in the number of passengers carried by EU airlines and in EU airlines' revenue. EU airports will also benefit as they will attract more passengers.

Expected operational consequences include improved connectivity in the European airspace, driven by fair competition among air carriers.

1.4.4. *Indicators of results and impact*

Specify the indicators for monitoring implementation of the proposal/initiative.

- number and nature of official complaints from the sector to the Commission;
- European stakeholders' opinions about the applicability of the European legal framework.

1.5. **Grounds for the proposal/initiative**

1.5.1. *Requirement(s) to be met in the short or long term*

Provide an effective tool that makes it possible to address practices affecting competition causing injury or threat of injury to Union air carriers. Measures in such cases are intended to offset such injury or threat of injury.

Provide for a framework for the adoption of measures where applicable international obligations have (allegedly) been violated.

All such measures also contribute to a high level of connectivity between the EU and third countries.

1.5.2. *Added value of EU involvement*

Compatibility with the principle of subsidiarity was recognised in the 26th recital of Regulation (EC) No 868/2004, insofar as it concerned the terms of that Regulation.

The new central element contained in the proposed Regulation is action in cases of 'violation of applicable international obligations'. The proposed Regulation defines 'applicable international obligations' as obligations contained in an agreement to which the Union is a party. Rights vis-à-vis third countries, under agreements to which the Union is a party, cannot be exercised separately by individual Member States.

Since the objectives sought could not be achieved without action at Union level, such action is necessary to this effect and provides an added value compared to actions at national level.

1.5.3. *Lessons learned from similar experiences in the past*

The aim of Regulation 868/2004 of the European Parliament and the Council was to prevent and counteract unfair practices, i.e. subsidies and discrimination, from third countries and third country entities negatively affecting EU carriers.

However, over the more than 10 years since its adoption, the Regulation has never been used, as no EU carrier has ever lodged a formal complaint, spite there being many informal accusations and complaints in the industry about the unfair practices allegedly adopted by third countries and third country entities.

The main reason for why Regulation 868/2004 has proven to be ineffective is the very fact that, insofar as it concerns “unfair pricing”, it is conceptually modelled on tools used against the dumping of goods and is therefore not adapted to the specificities of the air transport sector.

Indeed, outside subsidisation, Regulation (EC) No 868/2004 exclusively applies to so-called unfair pricing practices. These can only be found to exist where a third country carrier charges “air fares which are sufficiently below those offered by competing Community air carriers to cause injury”, evidence of which is difficult to administer. While the finding of “unfair pricing practices” also requires that the third country carrier has received a non-commercial advantage, the existence of such advantage alone is not sufficient to trigger Union action.

Moreover, Regulation (EC) No 868/2004 fails to provide for a dedicated EU internal procedure in respect of obligations contained in air transport or air services agreements, to which the Union is a party, and that are intended to ensure fair competition, i.e. where such obligations have been violated.

Lastly, the rules regarding the opening of an investigation are quite restrictive. Notably, a proper right to complain to the Commission is confined to the “Community industry”, defined as “the Community air carriers supplying like air services as a whole or those of them whose collective share constitutes a major proportion of the total Community supply of those services”. Neither Member States nor individual air carriers are conferred a position as complainants in their own right.

1.5.4. *Compatibility and possible synergy with other appropriate instruments*

The proposed Regulation is in line with the objectives presented in the Aviation Strategy and as such directly contributes to these objectives, in the interest of a more competitive EU aviation sector.

1.6. Duration and financial impact

- ☐ Proposal/initiative of **limited duration**
 - ☐ Proposal/initiative in effect from [DD/MM]YYYY to [DD/MM]YYYY
 - ☐ Financial impact from YYYY to YYYY
- ☒ Proposal/initiative of **unlimited duration**
 - Implementation with a start-up period from YYYY to YYYY,
 - Followed by full-scale operation.

