
EU's proposal to safeguard competition may flush out protectionist complaints against Gulf airlines

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European aviation regulators have drawn the battle line between those seeking a protectionist response to Gulf competition and those that do not want to see such regulatory backsliding. On 8-Jun-2017 the European Commission published a proposal aimed at safeguarding competition in air transport. This was the highlight among a number of measures adopted by the Commission to progress the Aviation Strategy that it issued in Dec-2015.

The Commission proposes a new Regulation to make it easier for European airlines to lodge a formal complaint against practices by non-EU countries, or airlines, that might distort competition. These include subsidies, unfair pricing and other forms of discrimination. If these are found to cause injury – or to threaten to cause injury – to EU airlines, it will allow the Commission to impose penalties on the non-EU airline.

The EU believes that this will help to ensure fair competition, or a “level playing field” between its airlines and those of third countries (‘third countries’ is EU speak for non-EU countries). According to the EU, this will contribute to “conditions conducive to a high level of connectivity”. The EU also sees the proposed Regulation contributing to strengthening its role as a “global actor”.

The European Commission has also published other measures further fleshing out its Aviation Strategy. These include new guidelines on the ownership and control of EU airlines (but no changes to the limits); guidelines on Public Service Obligation routes in aviation; and a consultation on good practices to ensure air service continuity when there are strikes.

These measures build on the EU Aviation Strategy published in Dec-2015.

Encouraging an international framework and replacing existing Regulation 868 on unfair competition

The starting point for the EU's proposal is that the principles of fair competition in the airline industry are not clearly defined through specific multilateral rules, either via ICAO or WTO.

In order to address what it considers shortcomings in existing arrangements with respect to the safeguarding of competition in air transport, the EU proposes two broad policy areas.

One is increased efforts to seek the development of an international multilateral framework for fair competition at ICAO and WTO level, with expanded fair competition clauses in air services agreements. The second policy proposed by the EU is to replace its existing Regulation 868/2004 with a new Regulation.

EU argues existing Regulation is insufficient

Regulation 868/2004 addresses the protection of EU airlines from unfair competition by third countries or their airlines but has never been used, despite “there being many informal accusations and complaints in the industry about the unfair practices allegedly adopted by third countries and third country entities”.

The words in inverted commas here are taken directly from the EU’s proposal, and can only be seen as a thinly veiled reference to the campaign against the Gulf airlines initiated by the US Big Three airlines – Delta, American and United – and echoed by European airline groups such as Lufthansa and Air France-KLM.

The EU’s existing Regulation 868/2004 is regarded as insufficient, and in need of replacement. It covers subsidisation, but otherwise is restricted to unfair pricing practices. Its concepts are based on measures used against the dumping of goods, but is not well adapted to the air transport sector.

Unlike existing Regulation, the proposal allows individual airlines to make a formal complaint

Moreover, 868/2004 makes it difficult for complaints to be lodged. The Regulation limits the right to complain to the European Commission to the “Community industry”.

This is defined as “the Community air carriers supplying like air services as a whole or those of them whose collective share constitutes a major proportion of the total Community supply of those services”.

EU member states and individual airlines cannot be complainants in their own right. In effect, complaints cannot be made to the EC under the existing Regulation without the agreement of airlines representing a significant proportion of EU air traffic.

Europe’s anti-Gulf lobby has never solidified its argument into a formal complaint, but the system has made it hard for it to do so (this is discussed further below).

The proposed new Regulation will allow individual airlines, groups of airlines and member states to lodge a complaint to the Commission for investigation.

Complaints to be investigated, leading to possible “redressive measures”

The new Regulation includes detailed rules about whether, when, and how a complaint will be investigated. It proposes that, where necessary, the EU should be enabled to carry out the investigation in third countries. In practice, this could be softened by the need for any investigation in third countries to be subject to their agreement.

If an investigation finds that a third country or one of its airlines has employed a practice affecting competition that has caused injury or threat of injury to an EU airline, the Commission will then impose what it calls ‘redressive’ measures.

