



*European Economic and Social Committee*

**TEN/641**  
**Aviation: Open and Connected Europe**

## **OPINION**

European Economic and Social Committee

**Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Aviation: Open and Connected Europe**

COM(2017) 286 final

and

**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 – 2017/0116 (COD)]

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Consultation	European Commission, 05/07/2017 European Parliament, 15/06/2017 Council, 19/06/2017
Legal basis	Articles 100(2) and 304 of the Treaty on the Functioning of the European Union
Section responsible	Transport, Energy, Infrastructure and the Information Society
Adopted in section	04/01/2018
Adopted at plenary	17/01/2018
Plenary session No	531
Outcome of vote (for/against/abstentions)	115/1/4

## 1. Conclusions and recommendations

- 1.1 The European Economic and Social Committee reaffirms the position adopted in its Aviation Package I opinion<sup>1</sup> that the overriding goal of the Aviation Strategy for Europe (EU Aviation Strategy), as presented by the European Commission in December 2015 should be to "improve the investment climate to encourage more European investment in the EU aviation industry, increase the competitiveness of the sector and its role for the economy, thus promoting overall economic growth and creation of new jobs".
- 1.2 The EESC emphasises the crucial importance of the quality of implementation of the EU Aviation Strategy for the success of EU civil aviation. Rapidly changing internal and external conditions, the development of markets in multiple directions, growing pressure on people and companies, increasing competition inside and outside the EU, new disruptive technologies and swiftly advancing digitalisation: these are only a few of the challenges that must be addressed when implementing the EU Aviation Strategy. As the EESC predicted in its Aviation Package I opinion<sup>2</sup>, the strategy has raised the political profile of civil aviation on the EU agenda and this position needs to be maintained. In this context, the EESC commends the Commission for its perseverance in promoting a globally accepted and implemented scheme to decarbonise aviation. Likewise, the need for effective sectoral social dialogue at both EU and national levels must be championed more than ever. The EESC refers again to its opinion on Social Dumping in Aviation<sup>3</sup> and urges the Commission to consider effective remedies to address the situation.
- 1.3 The EESC supports the Commission's dual approach to safeguarding fair international competition – on the one hand, giving more teeth to a unilateral instrument to protect EU community aviation interests (Proposal for a Regulation on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004, referred to henceforth the Commission proposal revising Regulation 868/2004) and, on the other, seeking mandates to negotiate new market access agreements with third countries, combined with a consensus on how fair competition should be maintained. The EESC remains convinced that a level playing field can only be secured sustainably if third countries also respect the basic principles of labour protection as outlined in ILO standards as well as consumer protection and environmental standards. The Commission proposal revising Regulation 868/2004 addresses several weaknesses in Regulation (EC) No 868/2004 in its current form; however, establishing a functioning social dialogue should become an integral element of a mutually agreed "fair competition" clause in the European Union's international air service agreements. The EESC fully supports the Commission's efforts to secure further mandates to open new comprehensive aviation agreements and calls for swift and efficient completion of ongoing negotiations.
- 1.4 The interpretative guidelines for ownership and control provisions provide improved clarity regarding the relevant provisions of Regulation (EC) No 1008/2008 to help Member States and other stakeholders in their ongoing implementation. However, in the Committee's opinion, these

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1 [OJ C 389, 21.10.2016, p. 86.](#)

2 [OJ C 389, 21.10.2016, p. 86.](#)

3 [OJ C 13, 15.1.2016, pp. 110–115.](#)

guidelines do not give enough consideration to market changes taking place and the disruptive and structural challenges that European aviation will be facing in the short and medium term. If implementation of the EU Aviation Strategy is to be robust, the EESC recommends that an impact assessment be drafted based on a number of scenarios to pave the way for an informed consideration of the question of ownership and control.

