

November 2017

## Safeguarding competition in air transport

*Impact assessment (SWD(2017) 182 final, SWD(2017) 183 final (executive summary)) of a Commission 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 final)*

### Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [impact assessment](#) (IA) accompanying the above [proposal](#), adopted on 8 June 2017 and referred to Parliament's Committee on Transport and Tourism (TRAN).<sup>1</sup> The proposal intends to repeal Regulation (EC) No 868/2004<sup>2</sup> in order to 'ensure a fair level playing field between European and third country air carriers' (IA, p. 44), 'with a view to maintain conditions conducive to a high level of connectivity' (explanatory memorandum, p. 8). According to the IA, 'Regulation (EC) No 868/2004 intended to protect EU air carriers against objectively defined practices considered as "unfair" and "discriminatory", namely subsidisation and unfair pricing practices causing injury to EU carriers in the supply of air services to and from third countries' (IA, p. 34). However, for the reasons comprehensively outlined in the IA (pp. 34-36), the regulation 'has never been applied, and some of its features make it very unlikely that it will ever be (concretely) applied' (explanatory memorandum, p. 3).<sup>3</sup> The proposal is part of the 'Open and Connected Aviation' package, which includes three other initiatives.<sup>4</sup>

The European Parliament has called for the revision of this regulation in a number of its resolutions,<sup>5</sup> as it had proved inadequate and ineffective. The Council, in its conclusions adopted on 20 December 2012,<sup>6</sup> called for a more ambitious and robust EU external aviation policy,<sup>7</sup> based on the principles of reciprocity and open and fair competition in a level playing field. It considered that this regulation had proved itself unable to adequately address the specific characteristics of the aviation services sector and supported the Commission's intention to

<sup>1</sup> For more information, see A. Debyser, [Safeguarding competition in air transport](#), EU Legislation in progress, EPRS, September 2017.

<sup>2</sup> [Regulation \(EC\) No 868/2004](#) 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.

<sup>3</sup> According to the IA, in order to take redressive measures to compensate for subsidies or unfair pricing practices, proof of three conditions is required: 1. the existence of subsidies or unfair pricing practices; 2. the existence of a serious injury to the Community industry; and 3. a causal link between the subsidies or unfair pricing practices and the injury suffered. However, the IA states that it is difficult to determine the existence of unfair pricing practices as the current regulation '...uses the concepts and definitions drawn directly from the legal instruments used for defence of trade in goods', and the '...simple assessment of publicly available price levels of different air carriers is not sufficient to argue the existence of unfair practices', as explained in the IA (p. 35). The IA provides another example of the inadequacy of the trade defence approach in referring to the 'like air service' concept (IA, p. 36).

<sup>4</sup> Namely: interpretative guidelines on Regulation (EC) No 1008/2008 Rules on ownership and control of EU air carriers, [C\(2017\) 3711 final](#); interpretative guidelines on Regulation (EC) No 1008/2008 Public services obligations, [C\(2017\) 3712 final](#); practices favouring air traffic management service continuity, as outlined in [SWD\(2017\) 207 final](#). The four initiatives come together with a Commission communication, [COM\(2017\) 286 final](#), which puts them in their wider context.

<sup>5</sup> European Parliament [resolution of 2 July 2013](#) on the EU's External Aviation Policy-Addressing future challenges (2012/2299(INI)); [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)); [resolution of 11 November 2015](#) on aviation (2015/2933(RSP)), and [resolution of 16 February 2017](#) on an aviation strategy for Europe (2016/2062(INI)).

<sup>6</sup> [Council conclusions of 20 December 2012](#) on the EU's External Aviation Policy – Addressing Future Challenges, 3213th Transport, Telecommunications and Energy Council meeting.

<sup>7</sup> For more information, see A. Debyser, [EU external aviation policy](#), EPRS, 2016.

analyse possible options for a more effective instrument to safeguard open and fair competition. 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' (Recital 24, p. 4).

