



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.3.2002  
COM(2002) 110 final

2002/0067(COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**concerning protection against subsidisation and unfair pricing practices in the supply of  
airline services from countries not members of the European Community**

(presented by the Commission)

## **EXPLANATORY MEMORANDUM**

### INTRODUCTION

1. The airline industry in the Community is faced with a critical challenge: the need for it to compete with third-country airlines which benefit from generous subsidies, while the Community industry is subject to strict rules on government aid.<sup>1</sup>
2. The recent crisis in some parts of the industry has led third-country governments to subsidise their airlines in a manner which is likely to distort competition.<sup>2</sup> Community airlines have provided information about the pressure which these airlines exert on ticket prices and to which they are unable to respond.
3. Additionally, subsidisation is not the only type of state-involvement which can result in distortion of international supply of airline services. Pricing practices by foreign air carriers may be at unfair levels by virtue of them being state-controlled rather than being openly subsidised. In fact, any subsidies granted by foreign governments to carriers they themselves control would be extremely difficult to detect.
4. Some third countries have introduced instruments to deal with such situations.<sup>3</sup> Also the Community has, for the maritime sector, provided for redress in case of unfair pricing practices.<sup>4</sup> However, for the airline sector, no such possibility exists at the Community level. The only currently available means are bilateral agreements which often lack, both in terms of coverage and remedies, the potential to provide swift and comprehensive protection against subsidisation and unfair pricing practices.<sup>5</sup> Indeed, even if one of the Member States had been able to take any action under its bilateral agreements, this would have just widened the gulf even further between the ways in which different Community airlines are treated.

### THE NEED FOR ACTION

5. The proposed instrument is designed to address this problem. It will allow Community action against unfair competition from non-Community carriers on routes to and from the Community due to trade-distorting third country subsidies. Additionally, it will provide for a remedy against unfair pricing practices by state-controlled air carriers. Cases will be examined on the basis of industry complaints which show that such subsidies or unfair pricing practices are causing injury on certain routes. The investigation and decision-making processes are based

---

<sup>1</sup> Communication from the Commission of 20 May 1999 on the single market in the air industry (COM1999, 182 final) and 1994 guidelines on state aid to the air industry (OJ C 350, 10.12.1994, p.5).

<sup>2</sup> Communication from the Commission of 10 October 2001 on the repercussions of the terrorist attacks in the United States on the air transport industry (COM 2001, 574 final).

<sup>3</sup> E.g. in the United States, the Secretary of Transportation can take action to eliminate "an activity of a government of a foreign country or another foreign entity, including a foreign air carrier" when this is considered an "anticompetitive practice against an air carrier" (U.S.C. Section 41310).

<sup>4</sup> Council Regulation (EEC) No 4057/86 of 22 December 1986 on unfair pricing practices in maritime transport (OJ L 378, 31.12.1986).

<sup>5</sup> For the time being under the World Trade Organisation and more particularly the General Agreement on Trade in Services there are no agreed rules to redress trade distorting effects on subsidies to the international air transport industry and no rules have been agreed to under the WTO concerning unfair pricing practices of State-controlled air carriers.

predominantly on existing practices in the area of trade in goods<sup>6</sup> but allow sufficient flexibility to deal with the specific problems of the airline sector, and take into account the procedures set out in Council Decision 1999/468/EC.

6. This instrument is designed to restore the "equality of arms" with some of our competitors in providing protection against unfair pricing practices in air transport. However, it will not replace airline agreements with third countries that can be used to deal effectively with distortion issues. In cases where a legal instrument exists which would enable a satisfactory response to be made, that instrument will therefore take precedence over this Regulation, which will be subsidiary to it.

