

Brussels, 18 September 2002

OPINION

of the

Economic and Social Committee

on the

**Proposal for 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**
COM(2002) 110 final - 2002/0067 (COD)

On 3 April 2002 the Council of the European Union decided to consult the Economic and Social Committee, under Article 80(2) of the EC Treaty, on the

Proposal for 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
COM(2002) 110 final - 2002/0067 (COD).

The Section for Transport, Energy, Infrastructure and the Information Society, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 2 September 2002. The rapporteur was **Mr Green**.

At its 393rd plenary session of 18 and 19 September 2002 (meeting of 18 September) the Economic and Social Committee adopted the following opinion by 130 votes in favour, with four abstentions:

1. Background

1.1 The Commission notes in its explanatory memorandum to this proposal that the airline industry in the Community is faced with a critical challenge: the need for it to compete with third-country airlines which benefit from generous subsidies, while the Community industry is subject to strict rules on government aid.¹

1.2 The EESC opinion on the Commission communication of 20 May 1999 backed the wish to strengthen the competitiveness of European airlines, particularly vis à vis their US competitors, and to eliminate their structural disadvantages.² The Committee also agreed that the transitional period for the granting of state aid was now over. State aid should, therefore, no longer be granted.

1.3 The EESC opinion saw the need for harmonisation of European and US competition policy and endorsed Commission efforts to reach an open skies agreement between the EU and the USA.

1.4 The Commission communication on the repercussions of the terrorist attacks in the United States on the air transport industry³ notes, among other things, that the US Congress adopted an emergency package of measures on 21 September as part of an overall programme that could amount to \$18 billion. The Commission wanted to examine whether the support given to US airlines could

¹ Communication from the Commission of 20 May 1999 on the European airline industry: from single market to world-wide challenges (COM(1999)182 final) and 1994 guidelines on state aid to the air industry (OJ C 350, 10.12.1994, p.5)

² EESC opinion on the Commission Communication of 20 May 1999 on the European airline industry: from single market to worldwide challenges COM(1999) 182 final (OJ C 075, 15.3.2000, p. 4)

³ Communication from the Commission to the European Parliament and the Council - The repercussions of the terrorist attacks in the United States on the air transport industry (COM(2001) 574 final)

affect markets where American and European airlines were in intense competition, i.e. primarily the transatlantic routes.

1.5 It is also evident from the communication that the possible distortions of competition caused by direct aid to US airlines cannot be addressed in the absence of a contractual framework for relations between the Community and the United States. The Commission therefore reserves the right to make proposals where appropriate to offset the loss the Community airlines might suffer as a result. The Commission also intends to propose to the United States that a code of conduct be drawn up in this area.

1.6 In terms of relations with non-EU countries, the communication concludes that the Commission will make proposals to offset the loss Community airlines might suffer if support granted in a third country results in unfair advantages at the expense of EU competitors.

1.7 The starting point for the current proposal is that some third countries have instruments to deal with such situations while, in contrast to the position in the maritime transport sector, the Community has not provided for redress in case of unfair pricing practices in the airline sector.⁴ The only currently available means are bilateral agreements which often lack, both in terms of coverage and remedies, the potential to provide swift and comprehensive protection against subsidisation and unfair pricing practices.

2. The Commission proposal

2.1 The proposed instrument allows action against subsidised or certain unfairly priced and injurious air services supplied by non-Community carriers on certain routes to and from the Community. It contains rules of substance and procedure but, at the same time, does not require the EC to go below the tested standards applied to goods.⁵

2.2 The proposal uses the subsidy definition of the WTO Agreement on Subsidies and Countervailing Measures. Trade-distorting subsidies granted by foreign governments, i.e. subsidies targeted at certain enterprises or sectors and export subsidies are actionable. (Generally available subsidies, e.g. to all service providers including airlines, are considered not to be trade-distorting). Additionally, the definition covers "unfair pricing practices", i.e. charging at fares below those charged by established and representative carriers (or, if this information is not available, below the constructed rate, i.e. costs plus profit of other comparable carriers), but is limited to such practices conducted by state-controlled air carriers.

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 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)

2.3 The proposal provides for all the steps of a trade-in-goods-type investigation but in a simplified and less binding manner. An investigation would be defined by two parameters:

- subsidies given by a certain government to eligible foreign carriers or unfair practices by certain state-controlled foreign carriers,
- certain routes where the Community air industry faces problems.

2.4 The draft introduces a definition of "like air service" which is, however, less restrictive than in trade in goods. The EC carriers would have to fly on the same or almost the same routes as the foreign carriers but there are no restrictions concerning the type of service supplied.

2.5 The Community has a right to initiate an investigation if the duly substantiated complaint is made on behalf of the Community industry. Additionally, the Commission can open one ex officio if there is sufficient evidence.

2.6 Public notice in the Official Journal is given at initiation and foreign carriers and other interested parties have the right to be heard. Adverse inferences may be drawn from non-cooperation.

2.7 Member States will be consulted at every stage of the proceedings in a committee under the advisory procedure, in line with Council Decision 1999/468/EC of 28 June 1999.⁶ The "droit de regard" of the European Parliament is also ensured in accordance with Article 8 of that decision.

