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 Second edition  
 The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure. Please note this document has been designed for on-line viewing.

# Safeguarding competition in air transport

The issue of fair competition between EU and third-country airlines and the importance of guaranteeing a level playing field has been recognised for some years by the various EU institutions as key for the future of European aviation. The 2015 Commission communication on the aviation strategy underlined the importance and legitimacy of EU action to deal with possible unfair commercial practices in international aviation, and announced the revision of existing rules in this field.

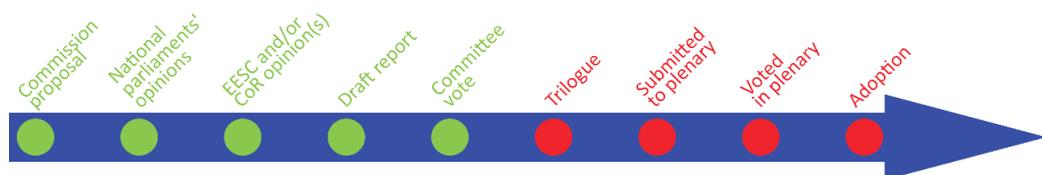
On 8 June 2017, the Commission adopted a legislative proposal for a regulation on safeguarding competition in air transport, repealing Regulation 868/2004 as part of the 'Open and Connected Aviation' package delivering part of the aviation strategy.

The objective of the proposal is to provide effective legislation in order 'to maintain conditions conducive to a high level of Union connectivity and to ensure fair competition with third countries air carriers'.

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

COM(2017) 289 8.6.2017 2017/0116(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

Committee responsible:	Transport and Tourism (TRAN)
Rapporteur:	Markus Pieper (EPP, Germany)
Shadow rapporteurs:	Gabriele Preuss (S&D, Germany) Jacqueline Foster (ECR, UK) Pavel Telička (ALDE, Czech Republic) João Pimenta Lopes (GUE/NGL, Portugal) Jakop Dalunde (Greens/EFA, Sweden) Daniela Aiuto (EFDD, Italy) Marie-Christine Arnautu (ENF, France)
Next steps expected:	Trilogue negotiations



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## Introduction

The issue of fair competition between EU and third country airlines and the importance of guaranteeing a level playing field has been recognised for some years as key for the future of European aviation.

Already in 2012, the Commission, in its [communication](#) 'The EU's External Aviation Policy – Addressing Future Challenges' noted the limitations of existing provisions, namely [Regulation 868/2004](#), when it came to protecting EU carriers against subsidisation and unfair pricing practices in the supply of air services from non-EU countries, and mentioned that 'A more appropriate and effective instrument would need to be developed to safeguard fair and open competition in the EU's external aviation relations'.

In the 2015 [communication](#) 'An Aviation Strategy for Europe', the Commission underlined that it was important and legitimate for the EU to deal with possible unfair commercial practices in international aviation. It pointed out that this issue should be addressed in the context of the negotiation of EU comprehensive air transport agreements, by intensifying corresponding policy action at International Civil Aviation Organization level, and that it was considering proposing new EU measures to tackle unfair practices. The action plan attached to the strategy announced a legislative proposal to address unfair practices (revision of Regulation 868/2004).

On 8 June 2017, the Commission adopted a [legislative proposal](#) for a regulation on safeguarding competition in air transport, repealing Regulation 868/2004.

The present legislative proposal is part of the 'Open and Connected Aviation' package that included three other initiatives: interpretative guidelines on [ownership and control](#) of EU air carriers, interpretative guidelines on [public services obligations](#), and [practices](#) favouring air traffic management service continuity. All four initiatives are outlined in the communication that presents the package.

## Context

The liberalisation and deregulation of international air transport has led to unprecedented competition on the global aviation market and is expected to further intensify in future years. In 2012, the Commission communication on the EU's external aviation policy put expected growth in international aviation at around 5 % annually until 2030 and underlined that this growth would be accompanied by a relative shift to areas outside the EU, particularly Asia and the Middle East.

