COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 9.1.2004
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2002/0067 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251(2) of the EC Treaty

concerning the

common position of the Council on the adoption of 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

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1- BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM(2002) 110 final –2002/0067 (COD)):	13 March 2002
Date of the opinion of the European Economic and Social Committee:	18 September 2002
Date of the opinion of the European Parliament, first reading:	14 January 2003
Date of transmission of the amended proposal:	7 May 2003
Date of adoption of the common position:	17 December 2003

2- OBJECTIVE OF THE COMMISSION PROPOSAL

The airline industry in the Community is faced with the critical challenge of needing to compete with third-country airlines that benefit from generous subsidies while being subject itself to strict rules on government aid.[1]

The recent crisis in some parts of the industry has led third-country governments to subsidise their airlines in a manner that is likely to distort competition.[2] Community airlines have provided information about the pressure these airlines exert on ticket prices, to which they are unable to respond.

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

2 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).

Some third countries have introduced instruments to deal with such situations.[3] Also, the Community has provided for redress in the maritime sector in cases of unfair pricing practices.[4] However, for the airline sector, no such possibility exists at Community level. The only currently available means are bilateral agreements, which often lack the potential, in terms of both coverage and remedies, to provide swift and comprehensive protection against subsidisation and unfair pricing practices.[5] 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 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 a remedy against unfair pricing practices by third-country carriers benefiting from non-commercial advantages. Cases will be examined on the basis of industry complaints which show that such subsidies or unfair pricing practices are causing injury to Community carriers on certain routes. The investigation and decision-making processes are based predominantly on existing practices in the area of trade in goods,[6] but they 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.

3- COMMENTS ON THE COMMON POSITION

The Council made a number of general changes to the Commission's proposal which are acceptable because they would ensure its aims were met.

First, the Council described the relationship that will prevail between the Regulation and existing air services agreements concluded by Member States and third countries. In particular, the Regulation will not preclude the prior application of any special provisions in air services agreements between Member States and third countries (Article 1(2)). However, the provisions of Article 7(2) provide that such a possibility open to Member States should not unreasonably delay proceedings at Community level in application of the Regulation.[7]

Second, in the initial Commission proposal, unfair pricing practices (Article 5) were deemed to exist where State-controlled non-Community air carriers benefiting from a non-commercial advantage continuously charged air fares on a particular route to or from the Community which were lower than the normal rate. The Council broadened the scope of unfair practices to include all third-country carriers rather than just State-controlled third-country carriers, on the grounds that not only State-controlled carriers could benefit from non-commercial advantages. The Council also replaced the reference to “normal fare rates” by a reference to

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3 In the United States, for example, 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" (USC Section 41310).

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

5 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.

6 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).

7 However, the Commission notes that the text of recital 5 is not consistent with the provisions of Articles 1(2) and 7(2). See attached declaration of the Commission.

"normal competitive practices". Eventually, the Council followed the European Parliament's suggested amendment as to the criteria that must be used when comparing air fares, and mandated the Commission to develop a detailed methodology for determining the existence of unfair pricing practices.

Third, the Council endorsed the European Parliament's suggestion that redressive measures should preferably take the form of duties.

Finally, the Council submitted the imposition of definitive measures and the review of such measures to a regulatory procedure in accordance with Council Decision 1999/468/EC, instead of the initially proposed advisory procedure.

The Commission accepted wholly, in part or in principle forty-six out of the sixty amendments proposed by the European Parliament at its first reading. Of these, the Council has included 29, either literally, partly or in principle, in its common position.

4- COMMISSION DETAILED COMMENTS

4.1 Amendments accepted by the Commission and incorporated in full, in part or in principle in the common position

The references below are to recitals and articles of the common position.

Amendment 1: Amendment of the title.

Amendment 2 provides for a more cautious wording of recital 1.

Amendment 3 enhances the scope and clarity of recital 2.

Amendment 4. The added recital 3 increases the clarity of the text.

Amendment 5 enhances the clarity of recital 4.

Amendment 10 part. The introduction of the words "via a transfer of funds" and "debts of any kind representing" enhances the clarity of recital 8.

Amendment 11 part. The added recital 10 increases the clarity of the text.

Amendment 12 enhances the scope and clarity of recital 11.

Amendment 13 and 14 improve the respective wording of recitals 12 and 13.

Amendment 15. The suggested amendment is inserted in recital 13. It increases the clarity of the text.

Amendments 16 and 49 provide for flexible and indicative time constraints concerning the duration of the investigation (Recital 14 and Article 8(1)).

Amendment 17 provides for the transparency of procedures referred to in recital 15.

Amendment 20 reiterates in recital 18 the double safety mechanism embodied in the articles.