1.7. Management mode(s) planned²⁷

- ☒ **Direct management** by the Commission
 - ☒ by its departments, including by its staff in the Union delegations;
 - ☐ by the executive agencies
- ☐ **Shared management** with the Member States
- ☐ **Indirect management** by entrusting budget implementation tasks to:
 - ☐ third countries or the bodies they have designated;
 - ☐ international organisations and their agencies (to be specified);
 - ☐ the EIB and the European Investment Fund;
 - ☐ bodies referred to in Articles 208 and 209 of the Financial Regulation;
 - ☐ public law bodies;
 - ☐ bodies governed by private law with a public service mission to the extent that they provide adequate financial guarantees;
 - ☐ bodies governed by the private law of a Member State that are entrusted with the implementation of a public-private partnership and that provide adequate financial guarantees;
 - ☐ persons entrusted with the implementation of specific actions in the CFSP pursuant to Title V of the TEU, and identified in the relevant basic act.
 - *If more than one management mode is indicated, please provide details in the 'Comments' section.*

Comments

N/A

²⁷

Details of management modes and references to the Financial Regulation may be found on the BudgWeb site: http://www.cc.cec/budg/man/budgmanag/budgmanag_en.html

2. MANAGEMENT MEASURES

2.1. Monitoring and reporting rules

Specify frequency and conditions.

The Commission services are expected to carry out an evaluation to verify whether the objectives of the initiative have been reached, five years after the entry into force of the Regulation. The aim is to verify if the new measures created a more equal-playing field and if they helped maintain a high level of connectivity. This evaluation will be carried out based on the core progress indicators specified in the section on "*indicators of results and impact*". It must be in line with Commission requirements on evaluation.

2.2. Management and control system

2.2.1. Risk(s) identified

The following risks related to the implementation of the proposed Regulation have been identified:

1) Retaliatory action directed at EU companies

The adoption of redressive measures could lead to retaliation measures towards EU industry (for example relating to air carriers' access to services or to purchases of EU aircraft by third country carriers). However, the proposed Regulation specifies that the Commission may decide not to take action if it would go against Union's interest. The Commission will also have the possibility to design redressive measures with the aim of minimising the risk of side effects, including retaliation.

2) Unexpected and unmanageable number of complaints

Enforcing the proposed Regulation will result in cases to be dealt with by the Commission and thus in an increase in administrative costs (labour costs, equipment and material cost, as well as overheads). If an unexpectedly high number of complaints is received, there may be a shortage of staff, management difficulties and additional costs. However, the proposed Regulation specifies that the Commission may decide not to take action if the case does not raise a systemic issue, nor have a significant impact on Union air carriers. Furthermore, the proposed Regulation foresees the possibility for the Commission to request Member States to support it in the investigation.

2.2.2. Information concerning the internal control system set up

- The Commission would impose redressive measures via implementing acts, in accordance with Article 291 of the TFEU.
- Member States' control would be governed by Regulation No 182/2011 on control by Member States of the Commission's exercise of implementing powers.
- The financial countermeasures targeting third country entities would be enforced in accordance with Article 299 of the TFEU.

2.2.3. Estimate of the costs and benefits of the controls and assessment of the expected level of risk of error

N/A

2.3. Measures to prevent fraud and irregularities

Specify existing or envisaged prevention and protection measures.

N/A

3. ESTIMATED FINANCIAL IMPACT OF THE PROPOSAL/INITIATIVE

3.1. Heading(s) of the multiannual financial framework and expenditure budget line(s) affected

- Existing budget lines

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [...][Heading.....]	Diff./Non-diff. ²⁸	from EFTA countries ²⁹	from candidate countries ³⁰	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	[5][06.01.01.01]	Non-diff.	NO	NO	NO	NO

- New budget lines requested

In order of multiannual financial framework headings and budget lines.

Heading of multiannual financial framework	Budget line	Type of expenditure	Contribution			
	Number [...][Heading.....]	Diff./Non-diff.	from EFTA countries	from candidate countries	from third countries	within the meaning of Article 21(2)(b) of the Financial Regulation
	[...][XX.YY.YY.YY]		YES/NO	YES/NO	YES/NO	YES/NO

²⁸ Diff. = Differentiated appropriations / Non-diff. = Non-differentiated appropriations.