Whether it be in terms of market share, transport capacity, or the traffic growth rates of EU passengers and particularly transfer traffic, the EU aviation sector and EU airlines appear to be gradually losing ground and are confronted with tough competition from fast-growing third countries and regions. Although Europe is still the region with the largest transfer market in the world, it is losing its lead as a global hub. While European hubs managed to increase intercontinental traffic flows from 42 million passengers in 2004 to 45 million in 2013, Middle Eastern and Turkish hubs, increased their transfer traffic from 8 to 30 and 2 to 10 million respectively during the same period.

Though the EU's overall connectivity still relies largely on air services performed by Union air carriers (an average of 7 million flights are operated per year by such carriers to or from Union airports as against 1.3

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million flights operated by third country carriers), the picture is different when it comes to the connection between the EU and other world areas. In this market, Union air carriers and third country air carriers have near to equal shares, with 49.9 % of flights and around 239 million passengers carried in 2015 by Union air carriers and 50.1 % of flights and around 240 million passengers carried in 2015 by third country air carriers.

## Existing situation

Within this context, the issue of third countries' unfair or allegedly unfair practices affecting EU carriers and the international position of EU aviation comes to the fore. As mentioned in the aviation strategy for Europe, 'As there is currently no international legal framework to deal with possible unfair commercial practices in international aviation, it is important and legitimate for the EU to address such practices to ensure fair and sustainable competition'. Indeed, unfair practices and discrimination are not covered by any binding multilateral rules and are not properly covered by the vast majority of bilateral [air services agreements](#) (ASAs).

While the World Trade Organization (WTO) provides the international legal framework for trade relations, covering goods, services and trade related aspects of intellectual property, air services are governed by a specific annex of the General Agreement on Trade and Services (GATS), the Annex on Air Transport Services. This annex does not cover the bulk of air transport services, namely traffic rights and services directly related to the exercise of traffic rights.

As for policy action within the context of the International Civil Aviation Organization ([ICAO](#)), existing rules do not cover fair competition in the international air transport sector. The decision-making process (consensus rule) coupled with the fact that a number of ICAO Member States have a different perception of fair competition principles has so far prevented real progress on setting up an international regulatory regime in the field. However, the 38th ICAO Assembly, held between September and October 2013, recognised the importance of fair competition as a principle in the operation of international air services and agreed that the 'ICAO should play a leadership role in identifying and developing tools to promote dialogue and the exchange of information among interested authorities with the goal of fostering more compatible regulatory approaches'. Though considered to be progress, the current regime at ICAO level is, for the time being, ineffective when it comes to addressing these issues.

The absence of a framework describing the conditions governing competition among air carriers may therefore lead to situations where practices regarding the treatment of air carriers vary from one country to another, with an impact on competition.<sup>1</sup>

Some Member States have attempted to include fair competition clauses in their bilateral ASAs with third countries but the reluctance among third countries to subscribe to them implies that a very limited number of ASAs have so far been amended to include such clauses. Within the context of EU-level negotiations, competition clauses were introduced in the EU's comprehensive aviation agreements, for example, with

<sup>1</sup> Within the Union, EU rules provide that all carriers, European and non-European, be granted the same rights and same opportunity to access air-transport-related services, while in some third countries, discriminatory practices and subsidies may give unfair competitive advantages to air carriers from those third countries.

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the US, Canada, Israel, Jordan, Morocco, Moldova and Georgia, as well as the initialled agreement with Brazil. However, fair competition is addressed in different ways in the above-mentioned agreements as a result of the compromise necessary to conclude them.

The objective of the existing legislation, Regulation (EC) No 868/2004, was to provide protection against subsidisation and unfair pricing practices in the supply of air services by countries not members of the European Community. However the tool has never been applied, and is deemed inadequate and ineffective, too restrictive and ill-suited to the specific characteristics of the aviation services sector (see European Parliament and Council sections below).