## SUMMARY OF THE PROPOSAL

7. Principle: The proposed instrument allows action against subsidised or certain unfairly priced and injurious air services supplied by non-Community carriers on certain routes to and from the Community. It contains simple and workable rules of substance and procedure but, at the same time, does not require the EC to go below the tested standards applied in the goods area.
8. Practices covered: The proposal uses the subsidy definition of the WTO Agreement on Subsidies and Countervailing Measures. Trade distorting subsidies granted by foreign governments, i.e. subsidies targeted at certain enterprises or sectors and export subsidies are actionable (generally available subsidies e.g. to all service providers including airlines are considered not to be trade distorting). Additionally, it takes over in large part the definition of "unfair pricing practices", i.e. the charging at fares at levels below those charged by a established and representative carriers (or, if this information is not available, below the constructed rate, i.e. costs plus profit of other comparable carriers), but limits it to such practices conducted by state-controlled air carriers.
9. Investigation: The proposal provides for all features of a trade in goods type investigation but in a simplified and less binding manner. An investigation would be defined by two parameters:
  - Subsidies given by a certain government to eligible foreign carriers or unfair practices by certain state-controlled foreign carriers
  - certain routes where our industry faces problems.

The draft introduces a definition of "like air service" which is, however, less restrictive as in trade in goods. The EC carriers would have to fly on the same or almost the same routes as the foreign carriers but there are no restrictions concerning the type of service supplied. The investigation covers at least "a major proportion" of EC supplied services.

---

<sup>6</sup> Council Regulation (EEC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ L 288, 21.10.1997).

10. Initiation threshold: The Community industry has a right to initiation if the duly substantiated complaint is made on made on behalf of Community industry. Additionally, the Commission can open ex officio if there is sufficient evidence.
11. Due process: Public notice is given at initiation, foreign carriers and other interested parties have the right to be heard, measures are published in the OJ. Rules on non-cooperation are necessary to be able to draw adverse inferences.
12. Procedure: Member States will be consulted at every stage of the proceeding in a Committee under the advisory procedure, in line with Council Decision 1999/468/EC of 28 June 1999.<sup>7</sup> The ‘droit de regard’ of the European Parliament is also ensured in accordance with Article 8 of that decision.
13. Measures: Measures (duties, undertakings or other appropriate measures e.g. restriction of landing rights) will be imposed on a per-carrier basis. The level of the measure is capped at the amount of subsidy in terms of benefit to the recipient (or the difference between the actual fare charged by a state-controlled foreign air carrier and the “normal fare”) or a level which is sufficient to remove the injury, whatever is the lower. Provisional measures have a duration of 6 months. Measures may be reviewed if warranted. Similar as in the goods area, there is no provision on how duties are levied. In practice, the Member State authorities collecting an "airport tax" could also collect the duty. Duties collected will be remitted to the Community budget in line with existing provisions applied within the European Union on redressive and countervailing duties.

---

<sup>7</sup> OJ L 184, 17.7.1999, p. 23.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**concerning protection against subsidisation and unfair pricing practices in the supply of  
airline services from countries not members of the European Community**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission<sup>8</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>9</sup>

Having regard to the Opinion of the Committee of the Regions<sup>10</sup>

Acting in accordance with the procedure laid down in Article 251 of the Treaty

Whereas:

- (1) There is reason to believe that the competitive participation of Community air carriers in providing air services to or from the Community is adversely affected by certain unfair practices of non-Community air carriers providing like air services;
- (2) Such unfair practices may result from a subsidy granted by a government of a country which is not a member of the Community or from certain pricing practices by a non-Community air carrier which is state-controlled;
- (3) Within the Community there are strict rules regarding the granting of government aid to airlines, and for Community airlines not to be placed at a competitive disadvantage there is a need for an instrument to offer protection against subsidised non-Community air carriers or those receiving other benefits from governments;
- (4) The Community should be able to take action to redress such unfair practices resulting from subsidies granted by the government of a country which is not a member of the Community;

---

<sup>8</sup> OJ C [...], [...], p. [...].