²⁹ EFTA: European Free Trade Association.

³⁰ Candidate countries and, where applicable, potential candidate countries from the Western Balkans.

3.2. Estimated impact on expenditure

3.2.1. Summary of estimated impact on expenditure

EUR million (to three decimal places)

Heading of multiannual financial framework	Number	[...][Heading]
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DG: <.....>			Year N ³¹	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)			TOTAL
• Operational appropriations										
Number of budget line	Commitments	(1)								
	Payments	(2)								
Number of budget line	Commitments	(1a)								
	Payments	(2a)								
Appropriations of an administrative nature financed from the envelope of specific programmes ³²										
Number of budget line		(3)								
TOTAL appropriations for DG <.....>	Commitments	=1+1a +3								
	Payments	=2+2a +3								

³¹ Year N is the year in which implementation of the proposal/initiative starts.

³² Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former ‘BA’ lines), indirect research, direct research.

• TOTAL operational appropriations	Commitments	(4)								
	Payments	(5)								
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)								
TOTAL appropriations under HEADING <....> of the multiannual financial framework	Commitments	=4+ 6								
	Payments	=5+ 6								

If more than one heading is affected by the proposal / initiative:

• TOTAL operational appropriations	Commitments	(4)								
	Payments	(5)								
• TOTAL appropriations of an administrative nature financed from the envelope for specific programmes		(6)								
TOTAL appropriations under HEADINGS 1 to 4 of the multiannual financial framework (Reference amount)	Commitments	=4+ 6								
	Payments	=5+ 6								

Heading of multiannual financial framework	5	‘Administrative expenditure’
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EUR million (to three decimal places)

		Year 2018	Year 2019	Year 2020	TOTAL
DG: MOVE					
• Human resources		1.242	1.242	1.242	3.726
• Other administrative expenditure		0.02	0.02	0.02	0.06
TOTAL DG MOVE	Appropriations	1.262	1.262	1.262	3.786

TOTAL appropriations under HEADING 5 of the multiannual financial framework	(Total commitments = Total payments)	1.262	1.262	1.262	3.786
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EUR million (to three decimal places)

		Year 2018	Year 2019	Year 2020	TOTAL
TOTAL appropriations under HEADINGS 1 to 5 of the multiannual financial framework	Commitments	1.262	1.262	1.262	3.786
	Payments	1.262	1.262	1.262	3.786

3.2.2. Estimated impact on operational appropriations

- ☒ The proposal/initiative does not require the use of operational appropriations
- ☐ The proposal/initiative requires the use of operational appropriations, as explained below:

Commitment appropriations in EUR million (to three decimal places)

Indicate objectives and outputs ↓			Year N		Year N+1		Year N+2		Year N+3		Enter as many years as necessary to show the duration of the impact (see point 1.6)						TOTAL	
	OUTPUTS																	
	Type ³³	Average cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	No	Cost	Total No	Total cost
SPECIFIC OBJECTIVE No 1 ³⁴ ...																		
- Output																		
- Output																		
- Output																		
Subtotal for specific objective No 1																		
SPECIFIC OBJECTIVE No 2 ...																		
- Output																		
Subtotal for specific objective No 2																		
TOTAL COST																		

³³ Outputs are products and services to be supplied (e.g.: number of student exchanges financed, number of km of roads built, etc.).

³⁴ As described in point 1.4.2. ‘Specific objective(s)...’

