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Subject:	Proposal for a Regulation of the European Parliament and of the Council on safeguarding competition in air transport, repealing Regulation (EC) No 868/2004 - General Approach

1. INTRODUCTION

On 8 June 2017, the Commission adopted the above-mentioned proposal, together with its Communication on an Aviation Strategy for Europe. In this Communication, the Commission stated its intention to assess the effectiveness of Regulation (EC) No 868/2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community, with a view to revising or replacing it with a more effective instrument that would ensure fair competition conditions between all air carriers and thereby safeguard connectivity to and from the Union.

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2. CONTENT OF THE PROPOSAL

The main objective of the proposal is to ensure fair competition between the Union air carriers and the third country air carriers, with a view to maintain conditions conducive to a high level of connectivity.

The proposal provides common rules on proceedings, namely:

- the two possible purposes for the investigation (pertaining either to the violation of applicable international obligations - the so-called 'violation' track-, or to practices adopted by a third country or third-country entity affecting competition and causing injury or threat of injury to Union air carriers - the so-called 'injury' track);
- the conditions under which an injury or a threat of injury can be found;
- the rules governing the initiation and conduct of the investigation;
- the conditions according to which the Commission may decide or refuse to open an investigation;
- the right of the Commission to seek all the information it deems necessary to conduct the investigation and to verify the accuracy of the information it has received or collected;
- the possible conclusions of the investigations, i.e. with or without redressive measures.

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3. WORK WITHIN THE EUROPEAN PARLIAMENT

The European Parliament has called for the revision of Regulation 868/2004 in a number of its resolutions, particularly its resolutions of 2 July 2013, 9 September 2015, 11 November 2015 and 16 February 2017. The EP's 11 November 2015 resolution on aviation emphasised that Regulation (EC) No 868/2004 had proved inadequate and ineffective and called on the Commission to revise this Regulation. In its recent resolution of 16 February 2017 on an Aviation Strategy for Europe, the EP welcomed the Commission's proposal to revise Regulation (EC) No 868/2004 addressing unfair current practices, but also stressed that 'neither an unacceptable trend towards protectionism, nor, on their own, measures to ensure fair competition can guarantee the competitiveness of the EU aviation sector'.

The legislative proposal has been assigned to the Parliament's Committee on Transport and Tourism (TRAN) which designated Markus Pieper (EPP, Germany) as rapporteur. The Economic and Monetary Affairs Committee has designated Ramon Tremosa I Balcells as rapporteur for opinion.

On 11 January 2018, the rapporteur presented his draft report to the Committee. The draft report supports the Commission's proposal, but introduces some changes in order to notably give more priority to finding solutions at bilateral level, involve more the European Parliament in the consultation process, or put more emphasis on the connectivity criterion in the investigations. The Committee Members discussed the amendments to the report on 20 February and adopted the draft report on 20 March 2018.

4. WORK WITHIN THE COUNCIL BODIES

The first presentation by the Commission of the new proposal on Safeguarding Competition and its impact assessment in the Aviation Working Party (AWP) took place on 14 June 2017, at the end of the MT Presidency.

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During the EE Presidency, two full working party meetings were dedicated to the detailed examination of the Impact Assessment (hereinafter '*IA*'). A number of delegations shared the Commission's assessment of the situation and supported the outcome of the IA (AT, BE, DE, FR, NL, RO). Other delegations (CZ, EL, FI, HU, IE, IT, LT, LV, MT, PL, PT, SE, SK, SI and UK), although sharing the objectives put forward by the Commission, expressed their concerns regarding potential gaps in the IA and questioned the necessity to address at Union level the issue of fair competition.

On 6 October 2017, the following delegations: CZ, CY, EL, HU, IE, FI, LV, MT, PL, PT and SK submitted a joint written statement to Coreper, highlighting their concerns with respect to certain areas where the IA did not sufficiently take into account the impact of the proposal (document 12937/17).

Furthermore, on 9 November 2017 a number of Member States submitted a document with questions for the Council's Legal Service about the proposal (WK 12682/2017). The Legal Service gave oral answers to some of those questions in the Working Party meeting on 17 November 2017.