Amendment 21 introduces in the added recital 20 that, where redressive duties prove not to be appropriate, other redressive measures may be considered.

Amendment 24 refers to the interest of consumers and industry for the purpose of the Community interest test in the added recital 25.

Amendment 25 introduces an introductory article about "objectives". Further to the text suggested by Parliament, that article has been complemented with provisions setting out the relationship between the Regulation and agreements concluded between third countries and Member States, on the one hand, and the Community, on the other.

Amendments 27 and 54 part are incorporated in the new Article 9, which establishes a preference for the imposition of redressive duties.

Amendments 28, 29, 30 and 31 enhance the scope and clarity of the provisions of Article 4(1).

Amendment 34 provides for objective criteria to distinguish normal competitive practices from unfair pricing practices. These criteria are set out in Article 5(2).

Amendment 44 enhances the clarity of the provisions of Article 7(1).

4.2 Amendments rejected by the Commission and incorporated in the common position

Amendments 23, 60, 61 and 62 were designed to ensure that Member States would be appropriately consulted through the "safeguard" comitology procedure.[8] The introduction in the common position of the regulatory procedure for the purpose of imposing and reviewing definitive measures results in the Member States being given a greater role. Hence, although the Council chose a different procedure, these amendments and their underlying rationale may be considered as incorporated in principle in the common position.

4.3 Amendments accepted by the Commission and not incorporated in the common position

Amendments 6 and 7 refer to the World Trade Organisation as an appropriate forum to discuss and regulate international civil aviation.

Amendments 18 and 50 provide that provisional measures cannot under normal circumstances be imposed more than six months after the initiation of proceedings.

Amendments 33, 36 and 37 provide for drafting suggestions and/or certain changes of substance in relation to Article 5. These amendments are not compatible with the newly drafted provisions of Article 5 and its enhanced scope.

Amendment 45 imposes on Member States that have sufficient evidence regarding the granting of subsidies and the injuries resulting therefrom to the Community industry to forward such evidence to the Commission.

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[8] See European Parliament Report on the proposal for a European Parliament and Council Regulation on protection against subsidisation and unfair pricing practices in the supply of airline services from countries not members of the European Community (Ref A5-0439/2002), justification for amendment 60, page 32.

Amendment 46 stipulates in the provisions of Article 7(2) that a complaint must be rejected if injury has not been sufficiently demonstrated in the complaint. However, a similar idea is set out in recital 13 of the text agreed in the common position.

Amendment 64 called on the Commission to submit an evaluation report to the European Parliament and to the Council.

Amendments 40, 41, 42, 43, 47, 48, 51, 52, 53, 56, 57 and 59 provide for drafting suggestions to enhance the scope and/or clarity of the draft regulation in Articles 6(1), 6(3), 6(4), 7(3), 7(5), 12(2), 12(3), 12(4), 13(1) and 14(1).

4.4 Amendments rejected by the Commission and not incorporated in the common position

Amendment 8 makes the link between the proposed regulation and the broader powers of the Community in external relations in the aviation transport sector.

Amendments 9 and 32 require countervailable subsidies to be specific, discriminatory, trade-distorting and to cause significant material injury to one or more Community carriers.

Amendment 19 suggests an amended wording in recital 17 that would have led to some inconsistencies with the provisions of Article 12(2).

Amendments 22 and 55 set out procedures providing for the reimbursement of third-country carriers where excessive redressive duties would have been imposed.

Amendment 35 consists of an amended wording of Article 5(2) which has the effect of excluding marketing carriers under code share agreements from the scope of the regulation. This amendment is not compatible with the newly drafted provisions of Article 5 and its enhanced scope.

Amendment 26 and 38 suggest the insertion of the word "significant" before the word "injury" in the provisions of Articles 2 and 3(a), which would have affected the legal certainty of the text.

Amendment 39 excludes from the definition of Community industry in Article 3(b) Community carriers which are related, for example, by means of an alliance agreement, to an allegedly subsidised third-country carrier.

Amendment 58 requires the Commission, in addition to its obligations pursuant to the relevant comitology procedure, to submit a report to the Council together with a proposal for closure of the investigation.

Amendment 63 reverses the presumption whereby the imposition of redressive measures is deemed to be in the interest of the Community where actual injurious subsidisation has been established in the course of the investigation.

5- CONCLUSION

Although noting some inconsistency between the provisions of recital 3a and those of Articles 1(2) and 7(2), the Commission considers that the common position unanimously adopted on 17 December 2003 does not alter the aims and approach of its proposal and can therefore support it.

STATEMENT BY THE COMMISSION

The Commission notes that the provisions of Articles 1(2) and 7(2) lay down rules for the application of national and Community instruments over time. It observes that the text of recital 5 is not consistent with those provisions.