Consequently, there is no existing and effective legal framework and therefore a risk that continuing unfair practices will hamper the EU's connectivity and competition, and lead in the long term to dominant or even monopolistic situations in the aviation market. It was this situation that led the Commission to adopt the present legislative proposal on 8 June 2017.

## Comparative elements

The debate and concerns regarding the 'fairness' of competition from third country players is not limited to the EU and is also taking place in the [United States of America](#) (USA), where several US network airlines and labour unions have raised the issue. Provisions that cover competition are enshrined in the International Air Transportation Fair Competitive Practices Act ([IATF CPA](#)), that aims to protect US carriers from unfair and discriminatory practices from third countries airlines or governments and to protect the rights acquired within the framework of bilateral air services agreements. The [scope](#) of this act is quite broad and in practice gives the US Department of Transportation substantial discretionary powers to protect the US aviation industry, based on complaint from a US airline or on its own initiative.

## Parliament's starting position

The European Parliament has called for the revision of Regulation 868/2004 in several resolutions, in particular in its resolutions of [2 July 2013](#), [9 September 2015](#), [11 November 2015](#) and [16 February 2017](#).

In its resolution of 2 July 2013, Parliament considered 'that bilateral air service agreements are not always the most appropriate solution to combat market restrictions or unfair subsidies', noted that a more coordinated Union approach should be applied to establish fair and open competition and called on the Commission to propose the revision or replacement of Regulation (EC) No 868/2004.

The European Parliament's 11 November 2015 resolution on aviation emphasised that Regulation (EC) No 868/2004 had proved inadequate and ineffective, and called on the Commission to revise it in order to safeguard fair competition in the EU's external aviation relations, prevent unfair competition more effectively, ensure reciprocity and eliminate unfair practices, including subsidies and state aid awarded to airlines by certain third countries, which distort the market. In its recent resolution of 16 February 2017 on an aviation strategy for Europe, Parliament welcomed the Commission's proposal to revise Regulation (EC) No 868/2004 but also stressed 'that neither an unacceptable trend towards protectionism, nor, on their own, measures to ensure fair competition can guarantee the competitiveness of the EU aviation sector'. It



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also welcomed the initiative to negotiate at EU level air transport agreements and bilateral aviation safety agreements with third countries, recalling that new agreements should be correctly implemented and enforced by all parties and should include a fair competition clause on the basis of international standards (ICAO, International Labour Organization).

## Council starting position

The [Council](#) adopted conclusions on 20 December 2012 in which it called for a more ambitious and robust EU external aviation policy, based on the principles of reciprocity and open and fair competition in a level playing field. It considered that Regulation (EC) No 868/2004 had proved itself unable to address adequately the specific characteristics of the aviation 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. It also encouraged the Commission and Member States to 'use their bilateral and multilateral relations to actively support the establishment of a level playing field favouring open and fair competition in international air transport'.



## Proposal

### Preparation of the proposal

The Commission based its preparation on an external study<sup>2</sup> 'Improved protection against unfair practices causing injury to EU air carriers in the supply of air services from non-EU countries on routes to and from the EU'. The study looked at trends in air traffic evolution between the EU and other world regions and protection against alleged unfair practices, as provided for under the existing regulation, analysed the need for an effective regulatory tool and examined several main options. It also covered the analysis and comparison of the related regulatory provisions and legislation in the US. The Commission also used the results of a report<sup>3</sup> '868/2004 – A Case for Better Regulation' to prepare for the Impact Assessment. The report analysed the reasons for the lack of use of Regulation 868/2004 by the European airline industry, and suggested ways to improve it using different policy options.

Others sources, such as Eurostat data, publications in the field, legislation, reported cases of alleged unfair practices by third countries and third country entities were also used.