On the basis of the progress report of the EE Presidency, the BG Presidency continued the intensive work on this file and the remaining questions were answered orally by the Council Legal Service on 18 January 2018. However, since the Working Party and the TTE Council of 5 December 2017 had asked the Council Legal Service to also provide the answers to their questions in writing, on 7 February 2018, the Council Legal Service issued a contribution dedicated to questions asked by the delegations (document 5990/18).

The compromise text contained in the progress report of the EE Presidency contained a new article on *scope*, new definitions for *'threat of injury'* and *'Member States concerned*', a new article for *'Union interest'*, an enhanced *role of the Member States* concerned in the investigation and throughout the whole proceedings, a new wording for Article 7 on '*non-cooperation'*, a shorter *time limit* for the Commission's investigation, as well as clarifications regarding the potential use of *traffic rights as redressive measures.*

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However, several important issues needed further reflection and compromise seeking. Therefore, in an effort to bridge the diverging view of the delegations, the BG Presidency has proposed new text providing concrete *examples of possible discrimination* against Union air carriers, compromises concerning the *suspension of the investigation* by the Commission, or the *termination of the investigation* without the adoption of redressive measures.

In order to take care of the concerns of several Member States related notably to consumers' interests and to high levels of connectivity in the Union, recital 15 and Article 4bis *'Union Interest'* have been strengthened to include an economic analysis by the Commission on the basis of a questionnaire filled in by the interested parties, thus clarifying an important criterion for the Commission to terminate of the investigation without redressive measures.

In order to have the same procedure for the conclusion of the investigation applying to both comprehensive air transport agreements (hereinafter '*CATAs*') and bilateral air transport agreements (hereinafter '*BATAs*'), the BG Presidency has also proposed the *deletion of Article 10*, applicable specifically to a *violation of international obligations* established on the basis of a CATA or of a provision in a Union level trade agreement. Consequently, regardless of the type of aviation agreement, before proposing redressive measures, the Commission's investigation would need to confirm the existence of an injury, of a practice distorting competition and of the causal link between them before proposing the adoption of any redressive measures.

As regards the *scope of the Regulation*, some delegations consider that the new wording in paragraphs 2a and 2b of Article 1, even though a welcome addition to the Commission proposal, is too wide and propose to limit it to city-pair routes or a city-pair market. They argue that unfair competition practices cannot exist unless there is direct competition between air carriers in the first place, either on direct or on indirect routes (involving intermediate points). Other delegations consider this proposal too restrictive. They emphasise that it should be possible to investigate all unfair practices, regardless of their link to a specific route, since there may be practices with a network effect. Moreover, they also underline that limiting the scope to city-pair markets would mean going back to the scope of the current Regulation (EC) No 868/2004 (Article 3(d)), one of the reasons why this Regulation could not be applied in practice.

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As a compromise, the Presidency is proposing a new recital 9bis clarifying that the Commission will need to adapt the *scope of its investigation* to the relevant context: a city-pair route or whole network, as the case may be. Moreover, point iii of paragraph 1 of Article 3 provides that that an investigation can only be initiated when a causal link has been established between the alleged unfair practice and the injury, on the basis of the competition existing in the relevant market.

At the end of the Aviation Working Party on 30 April 2018, the main outsanding issues were the following:

1. The suspension of the investigation

From the very beginning, since the adoption of the Commission proposal, one of the major concerns of several Member States has been the possible conflict between the Commission investigation and the Member States' bilateral aviation agreements. This group of Member States strongly argue that Member States should be allowed to try to find a solution to the unfair practices on the basis of the dispute settlement mechanisms provided in their bilateral aviation agreements and that only when these mechanisms are exhausted without results should an investigation be initiated by the Commission.

However, other Member States have a different view. Their opinion - confirmed by the Council Legal Service in its contribution - is that an investigation and a bilateral dispute settlement are two distinct procedures conducted under different legal systems and therefore, from a legal point of view, nothing prevents them from running in parallel. Moreover, in order to ensure consistency at Union level from a political point of view, recital 13 explains that the Commission needs to be fully informed of the bilateral negotiations of Member States, so that the Commission may have the possibility to take them into account and ensure coherence between the two procedures.