3.2.3. Estimated impact on appropriations of an administrative nature

3.2.3.1. Summary

- ☐ The proposal/initiative does not require the use of appropriations of an administrative nature
- ☒ The proposal/initiative requires the use of appropriations of an administrative nature, as explained below:

EUR million (to three decimal places)

	Year 2018	Year 2019	Year 2020	TOTAL
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HEADING 5 of the multiannual financial framework				
Human resources	1.242	1.242	1.242	3.726
Other administrative expenditure	0.02	0.02	0.02	0.02
Subtotal HEADING 5 of the multiannual financial framework	1.262	1.262	1.262	3.786

Outside HEADING 5³⁵ of the multiannual financial framework				
Human resources				
Other expenditure of an administrative nature				
Subtotal outside HEADING 5 of the multiannual financial framework				

TOTAL	1.262	1.262	1.262	3.786
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The appropriations required for human resources and other expenditure of an administrative nature will be met by appropriations that are already assigned to management of the action and/or have been redeployed within the Commission together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

³⁵ Technical and/or administrative assistance and expenditure in support of the implementation of EU programmes and/or actions (former 'BA' lines), indirect research, direct research.

3.2.3.2. Estimated requirements of human resources

- ☐ The proposal/initiative does not require the use of human resources.
- ☒ The proposal/initiative requires the use of human resources, as explained below:

Estimate to be expressed in full time equivalent units

	Year 2018	Year 2019	Year 2020
• Establishment plan posts (officials and temporary staff)			
06 01 01 01 (Headquarters and Commission's Representation Offices)	9	9	9
XX 01 01 02 (Delegations)			
XX 01 05 01 (Indirect research)			
10 01 05 01 (Direct research)			
• External staff (in Full Time Equivalent unit: FTE)³⁶			
XX 01 02 01 (AC, END, INT from the 'global envelope')			
XX 01 02 02 (AC, AL, END, INT and JED in the delegations)			
XX 01 04 yy³⁷	- at Headquarters		
	- in Delegations		
XX 01 05 02 (AC, END, INT - Indirect research)			
10 01 05 02 (AC, END, INT - Direct research)			
Other budget lines (specify)			
TOTAL	9	9	9

XX is the policy area or budget title concerned.

The human resources required will be met by staff who are already assigned to management of the action and/or have been redeployed within the Commission, together if necessary with any additional allocation which may be granted to the managing DG under the annual allocation procedure and in the light of budgetary constraints.

Description of tasks to be carried out:

Officials and temporary staff	Receive and process complaints addressed to the Commission, initiate proceedings and conduct investigations, prepare Commission legal acts, process requests for information, and process requests for review of Commission decisions.
External staff	N/A

³⁶ AC= Contract Staff; AL = Local Staff; END= Seconded National Expert; INT = agency staff; JED= Junior Experts in Delegations.

³⁷ Sub-ceiling for external staff covered by operational appropriations (former 'BA' lines).

3.2.4. *Compatibility with the current multiannual financial framework*

- ☒ The proposal/initiative is compatible the current multiannual financial framework.
- ☐ The proposal/initiative will entail reprogramming of the relevant heading in the multiannual financial framework.

Explain what reprogramming is required, specifying the budget lines concerned and the corresponding amounts.

- ☐ The proposal/initiative requires application of the flexibility instrument or revision of the multiannual financial framework.

Explain what is required, specifying the headings and budget lines concerned and the corresponding amounts.

3.2.5. *Third-party contributions*

- The proposal/initiative does not provide for co-financing by third parties.

3.3. **Estimated impact on revenue**

- ☐ The proposal/initiative has no financial impact on revenue.
- ☒ The proposal/initiative has the following financial impact:

(iv) ☒ on own resources

(v) ☐ on miscellaneous revenue

EUR million (to three decimal places)

Budget revenue line:	Appropriations available for the current financial year	Impact of the proposal/initiative ³⁸						
		Year N	Year N+1	Year N+2	Year N+3	Enter as many years as necessary to show the duration of the impact (see point 1.6)		
Article								

For miscellaneous ‘assigned’ revenue, specify the budget expenditure line(s) affected.

Specify the method for calculating the impact on revenue.

³⁸

As regards traditional own resources (customs duties, sugar levies), the amounts indicated must be net amounts, i.e. gross amounts after deduction of 25 % for collection costs.