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REACHING A LEVEL PLAYING FIELD IN THE AIR TRANSPORT INDUSTRY: THE COMMISSION'S PROPOSAL TO REVISE REGULATION 868/2004

As in many sectors today, the liberalisation and deregulation of international air transport has fostered unprecedented competition within the EU market and globally. At the same time, there is no multilateral framework that sets out the conditions governing competition in this sector leading to the risk of market distortions.

Regulation 868/2004 was intended to address this issue through unilateral action, but it has never been used as it was considered to be impracticable and not well adapted to the air services sector.

The Commission launched a public consultation on "a proposal for improved protection against subsidisation and unfair pricing practices" in late 2013-early 2014. The information gathered during such consultation was then complemented by studies, and informal meetings with the Member States and with the relevant stakeholders.

The text put forward by the Commission yesterday will now be examined by the Council and the Parliament for approval. It aims to address several of the regularly criticised features of this Regulation. We have highlighted below some of the features that seemed particularly relevant as regards the improvements that shall unquestionably result from the proposed text, but also as regards other aspects, mainly procedural ones.

SCOPE OF UNFAIR PRACTICES CONCERNED

In accordance with Regulation 868/2004, a complaint could be lodged on one of the two following grounds: subsidisation of the non-EU carriers concerned by their governments, but also unfair pricing practices by non-EU air carriers consisting in benefiting from a non-commercial advantage and charging air fares that are sufficiently below those offered by competing EU carriers.

It is unquestionable that is was very difficult for a potential complainant in the EU to be able to show that prices of the non-EU carriers were lower than those offered by the competing EU-carriers in relation to flights to and from the EU, since ticket prices vary significantly every day and depend on the seller (e.g. direct company, websites specialising in the sales of air flight tickets, travel agency, etc.).

This is why one of the important objectives of the new regulation was to broaden the grounds on the basis of which a complaint can be lodged. It determined that a complaint can be lodged against *a practice affecting competition*, with such practice taking the form of either a *subsidy*—so no innovation on this front—or a *discrimination*. This latter change is a great improvement as it may be better adapted to the particularities of the sector.

Discrimination in the terms of the proposed text means "*differentiation of any kind without objective justification in respect of the supply of goods or services, including public services, employed for the operation of air transport services, or in respect of their treatment by public authorities relevant to such services (including practices relating to air navigation or airport facilities and services, fuel, ground handling, security, computer reservation systems, slot allocation, charges, and the use of other facilities or services employed for the operation of the air transport services*."

Just like traditional trade defence instruments, the existence of practices affecting competition will not be sufficient to impose redress measures. There will indeed be a need to demonstrate that such practices are causing injury or are threatening to cause injury, it being understood that the "threat of injury" possibility has been extremely rarely used even in the context of the antidumping instruments, which may be viewed as the most efficient and widely used regulation against unfair trade in the goods sector.

In addition, the proposed regulation has also extended the application of the instrument to situations relating to the violation of applicable international obligations. In this respect, the Commission's rationale was to combine efforts to fight unfair practices on a unilateral basis (practices affecting competition), but also to provide a practical tool to ensure better enforcement of "fair competition" provisions contained in international air transport or air services agreement or trade agreement to which the Union is party and which are sometimes viewed as "toothless". In doing so, the Commission seems to be inspired by the so-called Trade Barrier Regulation which allows businesses to complain to the European Commission against certain practices from third countries that negatively impact their companies and that are contrary to international agreements on goods (mainly WTO, but not only).

However, it remains to be seen whether this international path on the grounds of a shared jurisdiction of the EU Member States would be effective or whether the implementation of such obligations would remain a complex issue. In any event, the initiative has its merits and it will be up to the Commission to work in cooperation with the relevant stakeholders to ensure this provision does not become yet another "toothless" tool.

BROADER "STANDING" FOR LODGING A COMPLAINT

The proposed text significantly broadens the scope of parties that are legitimate to lodge a complaint. It states that "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 (…)". Thus, a single company that has sufficient evidence that a non-EU carrier is (i) violating applicable international obligations, or (ii) is conducting a "practice affecting competition" which is causing injury to its activities, can lodge a complaint without having to receive the go-ahead of the other EU carriers, regardless of whether they are also concerned by such practices. In addition, the complaint can be lodged directly by a Member State or at the Commission's own initiative (ex-officio). In the context of TBR and traditional trade defence cases (AD and CVD) this is not commonplace but may be of importance in cases where the industry is not ready to go forward with a complaint directly for fear of retaliation, for instance.