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In conclusion, while some Member States are concerned about the parallel procedures and the effect the investigation may have on their bilateral relations with the third country concerned and connectivity, others consider that the Commission should be allowed to investigate in order to strengthen the Union's position and influence over the third country air carriers concerned. In order to bridge the gap between these diverging views, the Presidency is proposing a compromise in paragraph 2a of Article 4, which foresees that the investigation may be suspended for twelve months at the request of all the Member States concerned, in order to allow Member States the possibility to seek solutions exclusively on a bilateral basis.

Some Member States propose remove the above 12 month deadline and align the suspension of the investigation with the deadline provided by the dispute settlement procedure provided by the bilateral agreement in question. However, since many bilateral aviation agreement do not contain any deadlines, for legal certainty, the Presidency compromise text proposes to keep the twelve-month suspension.

A number of delegations also consider that the Member State who has the bilateral agreement in question should have the right to block the investigation on its own, on the argument that other Member States - even though they may be affected by the unfair practice - should not have the right to overrule the international obligations of the Member State which has the bilateral agreement wih the third country concerned. Other Member States do not agree with this unilateral veto for several reasons:

a) from a legal point of view, nothing prevents a Member State to continue its negotiations bilaterally in parallel with the Commission investigations;

b) Member States have equal rights and some of them may be even more affected by the unfair practice than the Member State who has the bilateral agreement in question;

c) The Regulation provides several safeguards ensuring coherence between the Member States' bilateral negotiations and the Commission's investigation, plus the involvement of the Member States in the adoption of any redressive measures at the end of the investigation.

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Consequently, the BG Presidency text is proposing to maintain the compromise set out in paragraph 2a of Article 4, which allows the suspension of the Commission's investigation for twelve months at the request of *all* the Member States concerned, in order to give first the Member States the possibility to exclusively negotiate with the third country concerned on a bilateral basis.

2. Threat of injury

Several Member States oppose the Commission proposal regarding the definition of *'threat of injury*'. They argue that the concept of *'threat of injury'* is too broad, hard to be determined and creating legal uncertainty and therefore request to delete it from the whole proposal. They also express concerns about how this concept can be applied in practice and about the fact that in other areas, in the past, it has been used for protectionist purposes.

Other delegations have an opposite view, emphasising that the proposal would be seriously weakened if the *'threat of injury'* were to be deleted. They argue that there are situations when it is certain that a protectionist measure will be imposed against Union air carriers, that it is only a matter of time until those measures start to apply, and that in such a situation an investigation would be entirely justified even if an injury had not occurred yet. Waiting for the threat to materialise into an actual injury might cause irreversible harm, which might have been avoided if an investigation had been initiated in advance. Moreover, these delegations emphasise that the concept of '*threat of injury*' is already well established and has been widely used in other policy areas (like trade and competition), both at Union level and in the legislation of several Member States.

Furthermore, they underline that Presidency compromise text already proposes the obligation of a *substantiated* threat of injury, which needs to be based on clear evidence and thus allows avoiding the risk of misuse.

In order to find a solution to address the above concerns, the EE Presidency had introduced a new paragraph 1a in Article 1 proposing that redressive measures could only be imposed on the basis of an actual injury to Union air carriers. In addition, investigations may be initiated on the basis of a complaint, but redressive measures could only be proposed when an injury has in fact occurred.

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Even though welcomed by the delegations, the compromise text proposed by the EE progress report did not solve the delegations' concerns. The group pleading for the deletion of the *'threat of injury'* have continued to argue that aviation is not a Union exclusive policy area like trade, and that the different circumstances of Member States make the potential consequences of an investigation a great deal more complicated. For that reason, they have insisted that a high evidence standard and clear boundaries should be established for launching investigations and that the concept of *'threat of injury*' does not guarantee these preconditions.

As a result, the compromise text proposed by the BG Presidency before the Coreper meeting on 4 May proposed the deletion of the 'threat of injury', as part of the overall General Approach compromise package on the proposal.

3. Member States' role and involvement during the different phases of the investigation

The Commission proposal foresees implementing acts adopted by the Commission for the adoption and the review of redressive measures. However, given the already mentioned potential consequences on regional connectivity or on the general relations with the third countries concerned, several Member States have stressed the importance of being in control of the adoption and review of any redressive measures. For these reasons, they insist the redressive measures should be adopted by means of a Council Decision. It may be worth recalling that, according to Article 291 TFEU, Council decisions can only be adopted in duly justified cases, and have to be explained in detail in a recital.

