Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004

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on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Aviation plays a crucial role in the Union's economy and in the everyday lives of Union citizens, and is one of the best performing and most dynamic sectors of the Union economy. It is a strong driver for economic growth, jobs, trade and tourism, as well as connectivity and mobility for businesses and citizens alike, particularly within the Union aviation internal market. Over the past decades, growth in air transport services has significantly contributed to improving connectivity within the Union and with third countries, and has been a significant enabler of the Union economy.

(2) Union air carriers are at the centre of a global network connecting Europe internally and with the rest of the world. They should be enabled to compete against third countries air carriers in an environment of open and fair competition. This is necessary in order to bring benefits to consumers, to maintain conditions conducive to a high level of Union air connectivity and to ensure transparency, a level-playing field and continuing competitiveness of Union air carriers, as well as high levels of quality employment in the Union aviation industry.

(3) In a context of increased competition between air transport actors at a global level, fair competition is an indispensable general principle in the operation of international air transport services. This principle is notably acknowledged by the Chicago Convention on International Civil Aviation of 7 December 1944 (‘the Chicago Convention’) whose preamble recognises the need for international air transport services to be established

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on the basis of equality of opportunity. Article 44 of the Chicago Convention also states that the International Civil Aviation Organization (ICAO) aims to foster the development of international air transport so as to ensure that every contracting State has a fair opportunity to operate international airlines and to avoid discrimination between contracting States.

(4) The fair competition principle is well established within the Union where market distortive practices are subject to Union law, which guarantees equal opportunities and fair competition conditions for Union and third-country air carriers operating in the Union.

(5) However, in spite of continued efforts by the Union and some third countries, principles of fair competition have not yet been defined through specific multilateral rules, in particular, in the context of the ICAO or of World Trade Organization (WTO) agreements, such as the General Agreement on Trade in Services (GATS), and the Annex on Air Transport Services thereto, from the scope of which air transport services have been largely excluded.

(6) Efforts should, therefore, be strengthened, in the context of the ICAO and of the WTO, to actively support the development of international rules guaranteeing fair competition conditions between all air carriers.

(7) Fair competition between air carriers should preferably be addressed in the context of air transport or air services agreements with third countries. However, most air transport or air services agreements concluded between the Union or its Member States, or both, on the one hand, and third countries on the other do not so far provide for adequate rules for fair competition. Efforts should therefore be strengthened to negotiate the inclusion of fair competition clauses in existing and future air transport or air services agreements with third countries.

(8) Fair competition between air carriers can also be ensured through appropriate Union legislation such as Council Regulation (EEC) No 95/93[(3)] and Council Directive 96/67/EC[(4)]. Insofar as fair competition supposes protection of Union air carriers from certain practices adopted by third countries or third-country carriers, this issue was previously addressed in Regulation (EC) No 868/2004 of the European Parliament and of the Council[(5)]. However, Regulation (EC) No 868/2004 has proved to be ineffective in respect of its underlying general aim of fair competition. This has been particularly the case in respect of some of its rules pertaining to the definition of the practices concerned, other than subsidisation, and to the requirements regarding the initiation and conduct of investigations. In addition, Regulation (EC) No 868/2004 has failed to provide complementarity with air transport or air services agreements to which the Union is a party. Given the number and significance of the amendments that would be necessary to address these issues, it is appropriate to replace Regulation (EC) No 868/2004 by a new act.

(9) The competitiveness of the Union aviation sector depends on the competitiveness of each part of the aviation value chain and it can only be maintained through a complementary set of policies. The Union should engage in constructive dialogue with third countries in order to find a basis for fair competition. In this respect,

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effective, proportionate and dissuasive legislation remains necessary in order to maintain conditions conducive to a high level of Union connectivity and to ensure fair competition with third-country air carriers. To that end, the Commission should be entrusted with the power to conduct an investigation and to take measures where necessary. Such measures should be available where practices distorting competition cause injury to Union air carriers.

(10) Discrimination might include situations where a Union air carrier is subject to differential treatment without objective justification, in particular differential treatment concerning: the prices of, and access to, ground handling services; airport infrastructure; air navigation services; the allocation of slots; administrative procedures, such as those for the allocation of visas for foreign carriers' staff; detailed arrangements for the selling and distribution of air services; or any other ‘doing business issues’, such as burdensome customs clearance procedures or any other unfair practice of financial or operational nature.

(11) Proceedings should be concluded without redressive measures under this Regulation where the adoption of the latter would be against the Union interest, giving special consideration to their impact on other persons, notably consumers or undertakings in the Union, as well as to their impact on high levels of connectivity throughout the Union. When assessing the Union interest, special attention should be given to the situation of Member States who rely exclusively or significantly on air transport for their connectivity with the rest of the world, and consistency with other Union policy areas should be ensured. Proceedings should also be concluded without measures where the requirements for such measures are not, or no longer met.

(12) When determining whether the adoption of redressive measures would be against the Union interest, the Commission should take into account the views of all interested parties. In order to organise consultations with all interested parties and to give them the opportunity to be heard, time limits for providing information or for requesting a hearing should be specified in the notice of initiation of the investigation. Interested parties should be aware of the conditions of disclosure for the information they provide and should be entitled to respond to other parties' comments.