<sup>9</sup> OJ C

<sup>10</sup> OJ C

- (5) The Community should also be able to address unfair pricing practices when the air carrier is controlled by a government of a country which is not a member of the Community;
- (6) It should be explained when a subsidy shall be deemed to exist and according to which principles it shall be countervailable (in particular whether the subsidy has been targeted at certain enterprises or sectors or is contingent upon service supply to third countries);
- (7) In determining the existence of a subsidy, it is necessary to demonstrate that there has been a financial contribution by a government or that government revenue that is otherwise due is foregone or not collected, and that a benefit has thereby been conferred on the recipient enterprise;
- (8) It should be explained when an unfair pricing practice is deemed to exist;
- (9) It is desirable to lay down clear and detailed guidance as to the factors which may be relevant for the determination of whether the subsidised or unfairly priced air services provided by non-Community air carriers have caused material injury or are threatening to cause injury; in demonstrating that the price levels of the supply of such air services are responsible for injury sustained by the Community industry, attention should be given to the effect of other factors and in particular prevailing market conditions in the Community;
- (10) It is advisable to define the terms 'Community air carrier', 'Community industry', 'like air service' and 'state-controlled';
- (11) It is necessary to lay down who may lodge a complaint, and the information on countervailable subsidies or unfair pricing practice, injury and causation which such complaint should contain;
- (12) It is necessary to lay down the manner in which interested parties should be given notice of the information which the authorities require; and interested parties should have ample opportunity to present all relevant evidence and to defend their interests; it is also desirable to set out the rules and procedures to be followed during the investigation, in particular the rules whereby interested parties are to make themselves known, present their views and submit information within specified time limits, if such views and information are to be taken into account; it is necessary to provide that, where parties do not cooperate satisfactorily, other information may be used to establish findings and that such information may be less favourable to the parties than if they had cooperated;
- (13) It is necessary to lay down the conditions under which provisional measures may be imposed; such measures may in all cases be imposed by the Commission only for a six-month period;
- (14) An investigation or proceeding should be terminated whenever there is no need to take measures, for example if the amount of subsidisation, the degree of unfair pricing or the injury is negligible; a proceeding shall not be terminated unless such a decision is duly motivated; that measures should be less than the amount of countervailable subsidies or the degree of unfair pricing if such lesser amount would remove the injury;

- (15) It is necessary to provide that measures should not exceed the value of subsidies or the non-commercial advantages granted as the case may be;
- (16) It is necessary to provide that measures are to remain in force only for as long as it is necessary to counteract the subsidies or unfair pricing practices causing injury;
- (17) It is necessary to specify procedures for the acceptance of undertakings eliminating or offsetting the countervailable subsidies or unfair pricing practices and injury in lieu of the imposition of provisional or definitive measures; it is also appropriate to lay down the consequences of breach or withdrawal of undertakings;
- (18) It is necessary to provide, in cases where sufficient evidence is submitted of changed circumstances, for review of existing measures;
- (19) In accordance with Article 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, measures for the implementation of this Regulation should be adopted by use of the advisory procedure provided for in Article 3 of that Decision.

HAVE ADOPTED THIS REGULATION:

#### *Article 1*

#### **Principles**

A redressive measure may be imposed for the purpose of :

- (1) Offsetting any subsidy granted, directly or indirectly to a non-Community air carrier, or
- (2) Offsetting the unfair pricing practices by state controlled non-Community air carriers

concerning the supply of air services on certain routes to and from the Community which cause injury to the Community industry.

#### *Article 2*

#### **Subsidisation**

- 1. A subsidy shall be deemed to exist if:
  - (a) there is a financial contribution by a government of a country not member of the European Community, that is to say,
    - (i) where a government practice involves a direct transfer of funds, potential direct transfer of funds or liabilities;
    - (ii) government revenue that is otherwise due is foregone or not collected;
    - (iii) a government provides goods or services other than general infrastructure, or purchases goods or services;

- (iv) a government makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the type of functions illustrated above which would normally be vested in the government and, in practice, in no real sense, differs from practices normally followed by governments; and
- (b) a benefit is thereby conferred.
- 2. Subsidies shall be subject to redressive measures only if the subsidies are limited, in law or in fact, to an enterprise or industry or group of enterprises or industries within the jurisdiction of the granting authority, including subsidies contingent upon export performance.

### *Article 3*

#### **Unfair pricing practices**

- 1. Unfair pricing practices shall be deemed to exist where state controlled non-Community air carriers benefitting from a non-commercial advantage continuously charge on a particular air service to or from a Community air fares which are lower than the normal fare rate.
- 2. The term 'normal fare rate' means
  - a) the comparable rate actually charged during a period of at least 6 months in the ordinary course of air transport for the like air service on the same or comparable route by an established and representative air carrier which is not a government controlled air carrier; or where such rate cannot be determined
  - b) the constructed rate which is determined by the costs of a comparable air carrier plus a reasonable margin of profit. This cost shall be computed on the basis of all costs incurred in the ordinary course of trade, both fixed and variable, plus a reasonable amount for overhead expenses.
- 3. A non-Community air carrier shall be deemed to be "state-controlled" if the Government or any other public body within the territory of a third country owns more than 50 per cent of the equity interest in it, or have the power to name a majority of its directors or otherwise legally direct its actions