For the same reasons, some of these delegations also propose that the initiation of an investigation should be done by comitology (examination procedure), in order to ensure the involvement of the Member States in the decision to launch the investigation.

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On the other hand, other Member States oppose these ideas. They consider that the Presidency compromise text provides sufficient safeguards to take care of the above-mentioned concerns. Member States will be informed of the existence of complaints. The Commission will verify their accuracy and whether an investigation is justified and will also check whether the initiation of the investigation would be against the Union's interest. If the Commission launches an investigation, Member States will have the possibility to ask for the suspension of the investigation for a period of time, allowing them the possibility to try and find a solution to the discriminatory practice through bilateral action.

Therefore, these delegations argue that the adoption of a Council Decision would only complicate the procedures and it may even leave the Member States vulnerable to political pressure from the 3rd countries concerned. Moreover, regarding the adoption, revision or repeal of redressive measures - since in this respect the Commission proposal provides an implementing act - the examination procedure already ensures the direct involvement of the Member States.

As a compromise, the BG Presidency is proposing to maintain the adoption of redressive measures by means of a Commission implementing act in case of financial duties, and by means of a Council Decision in case of any redressive measures of operational nature. Moreover, traffic rights are explicitly excluded as possible redressive measures.

The BG Presidency proposed compromise text was discussed in Coreper in its meeting on 4 May 2018 and enjoyed broad support from the Member States. The great majority of delegations took the floor to praise the significant progress made on the file and to underline the delicate balance of the proposed compromise, which, even if not entirely satisfactory for all delegations, manages to bring together the diverging interests of the Member States under one common Council position. Consequently, Coreper agreed on the text of the draft General Approach as proposed by the BG Presidency.

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The Commission fully reserves its position on the entire compromise proposal, pending the negotiations with the European Parliament.

DK, MT and UK have a parliamentary scrutiny reservation on the proposal.

5. CONCLUSIONS

In light of the above, at its meeting on 7 June 2018, the Council is invited to examine the text set out in the Annex to this report and to adopt a general approach on the proposal.

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ANNEX

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

(Text with EEA relevance)

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 Articles 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],

Having regard to the opinion of the Committee of the Regions[2],

Acting in accordance with the ordinary legislative procedure,

Whereas:

[1] OJ C , , p. .
[2] OJ C , , p. .

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(1) Aviation plays a crucial role in Union's economy. It is a strong driver for economic growth, jobs, trade and mobility. Over the past decades, growth in air transport services significantly contributed to improving connectivity within the Union and with third countries and has been a significant enabler of Union economy at large.

(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 between all air carriers. This would contribute to maintaining conditions conducive to a high level of Union's connectivity.

(3) Fair competition is an important general principle in the operation of international air transport services. This principle is notably acknowledged by the Convention on International Civil Aviation ('the Chicago Convention') whose preamble recognises the need for international air transport services to be based on the basis of "*equality of opportunity*". Article 44 of the Chicago Convention also states that the International Civil Aviation Organization ('ICAO') should aim to foster the development of international air transport so as to "*insure 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 existing Union law, which guarantees equal opportunities and fair competition conditions for all air carriers, European and non-European, operating in the Union.

(5) However, in spite of continued efforts by some third countries and the Union, principles of fair competition have not yet been defined through specific multilateral rules, notably in the context of the ICAO nor of World Trade Organization ('WTO') agreements, from the scope of which air transport services have largely been excluded[3].

[3] Marrakech Agreement, Annex 1B General Agreement on Trade in Services (GATS), Annex on Air Transport Services.

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(6) Efforts should therefore be strengthened in the context of ICAO and of 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 corresponding rules. 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[4] and Council Directive 96/97/EC[5]. Insofar as fair competition supposes protection of Union air carriers from certain practices adopted by third countries or third country carriers, this issue is currently addressed in Regulation (EC) No 868/2004 of the European Parliament and of the Council[6]. However, Regulation (EC) No 868/2004 has proven insufficiently effective, in respect of its underlying general aim of fair competition. This is notably due to certain of its rules pertaining notably 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 fails to provide for a dedicated Union internal procedure in respect of obligations contained in air transport or air services agreements to which the Union is a party and intended to ensure fair competition. Given the number and importance 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.