## Problem definition

The **main problem** identified by the IA are **concerns about unfair practices by third countries and third country entities negatively affecting EU carriers**, which continue to exist (IA, p. 14), and were 'strongly echoed in the ... public consultation on aviation package for improving the competitiveness of EU aviation sector' (IA, p. 21). In addition, the IA identifies two drivers, namely (IA, pp. 44-45):

- problem driver 1: absence of adequate and effective mechanisms to safeguard fair competition in a context of increasing liberalisation of the international aviation market;
- problem driver 2: lack of transparency and information about the support received and financial accounts of third country air carriers.

The identification of drivers is in line with the Commission's better regulation guidelines, [SWD\(2017\) 350 final](#), which indicate that policy proposals are built on a clear problem definition and an identification of the underlying factors and behaviours (or 'drivers'). According to the analysis carried out in the IA, supported by the additional information and data gathered by the Commission, there are a number of alleged cases of subsidies and unfair practices by third countries and third country entities that have been reported by EU governments, by air carriers, and by some media (e.g. restrictions of access to infrastructures and facilities, discriminatory allocation of airport slots, discriminatory airport charges, etc.). These practices are described in a dedicated, and comprehensive, section of the IA (pp. 24-29). Their impact on the EU transport market is analysed in section 2.1.6 (IA, pp. 29-31); the IA states that in case of no EU action, '... the most probable scenario for EU carriers is the continuation or even aggravation of the current situation. Namely, to the extent that unfair practices exist, some EU airlines will continue to suffer from absence of effective instruments to address them ...' (IA, p. 45). The evolution of the problem without EU action is comprehensively outlined, and the IA provides two specific sections illustrating the competitive advantages of third country carriers (IA, pp. 15- 18), and the competitive disadvantages of EU carriers (IA, pp. 18-20). The inclusion of these two sections appears to make sense, as it is reasonable to assume that the current situation of the EU airlines sector is partly attributable to such alleged unfair practices. This is, indeed, acknowledged in the IA, which states that 'there is no doubt that the 'natural' competitive advantages of foreign carriers and the parallel objective disadvantages of EU airlines play major role in the change of EU aviation position on global market' (IA, p. 58).<sup>8</sup> The IA analyses the consequences for EU air transport sector employees, for EU consumers, and for EU manufacturers and suppliers in the aviation sector. However, the analysis of the consequences for those working in the travel/hospitality industry, mentioned in Annex C ('affected parties and their key interests') of the IA (p. 99), appears insufficiently developed.

## Objectives of the legislative proposal

According to the IA (pp. 44-45 and p. 71), the proposal presents:

- one **general** objective: ensure a fair level playing field<sup>9</sup> between European and third country air carriers by effectively protecting European air carriers from unfair practices by third countries and third country entities;
- two **specific** objectives: provide effective defence and redress measures against possible unfair practices by third countries and third country entities, and ensure access to relevant data and information from third country parties;
- five **operational** objectives: 1. create an International Civil Aviation Organization (ICAO)<sup>10</sup>/World Trade Organization (WTO) framework for fair competition<sup>11</sup> in international air transport services; 2. adopt a comprehensive and effective EU legal instrument for protection of EU air carriers against subsidies and

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<sup>8</sup> This opinion appears also supported by the views expressed in the two public consultations carried out in connection to this proposal, and in the context of the public consultation linked to the preparation of the Commission [Aviation strategy for Europe](#), set out in its communication [COM\(2015\) 598 final](#) (IA, p. 23): see the specific section of this briefing.

<sup>9</sup> On this issue, see M. Trethewey and R. Andriulaitis, What do we mean by a level playing field in international aviation? [Discussion Paper 2015-06](#), OECD/ITF, Paris, 2015.

<sup>10</sup> On ICAO, see M. Juul, [The International Civil Aviation Organization](#), EPRS, 2016.