### *Article 4*

#### **Determination of injury**

- 1. For the purposes of this Regulation:
  - (a) the term "injury" shall be taken to mean material injury to the Community industry, or threat of material injury to the Community industry;
  - (b) the term "Community industry" shall be interpreted as referring to 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;

- (c) the term "Community air carrier" shall be taken to mean an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers<sup>11</sup>;
  - (d) the term "like air service" shall be interpreted to mean air services which are supplied on the same route or routes as the air services under consideration or such air services that are supplied on a route or routes closely resembling the route or routes on which the air service under consideration is supplied.
2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both:
- (a) the level of fares of the air services under consideration, and the effect of such air services on fares offered by Community air carriers; and
  - (b) the consequent impact of those air services on the Community industry as indicated by trends in a number of economic indicators such as number of flights, utilisation of capacity, passenger bookings, market share, profits, return on capital, investment, employment.
- No one or more of these factors can necessarily give decisive guidance.
3. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the air services under consideration are causing injury within the meaning of this Regulation.
4. Known factors other than the air services under consideration which are injuring the Community industry at the same time shall also be examined to ensure the injury caused by these other factors is not attributed to the air services under consideration.
5. A determination of threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstance which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent.

## *Article 5*

### **Initiation of proceedings**

1. An investigation under this Regulation shall be initiated upon a written complaint by any person or association acting on behalf of the Community industry, or on the Commissions own initiative, if there is sufficient evidence of the existence of countervailable subsidies (including, if possible, of their amount) or unfair pricing practices within the meaning of this Regulation, injury and a causal link between the allegedly subsidised air services and the alleged injury.

---

<sup>11</sup> OJ L 240 , 24.8.1992, p. 1

2. When it is apparent that there is sufficient evidence to justify initiating a proceeding, the Commission shall, acting in accordance with the procedure laid down in Article 12(2), initiate the proceeding within 45 days of the lodging of the complaint and shall publish a notice in the *Official Journal of the European Communities*. Where insufficient evidence has been presented, the Commission shall, acting in accordance with the procedure laid down in Article 12(2), inform the complainant within 45 days of the date on which the complaint has been lodged with the Commission.
3. The notice of initiation of the proceedings shall announce the initiation of an investigation, indicate the scope of the investigation, the airline services on the routes concerned, the countries whose governments allegedly granted the subsidies or control the air carriers allegedly engaged in unfair pricing practices and the period within interested parties may make themselves known, present their views in writing and submit information, if such views are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission.
4. The Commission shall inform the air carriers supplying the air services under consideration, the government concerned and the complainants of the initiation of the proceedings.
5. The Commission may, at any time before initiation of the proceedings and thereafter, invite the foreign government concerned for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 and arriving at a mutually agreed solution.

## *Article 6*

### **The investigation**

1. Following the initiation of the proceeding, the Commission shall commence an investigation which shall cover both subsidisation or unfair pricing practices of airline services supplied by non-Community carriers on certain routes, and injury.
2. The interested parties which have made themselves known in accordance with time limits set forth in the notice of initiation, shall be heard if they have made a timely request for a hearing showing that they are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard.
3. In cases in which an interested party refuses access to, or otherwise does not provide, necessary information within the appropriate time limits, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of the facts available.

## *Article 7*

### **Provisional measures**

1. Provisional measures may be imposed if a provisional affirmative determination has been made that the air carriers under consideration benefit from subsidies or are engaged in unfair pricing practices and consequent injury to the Community industry and that the Community interest calls for intervention to prevent such injury.
2. Provisional action may be taken in accordance with the procedure laid down in Article 12(2).
3. Provisional measures shall be imposed for a maximum of six months.

#### *Article 8*

##### **Termination without measures**

1. Where the complaint is withdrawn, the proceeding may be terminated by the Commission unless such termination would not be in the Community interest.
2. Where protective measures are unnecessary the proceeding shall be terminated in accordance with the procedure laid down in Article 12(2). Any decision to terminate a proceeding must be duly motivated.