2.8 Measures (duties, undertakings or other appropriate measures e.g. restriction of landing rights) will be imposed on a per-carrier basis. The level of the measure is capped at the amount of subsidy in terms of benefit to the recipient (or the difference between the actual fare charged by a state-controlled foreign air carrier and the "normal fare") or at a level which is sufficient to remove the injury, whatever is the lower. Provisional measures have a duration of six months. Measures may be reviewed if warranted. In a similar way to the goods area, there is no provision on how duties are levied. In practice, the Member State authorities collecting an "airport tax" could also collect the duty. Duties collected will be remitted to the Community budget in line with existing provisions applied within the European Union on redressive and countervailing duties.

2.9 The proposal does not replace air transport agreements with third countries where these can be used to deal effectively with distortion issues. In cases where a legal instrument exists which would enable a satisfactory response to be made, that instrument will therefore take precedence over this regulation, which will be subsidiary to it⁷.

3. General comments

⁶ OJ L 184, 17.7.1999, p. 23.

⁷ The English-language version incorrectly refers here to "airline agreements".

3.1 The Committee considers it vital to boost European airlines' competitiveness, particularly in relation to their US rivals. Hence, tools to protect the Community industry against subsidisation and unfair pricing practices in the supply of airline services from non-member countries can be of key importance.

3.2 The Committee has previously also endorsed the Commission's efforts to reach an open skies agreement between the EU and the USA, recognising a need to harmonise European and US competition policy. As we know, no such agreement has yet been reached, and there is uncertainty as to when – potentially – that might happen.

3.3 It is unclear how the proposal stands in relation to the consultation and arbitration clauses contained in the many existing bilateral air transport agreements – binding under international law – that the individual Member States have entered into with non-member countries, including how to resolve any clashes that may arise between the proposal and bilateral agreements of this kind (cf. *inter alia* Treaty Article 307).

3.4 In overall terms, state aid to companies, whether domiciled inside or outside the Community, may be very damaging for commercial development in the sector or area concerned. In principle, therefore, the Committee backs the aims set out in the proposal to counteract such contributions to airlines from governments in non-EU countries and state-controlled non-Community air carriers. Attention should focus on the massive financial aid given to certain companies after 11 September to save them from bankruptcy. Such aid takes many different forms: compensation for increased insurance premiums, straightforward federal or state subsidies etc. Without having the effect of price-dumping, the absence of comparable measures for companies within the EU, especially in the area of insurance, may eventually lead to their disappearance. On the other hand, it should also be mentioned that, in some instances, such counteraction may be a double-edged sword and, at any event, must be seen in conjunction with overall relations with the countries against which it is potentially directed.

3.5 Also, it is very often difficult to establish unequivocally any impact of damage, particularly in relation to unfair pricing practices.

3.6 With that in mind, consideration might be given to whether the committee proposed in Article 12 to assist the Commission instead of the suggested advisory procedure, should apply the safeguard procedure laid down in Article 6 of Decision 1999/468/EC. This secures the Member States more direct influence than the advisory procedure.

3.7 A determination as to whether the Community interest calls for intervention should be based on an appreciation of all the various interests taken as a whole, including the interests of users and consumers (cf. Council Regulation (EC) No. 384/96). The current proposal fails to make such a specific reference⁸.

⁸

Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.

4. Specific comments

4.1 General remarks

4.1.1 The Commission proposal does not make clear its position in relation to the bilateral air transport agreements which – it must be assumed – will continue to be applicable for some time to come and, until then, are binding under international law.

4.1.2 Recommendation

The proposed regulation should specify its position on Member States' competence in relation to the air transport agreements – binding under international law – entered into with non-member countries.

4.2 Article 3

4.2.1 The term "normal fare rate" and the proposal's definition thereof appear somewhat vague.

4.2.2 Recommendation

Instead, the definition of unfair practices could be based on whether the total ticket revenue on a particular route covers the average costs of that route over, say, a six-month period. The term "average costs" must thereby be taken to mean the costs involved in operating the route in question, but excluding overhead expenses and a reasonable profit margin.

4.3 Article 12(2)

4.3.1 Given the very fragmented aviation market in the Community and the comments in point 3, and the proposal's reference to the advisory procedure, consideration could be given to applying the safeguard procedure until such time as the obstacles in question have been removed even though, all other things being equal, the advisory procedure can usually be implemented more quickly – a fact that may be of importance for the matter in hand.

4.3.2 Recommendation

Consideration should be given to whether the committee proposed in Article 12 to assist the Commission, should apply the safeguard procedure laid down in Article 6 of Decision 1999/468/EC instead of the suggested advisory procedure.

5. Conclusion

5.1 In principle, the Committee backs the proposal for a regulation.

5.2 The proposal should make clear how the new provisions are to operate in accordance with the existing bilateral and internationally binding air transport agreements between the Member States and third countries.

Brussels, 18 September 2002

The President
of the
Economic and Social Committee

The Secretary-General
of the
Economic and Social Committee

Göke Frerichs

Patrick Venturini