<sup>11</sup> On competition issues, see the [existing ICAO policy and guidance material on competition](#), ICAO Information paper, Paris, April 2015, and the dedicated section of the ICAO website on the [Compendium of Competition Policies and Practices](#). In addition, see the OECD background paper on [Airline competition](#) prepared for the 121st meeting of the OECD Competition Committee.

discrimination in air transport services; 3. ensure financial transparency requirements at bilateral level; 4. enhance the investigative powers of the Commission under the EU legal framework; 5. ensure the protection of fair competition in air transport services at bilateral level.

General and specific objectives appear to be clear and consistent with the manner in which the problem has been defined; however, the general objective appears to omit considering the aspect of maintaining '...conditions conducive to a high level of connectivity' (explanatory memorandum, p. 8). Even though it does seem reasonable to assume that enabling Union air carriers 'to compete against third country air carriers in an environment of open and fair competition ... would contribute to maintaining conditions conducive to a high level of Union connectivity' (explanatory memorandum, Recital 2, p. 9), no supporting evidence or studies substantiating this statement are provided anywhere in the IA. The operational objectives are defined after the IA has identified the preferred option, in line with the Commission's [better regulation toolbox](#), which indicates that operational objectives are option-specific and should be set only after having identified the preferred option (tool #16, p. 100). The first two operational objectives are clearly linked to the first specific objective, while the third is linked to the second specific objective. However, the third and the fifth operational objectives do not appear to be truly operational, as their formulation is too broad, while the fourth could be interpreted as instrumental to ensuring effective defence against unfair practices, together with the enforcement of effective redress measures. On the whole, these operational objectives are relevant and achievable, even though they do not seem to be always specific, time-bound and measurable (at least considering their current formulation); as such, they appear to be set only to a limited extent according to the recommendations included in the better regulation toolbox (tool #16, pp. 100-101).

## Range of options considered

As illustrated in the table below, the IA considers five options; one is discarded, and not assessed, while four are retained for assessment. The baseline scenario is analysed in depth (IA, pp. 45-48), as well as the other retained options (IA, pp. 49-57).

OPTION	DESCRIPTION OF CONSIDERED OPTIONS	DECISION
A	Baseline: no further EU action	Retained
-	Improved functioning of the current Regulation (EC) No 868/2004 through a limited revision and the adoption of interpretative guidelines	Discarded
B	Increased international efforts at WTO and ICAO level aimed at the adoption of a multilateral legal framework for fair competition in aviation and inclusion of expanded fair competition clauses in Air Services Agreements (ASAs) <sup>12</sup> ensuring protection for EU air carriers against unfair practices (non-regulatory option)	Retained for assessment
C	Major changes to the regime contained in Regulation (EC) 868/2004 which would be repealed and replaced by a new comprehensive and effective EU legal instrument (regulatory option)	Retained for assessment
D	<b>Adoption of a new comprehensive EU legal instrument combined with increased efforts on the international scene and work on enhancing ASAs through inclusion of fair competition clauses</b>	<b>Preferred</b>

(Source: EPRS, based on European Commission IA text)

The explanations for the discarded option are provided under section 3.3 of the IA (pp. 48-49); the IA states that a limited amendment of the regulation aimed at improving the legal clarity of its provisions, as well as the procedural issues related to the filing of complaints and the conduct of investigations, would not address the essence of problem driver 1, i.e. that the regulation is 'unfit for purpose' because it is '... largely inspired by anti-dumping rules for trade in goods, and does not consider the specific nature of international air services' (IA, p. 48). The decision not to consider a limited revision of the regulation is supported by the majority of the stakeholders, even though only 20 replied to the public consultation (see specific section of this briefing). Within Option B, it is unclear why the Commission decided to consider (and retain) an option which envisages an increased effort at WTO level when the IA states that 'the application of WTO/GATS (General Agreement on Trade in Services) principles of NT (National Treatment) and MFN (Most Favoured Nation) to the existing web of ASAs will be almost impossible in practice' (IA, p. 49, and pp. 37-38). Option D, which 'combines the actions proposed under Option B and C' (IA, p. 55), appears to be rather artificial. In fact, it includes actions (foreseen under Option B) which the