SUBSIDIES AND DIFFICULTIES OF IDENTIFICATION

One of the recurring downsides raised by the EU industry in relation to Regulation 868/2004 in the past relates to the difficulty in identifying and quantifying subsidies.

The difficulty in gathering specific and detailed information on subsidies by third countries is a reality in various goods sectors of the economy and does not constitute an obstacle in itself due to the particularities of the sector. Such difficulty in identifying subsidy programs - which is commonplace notably in relation to investigations concerning countries where transparency is not a priority - has not prevented the Commission from accepting complaints against industries from countries where transparency on the subsidies granted is virtually non-existent.

It is true that evidence of the existence of certain programmes or certain practices needs to be provided, but the specific details and functioning of each programme are to be investigated and confirmed by the Commission in the course of its investigation.

In any event, it cannot be excluded that one of the reasons for broadening the scope of "discriminatory practices" that can be tackled via the instrument was also the recognition of the difficulty in identifying certain subsidies and that such a broader scope would increase the effectiveness of the instrument.

PROCEDURAL CONCERNS

A relevant aspect that will most likely be perceived with scepticism by the EU industry is that the proposal text included the "Union interest" assessment as a threshold for initiating the case: "the investigation will not be initiated if the Commission considers that the facts put forward in the complaint neither raise a systemic issue, nor have a significant impact on one or more Union air carriers.". It is difficult not to be sceptical about such a premature assessment of the Union interest. In trade defence investigations (i.e. AD and CVD) the Union interest is assessed at the time of imposing duties. This seems much more reasonable, as requiring such assessment to be conducted at such an early stage as the lodging of the complaint creates a great burden, with an analysis of elements that will hardly be available at this stage. One can only hope that such a clause does not create an obstacle to the initiation of cases on the basis of a rather incomplete overview of the stakes under dispute.

The Union interest analysis must be relevant to assess whether the adoption of redress measures would go beyond what is strictly necessary but should not be relevant for deciding whether or not to lodge a complaint. This is at least the policy for trade defence instruments (antidumping and anti-subsidy) and we see no reason why this should be different for the air transport sector.

As regards the timeframe of the investigation, some provisions also raise a series of questions.

The deadline for the Commission to inform the insufficiency of the complaint (60 days after lodging) as well as the deadline for the complainant to provide additional data requested by the Commission (30 days) seem reasonable. It is a longer period when compared with other trade defence instruments, but may be appropriate to take into account the complexity of the sector. However, the period of time granted to the Commission to decide on the initiation of an investigation—i.e. 6 months!—seems disproportionate and may create uncertainties in the industry.

This may be all the more worrying as regards the duration of the procedure, which is usually concluded within 2 years—a very long period for the industry to continue to suffer from unfair practices with no possibility of having provisional measures applied—but such period "may be prolonged in duly justified cases". It may be prolonged by… 6 months, 1 year, 5 years? This may lead to situations where there is no predictable timeframe for the outcome of EU air industry investigations.

As regards investigations into the violation of applicable international obligations, there is great uncertainty as to the procedure's timeframe. The text indicates that the procedure may be suspended where the third country has taken decisive steps to eliminate the violation under dispute. There is however no indication as to a limit of period for such a suspension. In other words, how long will the Commission wait for such "decisive steps" to be taken and confirmed?

The type of remedies, financial duties, will be rather unusual in the context of international relations and nothing is provided for in the proposal document regarding the method of quantification.

CONCLUSION

The proposal document has a dual nature. It looks like an instrument aiming at disciplining markets and at the same time an instrument aiming mainly at finding mutually agreeable solutions.

Whether this instrument will be an effective tool will depend on the capacity to render it attractive for possible complainants. Attractiveness only comes from the strength of the instrument and its capacity to impose dissuasive remedies when practices affecting competition arise. This is what the European Parliament should look at now, hoping that the debate will not be delayed for several months between free-traders and those asking for more discipline on an international level, just like for the public procurement reciprocity text.

In any event, it is in the absence of an international framework on competition conditions of air services that unilateral action becomes sometimes necessary, which in turn has the positive effect of stimulating discussions on an international level to generate new international rules.

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