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4 Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (OJ L 14, 22.1.1993, p.1).

5 Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at Community airports (OJ L 272, 25.10.1996, p.36).

6 Regulation (EC) No 868/2004 of the European Parliament and of the Council of 21 April 2004 concerning protection against subsidisation and unfair pricing practices causing injury to Community air carriers in the supply of air services from countries not members of the European Community (OJ L 162, 30.04.2004, p.1).

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(8bis) The discrimination may include situations where a Union air carrier is subject to a differentiation of treatment without objective justification, notably concerning the prices and access to ground handling services, airport infrastructure, air navigation services, the allocation of slots, the administrative procedures such as allocation of visas for foreign carrier's staff, the modalities for the selling and distribution of air services or any other 'doing business issues' such as burdensome customs clearance procedures.

(9) 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 countries 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 either where relevant obligations under an agreement to which the Union is a party are violated, or where practices distorting competition cause injury to Union air carriers.

(9bis) During the investigation the Commission should give consideration to the practice distorting competition in the relevant context. Given the variety of possible practices, in some cases the practice and its effects may be limited to air transport activities of a city-pair route, while in other cases it may be relevant to consider the practice and its effects on the wider air transport network.

(10) Where the Union is party to an air transport or air services agreement with a third country, the violation of international obligations enshrined therein should be addressed by the Union, in particular through the application of the fair competition clause where it exists, and, where relevant, dispute settlement.

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

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(12) It is important to ensure that the investigation can extend to the widest possible range of pertinent elements. To this effect, and subject to the consent of the third country and third country entity concerned, the Commission should be enabled to carry out investigations in 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.

(13) Where the investigation conducted by the Commission concerns operations covered by an air transport or air services agreement with a third country to which the Union is not a party, it should be ensured that the Commission acts in 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 that case, Member States should have the possibility to ask the Commission to suspend its investigation and address the practice distorting competition exclusively under the dispute settlement mechanisms contained in their air transport or air services agreements with a third country to which the Union is not a party.

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

(15) Proceedings should not be initiated or 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 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.

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(16) […].

(17) Findings in respect of injury to the Union air carrier(s) 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 carrier(s) and to the general situation of the affected air transport market.

(18) 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.

(19) 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.

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(19a) Aviation remains to a large degree based on bilateral air transport agreements between Member States and third countries in which they grant each other traffic rights. For the present, the Union has not exercised the shared competence on traffic rights and where the Union and Member States have concluded a comprehensive air transport agreement with a third country, Member States may grant further traffic rights bilaterally beyond what is included in the agreement. An adoption of redressive measures might affect tenets of the bilateral aviation relationship between Member States and third countries, in particular where no comprehensive air transport agreement is in place. Conferral of implementing powers on the Council in this sensitive area should ensure a deeper involvement of Member States in the adoption of operational redressive measures and allow for the full consideration of potential negative effects on the bilateral relationship with third countries at Member State level. Furthermore, air connectivity and the availability of routes is primarily a public good and a well-established link exists between connectivity and economic performance in terms of jobs and growth. As such, connectivity is directly linked to the vital national interests of Member States and the economic performance of both local and national economies. The possible decrease in air connectivity which might be caused by the adoption of operational redressive measures against third country air operators in a case of unfair competition could affects the wider economic environment at regional and national level and the economic opportunities for local industries, businesses as well as consumers and citizens. This is not least the case in regions and Member States that are less well connected or where connections to other regions and Member States are particularly dependent on aviation. A conferral of the implementing power to adopt operational redressive measures on the Council should ensure a deeper involvement of the Member States in the adoption of redressive measures and allow for the full consideration of their impact at local and national level.

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(20) In line with the same principle, 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, a review should be provided for where circumstances so warrant.

(21) Situations investigated under this Regulation and their potential impact on Member States may differ according to the circumstances. Redressive measures may therefore apply, according to the case, to one or more Member States or be limited to a specific geographical area.

(22) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[7].

(23) Since the objective of this Regulation, namely the efficient protection, equal for all Union carriers and based on uniform criteria and procedures, against injury to one or more Union air carriers caused by practices distorting competition, adopted by third countries or third country entities cannot be sufficiently achieved by the Member States, but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(24) Since this Regulation replaces Regulation (EC) No 868/2004, that Regulation should therefore be repealed,

HAVE ADOPTED THIS REGULATION:

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[7] Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ L 55, 28.2.2011, p. 13).