(13) In order for the Commission to be adequately informed about possible elements justifying the initiation of an investigation, any Member State, Union air carrier or association of Union air carriers should be entitled to lodge a complaint, which should be addressed within a reasonable time.

(14) In the interest of ensuring the effectiveness of this Regulation, it is essential that the Commission is able to initiate proceedings on the basis of a complaint presenting prima facie evidence of a threat of injury.

(15) During the investigation, the Commission should give consideration to the practices distorting competition in the relevant context. Given the variety of possible practices, the practice and its effects might, in some cases, be limited to air transport activities of a city-pair route while, in other cases, it might be relevant to consider the practice and its effects on the wider air transport network.

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(16) It is important to ensure that the investigation can extend to the widest possible range of pertinent elements. To this effect, the Commission should be enabled to carry out investigations in third countries, subject to the consent of the third-country entities concerned and in the absence of an objection by those third countries. For the same reasons and to the same end, Member States should be obliged to support the Commission to the best of their abilities. The Commission should conclude the investigation on the basis of best available evidence.

(17) During the investigation, the Commission might consider whether the practice distorting competition also constitutes a violation of an international air transport or air services agreement or any other agreement which contains provisions on air transport services to which the Union is a party. If that is the case, the Commission might consider that the practice distorting competition, which also constitutes a violation of an international air transport or air services agreement or any other agreement which contains provisions on air transport services to which the Union is a party, would be more appropriately addressed through the application of the dispute settlement procedures established by that agreement. In such a case, the Commission should be entitled to suspend the investigation initiated under this Regulation. Where the application of the dispute settlement procedures established by the international air transport or air services agreement or any other agreement which contains provisions on air transport services to which the Union is a party fails to sufficiently remedy the situation, it should be possible for the Commission to resume the investigation.

(18) Aviation agreements and this Regulation should facilitate dialogue with the third countries concerned in order to efficiently resolve disputes and restore fair competition. Where the investigation conducted by the Commission concerns operations covered by an air transport or air services agreement or any other agreement which contains provisions on air transport services concluded with a third country and to which the Union is not a party, it should be ensured that the Commission acts with full knowledge of any proceedings intended, or conducted by the Member State concerned, under such agreement and pertaining to the situation subject to the Commission's investigation. Member States should therefore be obliged to keep the Commission informed accordingly. In such a case, all Member States concerned should have the right to notify the Commission of their intention to address the practice distorting competition exclusively under the dispute settlement procedures contained in their respective air transport or air services agreements or any other agreement which contains provisions on air transport services concluded with a third country and to which the Union is not a party. If all the Member States concerned notify the Commission and no objection has been raised, the Commission should temporarily suspend its investigation.

(19) If the Member States concerned intend to address the practice distorting competition exclusively by means of dispute settlement procedures applicable under the air transport agreements, air services agreements, or any other agreement which contains provisions on air transport services that they have concluded with the third country concerned in order to fulfil their obligations under these agreements, the Member States should endeavour to proceed expeditiously with the bilateral dispute settlement procedures and

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they should fully inform the Commission in that respect. Where the practice distorting competition persists and the Commission resumes the investigation, the findings acquired during the application of such an air transport or air services agreement or any other agreement which contains provisions on air transport services, should be taken into account in order to ensure that fair competition is restored as soon as possible.

(20) Findings acquired during the application of the dispute settlement procedures under an international air transport or air services agreement or any other agreement which contains provisions on air transport services to which the Union or a Member State is a party should be taken into account.

(21) For reasons of administrative efficiency and in view of a possible termination without measures, it should be possible to suspend the proceedings where the third country or third-country entity concerned has taken decisive steps to eliminate the relevant practice distorting competition or the ensuing injury or threat of injury.

(22) Findings in respect of injury or threat of injury to the Union air carriers concerned should reflect a realistic assessment of the situation and should therefore be based on all relevant factors, in particular pertaining to the situation of those carriers and to the general situation of the affected air transport market.

(23) It is necessary to lay down the conditions under which proceedings should be concluded, with or without the imposition of redressive measures.

(24) Redressive measures in respect of practices distorting competition are aimed at offsetting the injury that occurs due to those practices. They should therefore take the form of financial duties or of other measures which, representing a measurable pecuniary value, are capable of achieving the same effect. In order to comply with the principle of proportionality, measures of any kind should be confined to what is necessary to offset the injury identified. The redressive measure should have regard to the proper functioning of the Union air market and should not result in an undue advantage being given to any air carrier or group of air carriers.

(25) This Regulation does not aim to impose any standards on third-country air carriers, for instance with regards to subsidies, by introducing more restrictive obligations than those applying to Union carriers.

(26) Situations investigated under this Regulation and their potential impact on Member States might differ according to the circumstances. It should therefore be possible to apply redressive measures, depending on the case, to one or more third-country air carriers, to a specific geographical area or for a specific period of time, or to set a date in the future from which they are to apply.

(27) Redressive measures should not consist of the suspension or limitation of traffic rights which are granted by a Member State to a third country.

(28) In line with the same principle of proportionality, redressive measures in respect of practices distorting competition should remain in force only as long as, and to the extent that, it is necessary in view of such practice and the ensuing injury. Consequently, where circumstances so warrant, a review should be provided for.