- 1.5 The Committee endorses the proposed interpretative guidelines on the Public Service Obligation (PSO) contained in Regulation (EC) No 1008/2008, while noting that long-term market development – involving a growing need for greater connectivity of Member States at the periphery of the EU or with small domestic markets – will require further in-depth economic and societal analysis of how to better provide sustainable connections between their main airports and key destinations in the EU to better address passengers' demands. Further political discussions will be needed on this, also taking account of the Connectivity Index prepared by the Network Manager and now published on the European Commission's website.
- 1.6 The Committee believes that Regulation (EC) No 1008/2008 is in need of comprehensive revision. Given its fundamental importance for the sector, it is vital that the review process incorporates feedback from all stakeholders – including civil society representatives – and that it enables the long-term vision of EU civil aviation as set out by the EU Aviation Strategy to become a reality. With the proviso that the Commission conducts an extensive analysis, and that this is confirmed through public consultation, it would be in the best interests of the EU for the current Commission to propose a revision of Regulation (EC) No 1008/2008.
- 1.7 The EESC is of the view that at EU level the Network Manager<sup>4</sup> has already initiated the process to mitigate ATM disruptions. Moreover, the social partners already have the tools to reduce any impact because they are mutually implemented. The EESC reaffirms that strikes are a fundamental workers' right and that the right to strike falls outside the scope of the EU treaties<sup>5</sup>. According to the principle of subsidiarity, it falls within the Member States' competence to determine how this right is exercised. Furthermore, the social partners have developed a set of measures which could be jointly implemented to reduce the risk of industrial conflict ("Toolbox"<sup>6</sup>). The EESC welcomes this initiative as an appropriate and effective approach to avoid as far as possible disruptions to air traffic. The passengers and citizens of Europe will be the ultimate beneficiaries of this approach.
- 1.8 In order to provide for the efficient implementation of the EU Aviation Strategy, it is essential to inject into the political discussion the views of organised civil society concerning the political, social, economic and environmental consequences of these initiatives. The EESC, as it has already stated on several occasions, is prepared to actively participate in this process. It is also of utmost importance that further legislative work on the proposal revising Regulation

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4 The Network Manager is a directorate within EUROCONTROL responsible for network capacity planning. It must ensure that air traffic capacity is made available and used in the best possible way in the pan-European network's daily operations. To this end it cooperates closely with its Member States and their national air navigation service providers.

5 Article 153(5) TFEU.

6 ATCEUC, CANSO and ETF (2016): Toolbox for successful social dialogue in air traffic management, available at: <http://www.etf-europe.org/files/extranet/-75/45567/Brochure%20ETF%20Toolbox%20March%202016.pdf>

868/2004 in the European Parliament and the Council proceeds promptly in order to effectively address distortions to international competition.

- 1.9 The EESC reiterates the position adopted in its Aviation Package I opinion<sup>7</sup>, recommending that: "inclusion of stakeholders in the implementation of the Strategy should be accompanied by a structured and concrete explanation of the way in which the Strategy will be implemented". A road map is still required to provide greater detail on "how the Commission will reach out to the stakeholders to secure such crucial engagement. Mobilisation of all aviation stakeholders acting together on implementation of the Strategy is challenging but necessary".

## 2. Introduction

- 2.1 Commission Communication COM (2017) 286 on Aviation: Open and Connected Europe (the Communication), published on 8 June 2017 follows the European Commission's launch in December 2015 of the Aviation Strategy for Europe<sup>8</sup> (EU Aviation Strategy), which sets the agenda for a targeted discussion within the civil aviation community about the necessary key elements of a holistic aviation policy and how best to implement it.

- 2.1.1 The EU Aviation Strategy "(...) aims at boosting Europe's economy, strengthening its industrial base and reinforcing its global leadership position in aviation whilst addressing environmental and climate challenges, thus contributing directly to the Commission's strategic priorities"<sup>9</sup>. By taking the economic, legal, environmental, political and social aspects of aviation into consideration, the Commission is pursuing a holistic approach to aviation and has proposed objectives to address the challenges within the EU market as well as international aviation markets. The more concrete results of the implementation of the EU Aviation Strategy remain to be seen.

- 2.2 The EESC has been very actively involved in recent years in EU civil aviation policy development. It has held a large number of public hearings, conferences and bilateral and multilateral events to provide more civil society involvement in various policies concerning EU civil aviation. It has thus built up a strong network of EU civil society stakeholders in order to actively respond to forthcoming Commission proposals as well as to enable and empower civil society to engage in this highly important and sensitive dossier.