<sup>12</sup> On ASAs, see IA (pp. 7-8, 41-42, and 55-57). In addition, see: [An overview of the air services agreements concluded by the EU](#), Policy Department for Structural and Cohesion Policies, European Parliament, 2013.

same IA narrows down to '... mainly in the work at ICAO' (IA, p. 49), as the IA extensively explains (pp. 49-52). At the same time, the Commission's decision seems to be reasonable in the light of ICAO already working on a multilateral air service liberalisation agreement under the aviation transport regulatory panel ([ATRP](#)), as stated in the IA (p. 49). However, the IA does not specify how the Commission would get involved in the proposed work at ICAO. The IA provides a comparison of the retained options with respect to the criteria of effectiveness, efficiency and coherence (IA, pp. 68-70), with Option D always scoring better than the others, as illustrated in the summary provided in Table 4 of the IA (p. 70).

## **Scope of the impact assessment**

The IA provides an assessment of the economic, social, and environmental impacts of the retained options, with a clear focus on the economic dimension, analysed with respect to the following aspects: functioning of the internal market and competition, competitiveness, trade and investment flows, SMEs (see specific section of this briefing), consumers and households. Costs associated with the implementation of the retained options are also considered, but not the administrative burden for non-EU carriers. As regard the impact on competitiveness, the IA acknowledges that a direct, causal link, between the EU carriers' market share and the alleged unfair practices cannot be established, and that other factors could also be relevant as well (IA, p. 58 and pp. 18-20). Based on a number of assumptions (IA, p. 59), and on the ensuing analysis (IA, pp. 59-61), the IA concludes that Option D would bring the strongest positive impact to restoring the competitive level playing field for EU airlines. According to the IA, it is difficult to assess how this would impact, in turn, on consumers and households, for the reasons provided in section 4.1.5 (pp. 65-66). This is because the net impact would be the result of short-term and longer-term effects, e.g. on quality of services provided and air fares. In respect of trade, the IA focuses on the aspect of the potential risk of retaliation from the countries affected by a revised regulation. This is considered to regard, mainly, European aircraft manufactures (i.e. Airbus) in the form of reduction or cancellation of some aircraft orders. The IA acknowledges that this potential risk 'would depend on a wide range of factors which are generally hard to predict' and that the risk of retaliatory actions 'would be strongly mitigated by the relative size and importance of the EU market' (IA, p. 63). The impact, if any, on foreign direct investment decisions is not dealt with, though it is mentioned. This is probably because the IA is implicitly assuming, though not clearly stated, that any potential retaliation would mainly impact on aircraft manufacturers, without leading automatically to a change of investment flows coming, for instance, from private companies or governments (e.g. through their sovereign wealth funds) belonging to those countries which might be affected by a revised regulation. The social impact is considered with respect to employment which, according to the IA, is expected to increase and be driven by the expected growth of passengers flying on EU carriers as a result of the policy option implemented. According to the IA, policy options C and D are expected to contribute most to the creation of new jobs, both directly and indirectly, along the entire air transport value chain, including airports and associated industries (IA, p. 66). However, no quantification is provided, with the IA clarifying that the impact on employment is analysed, as an illustrative example, with respect to the connections between EU hubs and the Middle East and Asia. Environmental impacts are considered with respect to greenhouse gases (GHG) emissions and aircraft noise (IA, pp. 66-67), but only from a qualitative point of view (IA, Annex D, pp. 100-101). Overall, the analysis on environmental impacts appears to be largely insufficient, and omits some impacts that could perhaps have been usefully included in the current analysis. For instance, the analysis would have benefited from at least considering the impact on energy use (through the fuel burnt by aircrafts) which is one of the aspects suggested for screening by the better regulation toolbox (tool #19, pp. 131-132). This is because, according to the IA, the implementation of at least one of the retained options would make it economically sound to use direct flights from European hubs to the final destinations, without transfer flights, therefore reducing the energy globally used by the aviation sector, as 'direct flights limit the number of take-offs and landings ... and reduces the length of flights' (IA, p. 67).