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CHAPTER I
GENERAL PROVISIONS

Article 1

Subject matter

1. This Regulation lays down rules on the conduct of investigations by the Commission relating to practices distorting competition between Union air carriers and third country air carriers and causing injury to Union air carriers.

1a. This Regulation also lays down rules on the adoption of redressive measures by the Council, where practices distorting competition between Union air carriers and third country air carriers have caused injury to Union air carriers.

2. […]

2a. This Regulation applies without prejudice to Article 12 of Regulation (EEC) No 95/93 and Article 20 of Directive 96/67/EC.

Article 2

Definitions

For the purposes of this Regulation:

(a) 'air carrier' means an air carrier as defined in Regulation (EC) No 1008/2008 of the European Parliament and of the Council[8];

[8] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (OJ L 293, 31.10.2008, p.3).

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(b) 'air transport service' means a flight or a series of flights carrying passengers, cargo or mail for remuneration or hire;

(c) […];

(d) 'interested party' means any natural or legal person or any official body, whether or not having its own legal personality, that is likely to have a significant interest in the result of proceedings;

(e) 'third country entity' means any natural or legal person, whether profit-making or not, or any official body with or without own legal personality, which is under the jurisdiction of a third country, whether controlled by a third country government or not, and is directly or indirectly involved in air transport services or related services or in providing infrastructure or services used to provide air transport services or related services;

(f) 'practices distorting competition' means discrimination and subsidies;

(g) 'discrimination' 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 air transport services);

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(h) 'subsidy' means a financial contribution:

(i) granted by a government or other public organisation of a third country in any of the following forms:

(1) a practice of a government or other public organisation involving a direct transfer of funds, potential direct transfer of funds or liabilities (such as grants, loans, equity infusion, loan guarantees, setting-off of operational losses, or compensation for financial burdens imposed by public authorities);

(2) revenue of a government or other public organisation that is otherwise due is foregone or not collected (such as preferential tax treatment or fiscal incentives such as tax credits);

(3) a government or other public organisation, including publicly controlled undertakings, provides goods or services, or purchases goods or services;

(4) a government or other public organisation makes payments to a funding mechanism or entrusts or directs a private body to carry out one or more of the type of functions referred to in points (1), (2) and (3) which would normally be vested in the government and, in practice, in no real sense differs from practices normally followed by governments;

(ii) conferring a benefit;

(iii) limited, in law or in fact, to an entity or industry or group of entities or industries within the jurisdiction of the granting authority;

(i) ‘Union air carrier’ means an air carrier with a valid operating licence granted by a Member State in accordance with Regulation (EC) No 1008/2008.

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(i bis) ‘Member State concerned’ means

a) the Member State which granted the operating licence to the Union air carrier(s) concerned pursuant to Regulation (EC) No 1008/2008;

b) […];

c) the Member State under whose air transport agreement, air services agreement or any agreement containing provisions on air transport services with the third country concerned, the Union air carrier (s) concerned operate(s);

d) […].

(i ter) ‘Union air carrier concerned’ means the air carrier which is allegedly subject to an injury pursuant to Article 3(1)b.

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CHAPTER II
COMMON PROVISIONS REGARDING PROCEEDINGS

Article 3

Initiation of proceedings

1. 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, or on the Commission's own initiative, if there is prima facie evidence of the existence of all the following circumstances:

   (i) a practice distorting competition, adopted by a third country or a third country entity;

   (ii) injury to one or more Union air carriers;

   (iii) a causal link between the alleged practice and the alleged injury.

2. […]

2a. When receiving a complaint pursuant to paragraph 1, the Commission shall inform all Member States.

3. The Commission shall examine the accuracy and adequacy of the elements provided in the complaint or at the disposal of the Commission, in order to determine whether there is sufficient evidence to justify the initiation of an investigation in accordance with paragraph 1.

4. The Commission shall decide not to proceed to the initiation of an investigation where the adoption of measures in accordance with Article 13 would be against the Union interest or where 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.