#### *Article 9*

##### **Imposition of definitive measures**

1. Where the facts as finally established show the existence of subsidies or unfair pricing practices and injury caused thereby, and the Community interest calls for intervention in accordance with Article 13, a definitive measure shall be imposed in accordance with the procedure laid down in article 12(2).
2. The level of measures imposed to offset subsidies shall not exceed the amount of subsidies, calculated in terms of benefit conferred on the recipient, from which the non-Community carriers have been found to benefit, and should be less than the total amount of subsidies, if such lesser level were to be adequate to remove the injury to the Community industry
3. The level of measures imposed to offset unfair pricing practices benefitting from a non-commercial advantage, shall not exceed the difference between the fares charged by the non-Community air carrier concerned and the normal fare rate established in accordance with Article 3 but should be less if a such lesser level would be adequate to remove injury to Community industry. In any event, the level of measures should not exceed the value of the non-commercial advantage granted to the non-Community air carrier.
4. A redressive measure shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on air services supplied by all non-Community air carriers found to benefit from subsidies or engaged in unfair pricing practices on the respective routes, except as to air services supplied by those non-Community air carriers for which undertakings under the terms of this Regulation have been accepted.

5. A measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the subsidies or unfair pricing practices which are causing injury.

#### *Article 10*

##### **Undertakings**

1. Investigations may be terminated without the imposition of provisional or definitive measures upon receipt of satisfactory voluntary undertakings under which:
  - (a) the government granting the subsidy or non-commercial advantage agrees to eliminate or limit the subsidy or non-commercial advantage or take other measures concerning its effects; or
  - (b) any non-Community air carrier undertakes to revise its prices or to cease the supply of airline service to the route in question so that the injurious effect of the subsidy or non-commercial advantage is eliminated.
2. Undertakings shall be accepted in accordance with the procedure laid down in Article 12(2).
3. In case of breach or withdrawal of undertakings by any party, a definitive measure shall be imposed in accordance with Article 9, on the basis of the facts established within the context of the investigation which led to the undertaking, provided that such investigation was concluded with a final determination as to subsidization and and that the non-Community air carrier concerned, or the government granting the subsidy, has, except in the case of withdrawal of the undertaking by the non-Community air carrier or such government, been given an opportunity to comment.

#### *Article 11*

##### **Reviews**

1. The need for the continued imposition of measures in their initial form may be reviewed, where warranted, on the initiative of the Commission or upon the request of a Member State or, provided that a reasonable time of at least one year has elapsed since the imposition of the definitive measure, upon a request by non-Community air carriers subject to measures or by Community air carriers.
2. Reviews shall be initiated by the Commission acting in accordance with the procedure laid down in Article 12(2). The relevant provisions of Articles 5 and 6 shall apply to reviews under paragraph 1. Where warranted by reviews, measures shall be repealed, amended or maintained, as appropriate in accordance with the procedure laid down in Article 12(2).

#### *Article 12*

##### **Committee**

1. The Commission shall be assisted by the Committee instituted by Article 11 of Regulation 2408/92.
2. Where reference is made to this paragraph, the advisory procedure laid down in Article 3 of Decision 1999/468/EC/ shall apply, in compliance with Article 7 and Article 8 thereof.

### *Article 13*

#### **Community interest**

A determination as to whether the Community interest calls for intervention should be based on an appraisal of all the various interests taken as a whole. In such an examination the need to eliminate the trade-distorting effects of injurious subsidisation or unfair pricing practices and to restore effective competition shall be given special consideration. Measures may not be applied where the authorities can clearly conclude that it is not in the Community interest to apply such measures.

### *Article 14*

#### **General provisions**

1. Provisional or definitive redressive measures shall be imposed by Regulation, and enforced by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such measures. If measures other than duties are imposed, the Regulation shall define the precise form of the measures in accordance with the provisions of this Regulation.
2. Regulations imposing provisional or definitive redressive measures, and Regulations or Decisions accepting undertakings or suspending or terminating investigations or proceedings, shall be published in the Official Journal of the European Communities.
3. This Regulation shall not preclude the application of any special rules laid down in agreements concluded between the Community and third countries.

### *Article 15*

#### **Entry into force**

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

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

Done at Brussels, [...]

*For the European Parliament and the Council*

[...]