## **Subsidiarity/proportionality**

The explanatory memorandum states that the legal basis of this proposal is Article 100(2) of the Treaty on the Functioning of the European Union (TFEU), the same used as a basis for the adoption of the current Regulation No 868/2004 (explanatory memorandum, p. 5). It also refers to the 26th recital of that Regulation, which has recognised compatibility with the subsidiarity principle (explanatory memorandum, p. 5). The deadline for the

submission of reasoned opinions by national parliaments on whether the proposal complies with the principle of subsidiarity was 4 September 2017. No reasoned opinions had been submitted by national parliaments by that date. However, the Portuguese parliament has submitted comments for political dialogue.<sup>13</sup> In respect of proportionality, the IA contains a brief section on proportionality, describing how the retained policy options comply with the proportionality principle (IA, p. 70).

## **Budgetary or public finance implications**

The explanatory memorandum of the proposal states that, for the Commission, the budgetary impact is linked to examining the evidence included in a written complaint and, where sufficient evidence is provided, to initiating and conducting an investigation (explanatory memorandum, pp. 14-16). The IA lists five types of costs of implementation including, inter alia, those related to diplomatic negotiations and to lodge a formal complaint (IA, pp. 63-64). The IA states that these are difficult to quantify but, due to the fact that Option D includes more areas of intervention, they would be higher than those associated with the alternative options. However, according to the IA, these costs are minor when compared to the size of the potential benefits (IA, p. 64). According to the explanatory memorandum (p. 7), the quantification of the resources necessary to implement the proposed regulation is difficult, as it depends on each individual case being examined. The Commission has estimated them to be in the range of three to four full time officers (officials and temporary staff) per investigation, for two to three investigations per year. According to the IA, these resources will be met by staff already assigned to the management of the action and/or redeployed within the Commission. However it is unclear whether the Commission, in concluding that nine officers are required for implementing the proposed regulation (explanatory memorandum, p. 7), has considered the resources tasked for negotiating and managing all the existing and future ASAs between the EU and third countries. These are, in fact, currently managed by about 10 case handlers (IA, p. 64). According to Article 3 of the proposed regulation, a written complaint may be submitted, inter alia, by a Member State; even though the IA does not provide any estimate regarding what the corresponding cost could amount to, the explanatory memorandum states that it is reasonable to assume that it should be fairly limited (pp. 14-15). Revenues are expected as a result of redressive measures taken in respect of practices affecting competition, if chosen in the form of financial duties (explanatory memorandum, Article 13, p. 21).

## **SME test/Competitiveness**

According to the specific, but short, section dealing with the impact on SMEs, 'none of the options is likely to produce significant overall direct impact on SMEs' (IA, p. 63). However, it is not immediately self-evident why the increased competitive power of EU carriers, resulting from option D, would be expected to lead to increased turnover for enterprises in the supply chain, independently of their size (IA, p. 63). With regard to indirect impacts, the IA states that businesses indirectly related to air services operated by EU carriers (e.g. ground handling providers, travel agencies, etc.), are expected to benefit from the increased number of future passengers, regardless of whether the passengers fly with EU or third country carriers. This is because EU and non-EU airlines, according to the IA, are expected to increase their presence in the European market in the future, leading to an expansion of the overall market (IA, p. 63), the trends (in Europe and in other regions) for which are illustrated in Annex E (IA, pp. 102-108). However, according to the (not publicly available) source referenced in footnote 139, SMEs are expected to be affected in the short term by a possible increase in ticket prices, as travel costs may constitute a greater proportion of their budgets in comparison to larger enterprises (IA, p. 63). The rationale for such a (likely) ticket price increase is provided in the section of the IA which analyses the impact on competitiveness, together with the impact on trade and investment flows (IA, p. 62). In respect of competitiveness, the majority of section 4.1.2 mostly deals with the retaliation which could result from introducing stronger and