From 29 October 2013 to 21 January 2014, an initial online public [consultation](#) on 'proposal for improved protection against subsidisation and unfair pricing practices' gathered the views of key stakeholders but attracted only a limited number of responses. The public consultation for the preparation of the Commission's aviation strategy, held between 19 March and 10 June 2015, attracted many more responses from stakeholders such as Member States and third countries, airlines, airports, pilots, aircraft suppliers and manufacturers, industry and employees' associations, consultancies, academia and citizens. Several informal meetings with the Member States and with relevant stakeholders (from the EU and third countries) also took place.

### The changes the proposal would bring

The legislative proposal, whose purpose is to ensure fair competition between Union air carriers and third country air carriers, consists of a tool to ensure that airlines can compete on the basis of equal opportunities and that the EU's connectivity can be safeguarded. In particular, Article 1(1) of the proposal mentions that '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'.

The scope of the proposal therefore goes beyond the existing Regulation 868/2004, which aimed to provide protection only against subsidisation and unfair pricing practices, evidence of such pricing practices being very difficult to demonstrate.

<sup>2</sup> Study carried out by PwC, 2014.

<sup>3</sup> 868/2004 – A Case for Better Regulation, Mott Mc Donald, 2013.



A new major element of the proposal is that it takes into account the obligations contained in international air transport or air services agreements with third countries while Regulation (EC) No 868/2004 failed to provide for a dedicated EU internal procedure with respect to obligations contained in such agreements. The proposal, indeed, defines two possible purposes of investigation, pertaining either to the violation of applicable international obligations (the '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 'injury' track). Article 3 (1) provides the following:

'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:

- > violation of applicable international obligations;
- > the existence of all the following circumstances:
  - > a practice affecting competition, adopted by a third country or a third country entity;
  - > injury or threat of injury to one or more Union air carriers;
  - > a causal link between the alleged practice and the alleged injury or threat of injury'.

Article 2 of the proposal defines the applicable international obligations as meaning: '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'. The implication, as laid down in recital 10 is that 'Where the Union is party to an air transport or air services agreement with a third country, the violation of international obligations enshrined therein should be addressed within the context of this agreement, in particular through the application of the fair competition clause where it exists, and, where relevant, dispute settlement'.

Article 3 (1) of the proposal also 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, while under the existing regulation this right to complain was much more restrictive, and did not cover Member States or individual air carriers. The proposal describes notably the conditions under which the Commission may or may not decide to open an investigation as well as its right to seek the information deemed necessary to conduct the investigation. The proposal also provides for the possibility under certain conditions to adopt financial or operational measures intended to offset injury or threat of injury.

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## Views

### Advisory committees

Consultation of the European Economic and Social Committee (EESC) and of the European Committee of the Regions (CoR) is mandatory as the initiative is based on [Article 100\(2\)](#) of the Treaty on the Functioning of the European Union. On 16 June 2017, the [COTER](#) Commission of the Committee of the Regions recommended not to issue an opinion on this legislative proposal. The European Economic and Social Committee (EESC) adopted its opinion on 17 January 2018

### National parliaments

The deadline for submitting a reasoned opinion on grounds of [subsidiarity](#) was 4 September 2017. The chambers of several national parliaments considered the proposal and Portugal and Italy submitted comments for political dialogue. No national parliament submitted a reasoned opinion.

### Stakeholders' views<sup>4</sup>

As already mentioned, the first online public consultation on the 'proposal for improved protection against subsidisation and unfair pricing practices', held between 29 October 2013 and 21 January 2014, attracted a limited number of responses, as only 20 entities took part (including four non-EU airlines and industry associations), implying that the results have to be interpreted with caution. These results, nonetheless, go into detail notably when it comes to issues to be addressed and policy options. The consultation results show a real difference between EU and non-EU entities. In particular, the revision of Regulation 868/2004 appeared to be the most popular option amongst EU entities, notably airlines, while non-EU entities, particularly Middle Eastern carriers and organisations, had concerns over a revision process that might adversely impact the market conditions in which they currently operate.