- 2.2.1 On 2 March 2015 the Commission decided to consult the Committee on an integrated EU aviation policy. Numerous recommendations contained in the EESC's opinion on the subject<sup>10</sup> (September 2015) were included in the final Commission proposal. Subsequently, upon delivery of the EU Aviation Strategy, the Committee gave strong support to the Commission proposal in its Aviation Package I opinion<sup>11</sup> (February 2016).

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7 [OJ C 389, 21.10.2016, p. 86.](#)

8 [COM \(2015\) 598 final.](#)

9 COM(2017) 286 final, page 2.

10 [OJ C 13, 15.1.2016, p. 169.](#)

11 [OJ C 389, 21.10.2016, p. 86.](#)

- 2.3 The Commission's current Communication addresses highly complex issues, each of which has numerous political, legal and economic ramifications. The Commission had listed these issues – amongst others in the Annex<sup>12</sup> to the Aviation Strategy – as integral elements of an "action plan" to achieve the main strategic goals.
- 2.4 Of the four measures proposed in the Communication, one is a legislative proposal. The remaining three are guidelines of a non-binding legal nature. Together they are as follows:
- new Proposal for a Regulation on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004,
  - Interpretative guidelines on Rules on Ownership and Control of EU air carriers contained in Regulation (EC) No 1008/2008,
  - Interpretative guidelines on the Public Service Obligation rules contained in Regulation (EC) No 1008/2008, and
  - Staff Working Document on Practices favouring Air Traffic Management Service Continuity<sup>13</sup>.
3. **Legislative proposal: a new Regulation replacing Regulation (EC) No 868/2004 (draft revision)**
- 3.1 Documents published by the Commission along with the Communication argue a further need to better protect EU airlines from the practices of non-EU competitors that are considered to distort fair market competition. Major organisations in the EU airline sector have asked the Commission to take decisive action to address what they consider to be the absence of a proper approach to non-EU carriers from countries lacking proper rules on fair competition. The social partners have made similar demands based on lack of respect for comparable social and labour standards. The Commission has taken a correct stand on these strong calls by putting forward a new draft regulation.
- 3.2 In cases where EU connectivity and competition are put at risk, the Union must be able to act effectively to ensure that competition is not distorted in international aviation markets and EU aviation interests are not harmed and consumers rights and interests are ensured and enhanced according to EU legislation on consumers' and passengers' rights. Regulation (EC) No 868/2004 was intended to address these issues through unilateral EU action.
- 3.3 Regulation (EC) No 868/2004 has proved to have many serious weaknesses<sup>14</sup>: it uses tools, procedures and criteria that stem from trade law, while the international aviation market is regulated by air service agreements. Regulation (EC) No 868/2004 has also been criticised because of its inadequate sanctions: it is considered a "toothless tiger".

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12 [COM \(2015\) 598 final](#).