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5. Where the evidence presented is insufficient for the purposes of paragraph 1, the Commission shall inform the complainant about the insufficiency within 60 days of the date on which the complaint was lodged. The complainant shall be given 30 days to provide additional evidence. Where the complainant fails to do so within that time limit, the Commission may decide not to initiate the investigation.

6. The Commission shall decide on the initiation of an investigation in accordance with paragraph 1 within a maximum period of 6 months of the lodging of the complaint.

6a. The Commission shall inform the complainant and all Member States where it has decided not to initiate the investigation. This information shall contain the reasons for the decision thereof.

7. Subject to paragraph 4, when the Commission considers that there is sufficient evidence to justify initiating an investigation, the Commission shall take the following steps:

(a) initiate the proceedings and notify the Member States thereof;

(b) publish a notice in the *Official Journal of the European Union*; the notice shall announce the initiation of the investigation, indicate the scope of the investigation, the third country or third country entity who has allegedly been engaged in practices distorting competition and the alleged injury, the Union air carrier(s) concerned and state the period within which interested parties may make themselves known, present their views in writing, submit information or may apply to be heard by the Commission.

(c) officially notify the representatives of the third country and third country entity concerned of the initiation of the investigation;

(d) inform the complainant and the Committee provided for under Article 15 of the initiation of the investigation.

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8. Where the complaint is withdrawn prior to the initiation of the investigation, the complaint is considered not to have been lodged. This is without prejudice to the right of the Commission to proceed to the initiation of an investigation on its own initiative in accordance with paragraph 1.

Article 4

The investigation

1. Following the initiation of proceedings, the Commission shall begin an investigation.

2. The investigation shall aim to determine whether a practice distorting competition, adopted by a third country or a third country entity, has caused injury to the Union air carrier(s) concerned.

2.0 The Commission shall suspend the investigation, if the Commission decides that it will address the practice distorting competition exclusively under the procedure for dispute settlement applicable to the air transport or air services agreements to which the Union is a party or to any other agreement which contains provisions on the air transport services to which the Union is a party. The Commission shall notify the Member States of the suspension of the investigation. The Commission shall resume the investigation in any of the following cases:

a) the outcome of the dispute settlement procedure referred to in this paragraph was in favour of the Union and has not been enforced correctly and expeditiously by the third country;

b) the dispute settlement procedure has not been initiated within three months from the date of notification set out in paragraph 2.0;

c) the Commission comes to the conclusion that the practice distorting competition has not been eliminated within 12 months as from the date of suspension of the investigation.

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2a. The Commission shall suspend the investigation, if all the Member State(s) concerned have notified the Commission, within 15 working days as from the date of the notification of the initiation of the investigation, of their intention to address the practice distorting competition exclusively under the procedure for dispute settlement applicable to the air transport, air services agreements or any other agreement which contains provisions on air transport services that they have concluded with the third country concerned.

The Commission shall resume the investigation in any of the following cases:

a) the Member State(s) concerned notifies the Commission that the outcome of the dispute settlement procedure referred to in paragraph 2a has not been enforced correctly and expeditiously;

b) the Member State(s) concerned has not initiated the dispute settlement procedure within 3 months from the date of the notification set out in paragraph 2a.

c) the Member State(s) concerned asks the Commission to resume the investigation;

d) the Commission comes to the conclusion that the practice distorting competition has not been eliminated within 12 months as from the date of the notification by the Member State(s) concerned referred to in paragraph 2a.

3. The Commission shall seek all the information it deems necessary to conduct the investigation and verify the accuracy of the information it has received or collected with the Union air carrier(s) concerned, or with the third country or third country entity concerned.

4. The Commission may request Member State(s) concerned to support it in the investigation. Upon request, Member States concerned shall take the necessary steps to support the Commission in the investigation by supplying relevant and available information.

5. If it appears necessary, the Commission may carry out investigations in the territory of the third country concerned, provided that the government of the third country concerned and the third country entity concerned have been officially notified and have given their consent.

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6. Parties which have made themselves known within the time limits set out in the notice of initiation, shall be heard if they have made a request for a hearing showing that they are an interested party.

7. Complainants, interested parties, Member States and the representatives of the third country or third country entity concerned may consult all information made available to the Commission, except for internal documents that are for the use of the Commission and the administrations of the Union and of the Member States(s) concerned, provided that such information is not confidential within the meaning of Article 6 and provided that it has addressed a request in writing to the Commission.