The [public consultation](#) for the preparation of the Commission aviation strategy, held between 19 March and 10 June 2015, attracted many more responses (233 full questionnaire responses and 41 position papers) from a variety of stakeholders. Among the key findings, many stakeholders considered the cost advantages of non-EU carriers, tax regimes and potential subsidies to be the most important obstacles/challenges confronting EU carriers on extra-EU markets. The majority also considered that state subsidies for non-EU carriers were an issue, though some stakeholders did not share that view. Respondents were more split or more neutral concerning possible discrimination from third countries or non-EU service providers. Fair competition, regulatory harmonisation and taxation were seen as key areas to improve the framework conditions of the EU's aviation sector in international competition.

<sup>4</sup> This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.



## Legislative process

The legislative proposal has been assigned to the Parliament's Committee on Transport and Tourism, which designated Markus Pieper (EPP, Germany) as rapporteur.

On 11 January 2018, the rapporteur presented his draft report to the committee. Committee members discussed the numerous amendments put forward, on 20 February, and [adopted](#) their report on 20 March, with 28 votes in favour, 9 against and 2 abstentions. The [report](#) supports the Commission's proposal, highlights the importance of connectivity, adds the obligation for the Commission to report to the EP regularly and introduces the possibility of adopting provisional redressive measures under specific circumstances. It also clarifies a number of concepts. The EP Committee on Economic and Monetary Affairs also adopted an [opinion](#) on the proposal, on 21 February 2018.

While the proposal mentions that proceedings should not be initiated, or redressive measures adopted, if this would be against the Union interest, the Committee report attempts to clarify this notion of 'Union interest', adding 'When determining the Union interest, priority shall be given to the need to restore effective and fair competition, the need to ensure transparency, the need to avoid any distortion to the internal market, the need to avoid undermining Member States' socio-economic situation and the need to maintain a high level of connectivity for passengers and the Union'. The report also introduces the concept of provisional redressive measures, defined as 'measures of a temporary nature against a third-country air carrier, that are proportionate to the threat, that have the sole purpose of preventing irreversible injury, that are taken by the Commission at the beginning of the proceeding on the basis of available facts, and that are to be repealed no later than upon the conclusion of an investigation'.

The report also adds, 'Where bilateral air transport or air services agreements with third countries include fair competition clauses or similar provisions, exhausting dispute settlement procedures foreseen in such international agreements should not be a precondition for opening a procedure under this Regulation and should not preclude the right of the Commission to initiate an investigation in order to ensure complementarity between this Regulation and the bilateral agreements'.

The Parliament confirmed the decision of the TRAN committee to enter into interinstitutional (trilogue) negotiations, during the April 2018 plenary session.

For its part, the Council adopted its position ([general approach](#)) at the Transport, Telecommunications and Energy Council held on 7 June 2018. In many [aspects](#), the Council's position appear to diverge from that adopted by the Parliament on 20 March, as well as from the Commission's proposals.

The Council notably removes the notion of threat of injury at the stage of initiating proceedings, implying that an injury has to materialise before the EU can act. The Council also introduces the possibility, under article 4, for the investigation to be suspended 'for twelve months at the request of all the Member States concerned, in order to allow Member States the possibility to seek solutions exclusively on a bilateral basis'. As regards redressive measures, the [Council](#) general approach draws a distinction between measures taking the form of financial duties, that would be adopted by means of Commission implementing acts, and those of an operational nature that would require a Council decision. It also formally excludes traffic rights as possible redressing measures.



## References

### EP supporting analysis

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Vettorazzi S., [Initial appraisal of a European Commission Impact Assessment Safeguarding competition in air transport](#), EPRS, November 2017.

### Other sources

[Safeguarding competition in air transport](#), European Parliament, Legislative Observatory (OEIL).

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