The redressive measures on the third country airline benefiting from the practice affecting competition could be financial duties, or “any measure of equivalent or lesser value”. This might include the suspension of concessions or traffic rights.

However, redressive measures should not be greater than is necessary to offset the injury or threat of injury.

The EU stresses that **fair competition between airlines should ideally be addressed through bilateral air services agreements with third countries.**

However, most bilaterals between the EU, or EU member states, and third countries do not provide corresponding rules in this area. It argues for increased efforts to include fair competition rules in bilateral agreements.

Framework for whether to proceed with an investigation examines injury to an EU airline

The proposal sets out a framework for considering whether or not to proceed with an investigation when a complaint is received by the Commission.

For an investigation to be started, there must be three things together: prima facie evidence of a practice affecting competition, injury or threat of injury to one or more EU airline, and a causal link between the practice and the injury.

Alternatively, prima facie evidence of a violation of applicable international obligations is also grounds for an investigation.

Action should not be taken where wider EU interests are threatened

However, the proposal makes it clear that it should not start an investigation or

impose redressive measures if the penalties would be against the wider EU interest. In particular, the impact of any redressive measures on “other persons, notably consumers or undertakings in the Union” must be considered.

It also says that findings in respect of injury or threat of injury to the EU airline should reflect a realistic assessment of the situation and should therefore be based on all relevant factors, including the “general situation of the affected air transport market”.

The proposal also considers the potentially damaging impact of retaliatory action by third countries if it were to impose redressive measures towards EU industry.

It gives as examples possible actions relating to market access for EU airlines or to purchases of EU aircraft by non-EU airlines. However, the proposed Regulation specifies that the Commission may decide not to take action if it would go against the Union’s interest.

Proposed new Regulation may prompt anti-Gulf complaints

It seems fairly clear that this EU proposal on safeguarding competition is at least partly a result of the campaign against the Gulf airlines. Sniping against the super connectors has been based on allegations of government subsidies and vague implications of unfair pricing that have never been substantiated.

Under the old Regulation 868/2004 **no single airline was able to make a formal complaint to the European Commission**. Even the combination of Lufthansa Group and Air France-KLM would not represent a sufficient share of EU capacity.

Realistically, the only way to lodge a complaint would have been through a joint initiative supported by all members of what was the Association of European Airlines. Although it did not represent LCCs, the AEA came the closest to the necessary criterion of representing the ‘industry’ in Europe.

It is no coincidence that disagreement among AEA members over their stance towards Gulf competition led to its rupture and subsequent demise, leaving the anti-Gulf snipers with no chance to complain formally. Europe’s new airline association –Airlines for Europe– explicitly avoids talking about the Gulf issue, since it knows that its members do not agree on this topic.

The proposed **new Regulation now makes it easier for individual airlines to lodge a complaint**. This raises the possibility of a spate of new complaints, a possibility also suggested by the Commission’s anticipating of a full time staff of nine to conduct investigations.

But the Regulation also provides grounds for dismissing complaints

At the same time, however, the new Regulation seems to give the Commission a number of 'get out' clauses, allowing it to dismiss a complaint if the state of the aviation market and wider EU interest favour doing so.

It appears that the EU has decided to **tread a careful line between those looking for formal regulatory weapons in the fight against Gulf competition** and those that do not want to see regulatory backsliding into protectionism by Europe.

It may need one or two live cases to be processed before a clearer picture of the Commission's thinking emerges. (If nothing else, the new Regulation could turn out be a successful job creation scheme in Brussels.)

Airlines are responsible for their own competitiveness

However, **any EU airlines hoping to rely on the new Regulation to protect themselves from competition** would do well to act on the following words from the European Commission:

"...EU airlines are ultimately responsible themselves for their competitiveness and must continue to adapt their products and business models to the prevailing market conditions...".

(centreforaviation.com)