13 SWD (2017) 207 final.

14 Study for the Commission in April 2013 268/2004 – "A Case for Better Regulation".

- 3.4 The goal of revising or replacing Regulation (EC) No 868/2004 was shared by the Council and the Commission. The European Parliament also called for revision of this regulation.
- 3.5 Stakeholders were consulted on a proposal for improved protection against subsidisation and unfair pricing practices. They were also consulted as part of the public consultation for the drafting of the Commission EU Aviation Strategy. As a result of these consultations, an integrated approach was proposed by the Commission as the best means of addressing the problems identified. The inclusion of the three complementary building blocks (international negotiations, fair competition clauses in international agreements and the revision of Regulation (EC) No 868/2004) reinforce each other and creates synergies, making it possible to efficiently safeguard EU connectivity and support open fair competition between all air carriers.
- 3.6 This approach is also expected to bring economic benefits as it allows EU airlines to compete fairly with third country air carriers; it will also benefit EU airports and passengers through increased traffic and choice.
- 3.7 The Commission proposal revising Regulation 868/2004 proposes empowering the Commission to act decisively as the lead EU institution, ensuring adherence to international obligations by third countries within well-established EU law and the principles of transparency, subsidiarity and proportionality. The proposed amendments simplify the process and encourage the parties concerned to resolve any conflict by having recourse to a mutual conflict settlement procedure wherever possible. The Commission proposal, if adopted, would therefore effectively address weaknesses in Regulation (EC) No 868/2004 currently in force.
- 3.7.1 However, several issues remain unclear, in particular what measures the Commission could undertake to ensure compliance with international obligations by third countries<sup>15</sup>.
- 3.7.2 A further concern raised by stakeholders is the absence of action provided for in cases where a third party fails to abide by basic principles of labour protection as outlined in ILO standards or where consumer protection and/or environmental standards are not respected. In view of the holistic approach pursued by the Commission, it is important to underline that a balanced approach must be ensured between a WTO-like free-market access and sustainable international competition in the interests of employees and consumers.
- 3.7.3 The Commission proposal revising Regulation 868/2004 provides for a second avenue to remedy distortions. By addressing unfair market practices which cause injury to individual EU airlines, the Commission could intervene, should prima facie evidence be provided that such unfair practices exist and have a causal and detrimental effect on one or several EU airlines. Member States and airlines can also file a complaint.
- 3.7.4 For the Commission proposal revising Regulation 868/2004 to act as a catalyst for voluntary conflict resolution, it is essential that any sanctions imposed are meaningful for the third party. The Commission proposal thus provides measures such as the suspension of concessions of

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An example of such an unfair practice could be a situation in which an important third country economic power *de facto* refuses EU carriers access to commercially important slots at its main airports.

services or other rights of the third country, provided this does not lead to the violation of Air Service Agreements with the third country or other international obligations<sup>16</sup>.

- 3.8 It can therefore be argued that the Commission's proposal in its current version effectively addresses the key reservations voiced against Regulation (EC) No 868/2004; for the Commission proposal revising Regulation 868/2004 to achieve the desired effect of acting as a deterrent to third countries or third country carriers to undermining competition in international aviation, further clarification may appear necessary on the measures which the Commission could deploy to this end and on the broader approach which should be contemplated when defining the notion of "unfair" competition.
- 3.9 Nevertheless, while supporting the Commission's approach, some details could be tightened up to ensure the revised regulation is effective: the duration of an investigation should be reduced and it should not be possible to halt investigations without sufficient cause – such as agreement with the parties about remedial measures and implementation of such measures. There should also be an instrument for temporary relief.
- 3.10 In order to safeguard the EU aviation industry from unfair competition by third country operators, the EESC insists that a new Regulation revising the one currently in force must go beyond consideration of improved protection against subsidisation and unfair pricing practices and identify the need to address in an appropriate international form the issue of labour conditions which breach ILO Conventions.

#### 4. **Non-legislative proposals**

##### 4.1 Interpretative guidelines on the ownership and control rules

- 4.1.1 In its latest opinion on the EU Aviation Strategy<sup>17</sup>, the EESC agreed that the strategy's overriding goal should be to support overall economic growth and the creation of new jobs. In order to grow, European airlines need access to investment – including foreign investment. Consideration needs to be given, however, to the fact that some non-EU governments are using investments as a strategic tool in a manner which is potentially incompatible with the spirit and wording of Regulation (EC) No 1008/2008.
- 4.1.2 Under the current EU investment rules for foreign airlines, investment may not exceed 49% ownership<sup>18</sup>. Additionally, the effective control of the company needs to remain with Member States of the European Union or their nationals<sup>19</sup>. In recent years, this rule has given rise to reviews of several foreign investments by Member State licensing authorities and by the Commission<sup>20</sup>.

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<sup>16</sup> COM(2017) 289, Article 13

<sup>17</sup> [OJ C 389, 21.10.2016, p. 86.](#)

<sup>18</sup> Regulation (EC) No 1008/2008, Article 4(f).

<sup>19</sup> Regulation (EC) No 1008/2008, Article 4(f).

<sup>20</sup> SWD(2017) 207 final, p. 4.



4.1.3 The interpretative guidelines on ownership and control do not change the existing rules on these two matters; they do, however, explain various important procedural aspects. In addition, they lay out which investment schemes are acceptable if airlines are still to operate with their EU licenses.