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<sup>13</sup> As regards the Assembly of the Portuguese Republic, it should be pointed out that there is a discrepancy in the final conclusions reached by its European Affairs Committee, who received the Commission proposal, and the Committee on Economy, Innovation and Public Works, who received the mandate to examine it. While the former concluded that the Commission initiative was in accordance with the principle of subsidiarity, the latter concluded that the initiative '*...viola os Princípios da Subsidiariedade e da Proporcionalidade, na medida em que atribui à Comissão Europeia um poder de intervenção, no domínio da Aviação Civil, contra os Estados-Membros e contra os Estados Terceiros, sem ter em conta as relações bilaterais dos vários Estados-Membros*'. Assembléia da República Portuguesa, [written opinion](#), 14 July 2017 (pp. 7 and 11).

more effective 'defence instruments' (IA, pp. 62-63); this choice appears to make sense, as possible retaliations from third countries might ultimately affect the competitiveness of EU air carriers. The remaining part of this section considers how the retained options would impact European airports and European manufacturers. Consequently, the analysis provided in the IA with regard to the impact on competitiveness appears to be insufficient; perhaps the analysis would have benefited from considering whether and, if so, to what extent the retained options might have been able to impact positively on those elements being already identified as causing a competitive disadvantage for EU airlines such as, inter alia, highest labour standards, regulations on environmental protection, airport capacity, etc. (IA, pp. 18-20).

## **Simplification and other regulatory implications**

The proposal is consistent with the EU's external aviation policy set out in [COM\(2012\) 556 final](#), with the EU's policy on fair competition, and with the relevant Union policies (explanatory memorandum, p. 4).

## **Quality of data, research and analysis**

The analysis of the identified problems, and their underlying drivers, is supported by an external study,<sup>14</sup> and by a topical report,<sup>15</sup> as well by other reports referenced in the IA. These are supplemented by additional data, publications and reported cases of alleged unfair practices by third countries and third country entities gathered by the Commission. Together with the additional analytical work carried out by the Commission, they provide ample and detailed insights and analysis on the different issues considered in the IA, making the overall analysis, and the assessments of the retained options, reasonably sound. However, apart from some exceptions, the majority of the studies referenced throughout the IA are not publicly available. Even though their unavailability is likely to be justified by confidentiality reasons, it would have been useful to make at least their respective executive summaries available for consultation. This is especially the case for the Mott McDonald report analysing the reasons for the lack of use of Regulation (EC) 868/2004 by the European airline industry. The report, in fact, includes an overview of existing competition and trade defence instruments compared to this regulation (IA, p. 72). As such, it is not possible to assess to what extent its main findings have been considered under the section of the IA illustrating the ineffectiveness of Regulation (EC) 868/2004 (pp. 34-36). In addition, it is unclear how the global market shares of the European aviation sector have been calculated, as these figures are not available, at least in the latest edition of the Boeing market outlook 2017-2036, which is published yearly.<sup>16</sup>

## **Stakeholder consultation**

The Commission has gathered stakeholders' views on a 'proposal for improved protection against subsidisation and unfair pricing practices' through a public, online, 12-week, consultation, running from 29 October 2013 until 21 January 2014, the results of which are described extensively in Annex B of the IA (pp. 79-98).<sup>17</sup> This consultation is not very recent, compared to the date of adoption of the legislative proposal; in addition, the Commission has received only 20 replies, representing EU airlines, EU airport and industry associations, Member States, EU citizens, non-EU airlines, and industry associations, and EU trade unions (IA, p. 80). As acknowledged by the Commission (explanatory memorandum, p. 6), the low response rate should be taken into account when interpreting the data gathered; this is reinforced by the IA which adds that 'the results of this public consultation have to be interpreted with caution as they are not statistically representative' (IA, Annex B, p. 79). However, the Commission held a number of informal meetings with the Member States and with EU and non-EU relevant stakeholders (explanatory memorandum, p. 6), although it is unclear how their opinions contributed to the analysis carried out in the IA. Stakeholders were also consulted in the context of the public consultation linked to the preparation of the Commission Aviation Strategy for Europe, which took place between 19 March and 10 June 2015 (IA, Annex B, pp. 97-98). The IA states that a question on unfair practices was included in the submitted questionnaire, which

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<sup>14</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 EU, Study prepared for the European Commission, DG MOVE, by PricewaterhouseCoopers (PwC), 2014.