4.1.4 Several cases of strategic minority acquisitions by non-EU airlines have given rise to a rather controversial debate about whether these infringe the ownership and control provisions in Regulation (EC) No 1008/2008. They are indicative of the fundamental changes taking place in international aviation<sup>21</sup>. Although the EESC welcomes the proposed interpretative guidelines on ownership and control, it thinks it is important not just to consider how to interpret the current provisions, but rather to evaluate whether these might now require revision in the light of current and foreseeable market trends. In this context, granting investment opportunities based upon reciprocity is one of the most important avenues to pursue. In order to evaluate the impact of market developments on European competitiveness in the medium and long term, the EESC recommends that an impact assessment be drafted based on a number of scenarios. This would pave the way for an informed consideration of the question of ownership and control.

#### 4.2 Interpretative guidelines on the Public Service Obligation rules (PSO Guidelines)

4.2.1 There is recognition in the EU of the need to address cases where, on certain routes and due to specific conditions, insufficient demand or market failure prevents enough flights being provided to serve the needs of local communities. In such cases, Public Service Obligations (PSOs) – allowed under very specific conditions set out in Regulation (EC) No 1008/2008 – can guarantee that peripheral or developing regions are well-connected to the rest of Europe.

4.2.2 PSOs have generally been used by Member States to secure connections within their country to and from under-served regions. PSOs are subject to an assessment of necessity that takes account of proportionality requirements<sup>22</sup>, recourse to other modes of transport, airfares and conditions, as well as the combined effect of air carriers operating or intending to operate on the route<sup>23</sup>.

4.2.3 Existing rules concerning PSOs have not always been implemented in a consistent manner, which may have distorted both connectivity and competition on some routes. Questions have been raised by Member States on the content of procedural provisions of PSO Guidelines.

4.2.4 PSO Guidelines outline the proposed methodology to be followed by the Commission when assessing any PSO. They concern everything from the establishment of a PSO and related procedures to explanations as to the exclusive service concessions and compensation (in relation to state aid rules).

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21 Example: minority acquisition of Air Berlin by Etihad Airways as part of a strategy to create a strong partnership between several European airlines and Etihad Airways.

22 The obligation vis-à-vis economic development needs of the region.

23 Article 16(3), Regulation (EC) No 1008/2008.

4.2.5 The PSO Guidelines will contribute to more transparent and more consistent implementation and enforcement of the existing provisions of Regulation (EC) No 1008/2008. However, the EESC asks the Commission to take careful note of its opinion on Application of the Decision on public compensation for the provision of services of general economic interest (2012/21/EU)<sup>24</sup>, which urges a less burdensome requirement on national and local governments when complying with and reporting on their PSO awards, especially where the need for public intervention to support socially necessary but commercially unviable airline services is readily apparent (e.g., to achieve connectivity to remote areas, islands etc.). At the same time, respect of social standards should become a consideration when granting public support.

4.2.6 Member States on the periphery of the EU or with small domestic markets experience increasing difficulties not only in securing domestic connections, but connections between their main airport and key destinations in the EU and beyond. The issue is therefore not only one of regulatory clarity, but economically and politically how to ensure sufficient connectivity to peripheral destinations in Europe, thus better respond to passengers' needs. The Member States concerned are interested in sustainable and reliable air services to secure long-term planning stability irrespective of possible opportunity costs arising for the operating carrier.

4.2.7 The Connectivity Index should provide insight into whether such broader approaches to PSOs, possibly securing more economic growth, would be justified. In the long term, one could dispute whether the provisions in the PSO Guidelines can remain relevant and effective in a fast-changing aviation market.

#### 4.3 Air Traffic Management continuity

4.3.1 Air navigation services have a crucial role in ensuring reliable air connectivity, guaranteeing the safe performance of air traffic flows. In the busiest periods of the year, the European Air Traffic Management system (ATM) has to manage more than 30 000 flights per day. The workforce has an essential role in delivering such ATM services. In Europe as a whole the sector employs 56 300 people: 17 370 controllers and 38 930 other staff working in air navigation services. Working in this sector not only requires state of the art technology but also very high professional and personal skills. The efficiency and resilience of the ATM system have recently noticeably improved and it was able to absorb a traffic increase of 68% in twenty years, from 5.8 million flights in 1995 to 9.74 million in 2014. This improvement in efficiency, while maintaining the highest safety standards, has only been possible thanks to the strong commitment of all stakeholders in the aviation value chain to the European Single Aviation Area.

4.3.2 In the course of the public hearing "Air Traffic Management continuity in an Open and Connected Europe" organised by the EESC, the Network Manager outlined the process which has been put in place to minimise the impact of all types of disruption in Europe. These measures require the participation of Air Navigation Services Providers (ANSPs), airlines and

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TEN/605 Application of State aid rules for compensating the provision of services of general economic interest (Decision 2012/21/UE and Community Framework) – not yet published in the OJ.

Member States. They have proved to be a very efficient means of reducing the impact of disruptions on passengers.

4.3.3 One of the possible causes of disruption is industrial action in the aviation sector. Strikes are a fundamental workers' right and the right to strike falls outside the scope of the EU treaties<sup>25</sup>. It is therefore incumbent upon the Member States to determine how the right to strike can be exercised, and the majority of Member States have specific laws or regulations setting out the conditions for exercising the right to strike in ATM and any other part of the EU aviation value chain.

4.3.4 The Toolbox for successful social dialogue in ATM<sup>26</sup>, agreed between the social partners, is a good example of an efficient approach to establishing mechanisms which minimise the risk of disruption. These measures are implemented on the basis of mutual consent. The EESC welcomes the proposal by the social partners to extend the scope of the signatories and is open to participate in such an initiative.

## 5. Other proposals

5.1 To combat practices negatively affecting competition, and in addition to its proposal for a new Regulation 868, the Commission is encouraging the inclusion of far-reaching competition rules in comprehensive aviation agreements with third countries<sup>27</sup>. It is urging the Council to give it new mandates to open negotiations on further agreements of this kind with Bahrain, China, Kuwait, Mexico, Oman and Saudi Arabia. The Commission is also insisting – rightly so – on the immediate signing of the EU Comprehensive Aviation Agreement with Ukraine.

5.2 The first comprehensive agreement of its kind (Air Transport Agreement – ATA) concluded between the EU and the United States (2007) with respect to unfair competition establishes cooperation between competition regulators, creating a framework for coordination. Article 14 of the ATA addresses action with regard to state subsidies and support<sup>28</sup> and also contains provisions granting the ATA Joint Committee the right to resolve potential disputes – including by having recourse to a neutral arbitration procedure. The main added value of such comprehensive agreements lies in the regulatory convergence of many key areas (safety standards, certificates and licenses, as well as the sensitive area of security). It also relates in this context to state aid and state support.

5.3 To date, a comprehensive aviation agreement has been concluded with Canada. The agreement with Brazil is currently under renegotiation and the EU has concluded negotiations with Israel, Jordan, Morocco, Moldova and Georgia. Negotiations are ongoing with Australia and New Zealand. After the granting of Council mandates in 2016, negotiations have been started with

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25 Article 153(5) TFEU.

26 <http://www.etf-europe.org/files/extranet/-/75/45567/Brochure%20ETF%20Toolbox%20March%202016.pdf>

27 SWD (2017) 182 final, 3.4.4.

28 EU – US Air Transport Agreement signed on 25 and 30 April 2007, Article 14.

the Association of Southeast Asian Nations, Qatar, the United Arab Emirates and Turkey. In each case, the issue of fair competition clauses has formed part of the negotiations<sup>29</sup>.

- 5.4 Subject to the Commission successfully completing the ATAs currently mandated, the EESC takes note of the Commission's efforts to secure further mandates to open new comprehensive aviation agreements and urges the swift and efficient negotiation of those already begun. However, the labour practices of certain countries and their airlines are a source of concern and could negatively impact fair competition on the international aviation market. The EESC therefore urges the Commission to ensure that European operators are fairly treated and a level playing field is secured. The EESC recommends that the Council and the Commission acknowledge the need to negotiate appropriate binding social clauses in all EU aviation agreements with third countries.

Brussels, 17 January 2018

George DASSIS

The president of the European Economic and Social Committee

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<sup>29</sup> SWD (2017) 182 final, 2.2.1.3.