<sup>15</sup> Mott McDonald, 868/2004 - A Case for Better Regulation, Report prepared for the European Commission, DG MOVE.

<sup>16</sup> [Current market outlook 2017-2036](#), Boeing, Seattle, 2017.

<sup>17</sup> The [questionnaire submitted](#), as well as an accompanying [policy background document](#) explaining the context of the consultation, are available on the DG MOVE website.

received 233 full responses and 41 position papers (IA, p. 97); the section relevant to the current legislative proposal is presented and commented in Annex B of the IA (pp. 97-98).<sup>18</sup> The [published results](#) and the full [report](#) are available on the Commission Directorate-General for Transport and Mobility (DG MOVE) website.

## Monitoring and evaluation

The IA identifies indicators, and the sources of data, for monitoring the (five) **operational** objectives of the retained option (IA, table 5, p. 71); however, as already pointed out in another section of this briefing, two of these objectives do not appear to be truly operational, as their formulation is too broad. In addition, it appears that some of the identified core progress indicators would have benefited from a different formulation, even though the Commission acknowledges the qualitative nature of some of them (IA, p. 70). The IA states that the Commission will carry out an evaluation five years after the end of the implementation date of the proposed legislation, in order to verify whether the objectives have been reached (IA, pp. 70-71).

## Commission Regulatory Scrutiny Board

The Commission's Regulatory Scrutiny Board (RSB) adopted a [negative opinion](#) on a draft version of the IA report of 2 March 2016, recommending improvements to the report with respect to the economic context of the problem and its magnitude; the description of the policy options (also with respect to their legal compatibility and enforceability); the assessment of consumer impacts; and the diversity of stakeholders' opinions (to be better reflected in the IA). Subsequently, the RSB adopted a [positive opinion](#) on a resubmitted version of the IA report of 15 July 2016, recommending further improvements to the report with respect to the problem description (to be further reinforced); the baseline scenario (to be presented and assessed in one place); the impact analysis (to be enhanced); and the stakeholders' minority views on the various elements considered (also to be reflected in the report). In line with the Better Regulation guidelines, the IA describes how its final version has addressed the recommendations provided by the RSB on their first and second opinions (IA, Annex A, pp. 73-78). As regards the improvements requested by the RSB on the problem description, the IA was asked to explain how technological advances on the aircraft manufacturing market may influence the balance between the hub and spoke as well as the point-to-point models used by aircraft carriers (IA, p. 76-77). However, it seems that the IA has not entirely addressed the RSB's remark, as the additional paragraph inserted in the IA report refers only to the different visions of aircraft manufacturers about the strategic evolution of the international transport market, which result in the different characteristics of the aircrafts manufactured (IA, p. 16). In addition, in view of the availability of figures regarding the strategic evolution of the market,<sup>19 20</sup> it is unclear why the IA states that it is not possible to determine in what direction the market will evolve (IA, p. 77), while the impossibility of determining 'whether the strategic evolution of the manufacturing market will actually result in a competitive (advantage?) for either EU or non EU air carriers' (IA, p. 77) is open for discussion. With regard to the RSB suggestion to recognise the limitations of market share indicators, and focus more on the traffic to and from the EU, the IA indeed provides figures on traffic flows but, as mentioned above, it does not make the two quoted sources, PwC (2014) and Mott McDonald (2013) available. In respect of the impact analysis, the IA includes some cost estimates that, as suggested by the RSB, should allow the reader to understand the costs of negotiating and managing international agreements, compared to the size of potential benefits (IA, p. 64). As regards to the impact on consumers (IA, pp. 65-66), the IA appears to have addressed the RSB's suggestion to clarify the apparent contradictions between more direct services and feeder (i.e. indirect) services. The IA states that the impact on duration of passengers' travel has been removed from the final version of the IA in order to eliminate one apparent contradiction observed by the RSB (IA, p. 78). Further, the IA appears to take up the RSB's suggestion concerning the views expressed by stakeholders replying to the public consultation.

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<sup>18</sup> It is worth observing that all the figures reported in the IA, referring to this consultation (IA, p. 21), exclude systematically the number of respondents who had no opinion, as it is apparent from Annex B (IA, p. 98); this approach is not methodologically wrong, but it might result in more emphasis on some answers.

<sup>19</sup> [Global market forecasts, Growing horizons 2017-2036](#), Airbus, (pp. 30-35, pp. 40-97, and pp. 120-121).

<sup>20</sup> [Current market outlook 2017-2036](#), Boeing, (executive summary, pp. 6-9, pp. 18-71, and p. 79). This document is particularly interesting as it includes, inter alia, a specific analysis on the airlines business strategy drivers (pp. 14-17).

## Coherence between the Commission's legislative proposal and the IA

The legislative proposal appears to be aligned with the analysis carried out in the IA, even though some of the new articles of the proposed regulation include aspects that, quite understandably, were perhaps too detailed to be dealt with in the IA (e.g. Article 13, redressive measures, Article 14, review of redressive measures). However, the reasons for applying the proposed regulation to Article 12 of [Council Regulation \(EEC\) No 95/93](#) (regarding slot allocations at Community airports) and Article 20 of [Council Directive 96/67/EC](#) (regarding access to the ground-handling market) are not made immediately apparent by the analysis illustrated in the IA. Some indication seems to be included in the explanatory memorandum, which states that 'This initiative is based on considerations similar to those of Article 12 of Council Regulation...and of Article 20 of Council Directive ...' (explanatory memorandum, p. 4). Both, in fact, allow for actions against third countries granting preferential treatment to their air carriers with respect to the allocation of slots at airports or with respect to access to the ground handling markets. As such, perhaps the IA would have benefited from making explicit that the aviation-related activities considered by the two aforementioned pieces of legislation are, according to the IA, among the most commonly alleged unfair practices used to undermine a fair competition among air carriers (IA, pp. 27-28). In addition, perhaps, it would have been useful to highlight that these two pieces of legislation do not include the redressive measures whose adoption, and review, are envisaged by the proposed Articles 13 and 14 (explanatory memorandum, pp. 21-22).

## Conclusions

The IA defines the problem, as well as the general and specific objectives of the proposed initiative, clearly; however, two of the operational objectives do not appear to be truly operational, as their formulation is too broad. On the whole, these operational objectives are relevant and achievable, even though they seem not to be always specific, time-bound, and measurable; as such they appear to be only to a limited extent set according to the recommendations included in the better regulation toolbox. As regards the three policy options retained for assessment (excluding the baseline), one anticipates an increased effort at WTO level, which the same IA considers 'almost impossible in practice', while another appears to be rather artificial. The analysis of impacts focuses on the economic dimension. However, the analysis regarding the impact on SME competitiveness appears to be insufficient, while the impact on investment flows is not dealt with, although it is mentioned. Overall, the analysis on environmental impacts appears to be largely insufficient, and omits some impacts that could perhaps have been usefully included in the current analysis. The impact on employment is not quantified. The IA relies on external analytical work and on comprehensive, and updated, sources of information. However, apart from some exceptions, the majority of the studies referenced throughout the IA are not publicly available, very likely due to confidentiality reasons. The Commission received only 20 replies to its stakeholders' consultation, making the results obtained 'not statistically representative', though the Commission gathered additional information through informal meetings involving the Member States and EU and relevant non-EU stakeholders. The IA appears to have addressed most of the RSB's suggestions issued following its first negative opinion. The legislative proposal appears to be aligned with the analysis carried out in the IA, even though some of the new articles of the proposed regulation include aspects that, quite understandably, were perhaps too detailed to be dealt with in the IA.

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*This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Transport and Tourism (TRAN), analyses whether the principal criteria laid down in the Commission's own better regulation guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.*

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Manuscript completed in October 2017. Brussels © European Union, 2017.

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