7a. The Commission shall terminate the investigation without adopting redressive measures in accordance with Article 12, where it comes to the conclusion that the practice distorting competition has been eliminated.

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Article 4 bis

Union Interest

1. A determination as to whether the Union´s interest calls for intervention shall be based on an appreciation of all the various interests that are relevant in the particular situation and taken as a whole, prioritising the interests of consumers and connectivity. In such an examination, the need to eliminate the practices distorting competition shall be given special consideration.

2. The Union's interest shall be assessed by the Commission on the basis of a questionnaire sent out to the interested parties, and on an economic analysis by the Commission. The assessment shall take into consideration notably the factors set out in Article 11(1). A determination pursuant to this Article in application of Article~~s~~ 12 shall only be made where interested parties have been given the opportunity to make their views known pursuant to Article 4(6).

3. In determining the Union interest, the Commission shall examine the information provided by the interested parties which have made themselves known, presented their views in writing on the basis of the questionnaire referred to in paragraph 2, submitted information, or applied to be heard by the Commission in accordance with Article 3(7b).

4. The interested parties referred to in paragraph 3 may request that the fact and considerations on which decisions are likely to be taken be made available to them. Such information shall be made available to the extent possible and in accordance with Article 6, and without prejudice to any subsequent decision taken by the Commission.

5. Information shall be taken into account only where it is supported by actual evidence which substantiates its validity.

6. The economic analysis referred to in paragraph 2 shall be transmitted to the Council for information.

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Article 5

Cooperation with the Member States

1. […]

2. Where the Member State concerned intends to resort to procedures for dispute settlement provided in an air transport or air services agreement with the third country concerned and has not notified the Commission of its intention to resort to it exclusively in accordance with Article 4(2a), that Member State shall inform the Commission without undue delay of its intention.

3. The Member State concerned referred to in paragraph 2 shall also inform the Commission of all relevant meetings scheduled in the framework of the air transport or air services agreement or any provision on air transport services included in any other agreement with the third country concerned to discuss the issue covered by the investigation. The Member State concerned shall provide the Commission with the agenda and all relevant information permitting an understanding of the topics to be discussed at those meetings.

4. The Member State concerned shall keep the Commission informed of the conduct of any procedure as referred to in paragraph 2 and may, where appropriate, invite the Commission to attend those procedures. The Commission may request further information from the Member State concerned.

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Article 6

Confidentiality

1. Any information which is by nature confidential, including but not limited to information the disclosure of which would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon a person supplying the information or upon a person from whom the person supplying the information has acquired the information, or which is provided on a confidential basis by parties to an investigation shall, if good cause is shown, be treated as such by the Commission.

2. Interested parties providing confidential information shall be required to provide non-confidential summaries thereof. Those summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, the interested parties may indicate that the confidential information cannot be summarised. In such exceptional circumstances, a statement of the reasons why summarisation is not possible shall be provided.

3. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested. This provision shall not preclude the use of information received in the context of one investigation for the purpose of initiating another investigation in accordance with this Regulation.

4. The Commission and the Member States, including the officials of either, shall not reveal any information of a confidential nature received pursuant to this Regulation, or any information provided on a confidential basis by a party to an investigation, without specific permission from the party submitting such information. Exchanges of information between the Commission and Member States, or any internal document prepared by the authorities of the Union or the Member States, shall not be divulged except where specifically provided for in this Regulation.

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5. Where it appears that a request for confidentiality is not warranted and if the supplier is unwilling either to make the information public or to authorise its disclosure in generalised or summary form, the information concerned may be disregarded.

6. This Article shall not preclude the disclosure of general information by the Union authorities and in particular the disclosure of the reasons on which decisions taken pursuant to this Regulation are based or the disclosure of the evidence relied on by the Union authorities in so far as is necessary to explain those reasons in court proceedings. Such disclosure shall take into account the legitimate interest of the parties concerned that their business or government secrets shall not be divulged.

6a. Member States shall take the necessary measures to ensure appropriate confidentiality of the information relevant to the application of this Regulation.

Article 7

Non-cooperation

1. In cases in which any interested party, a third country or a third country entity concerned refuses access to, or otherwise does not provide the necessary information within the time limits provided for in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available.

   Where it is found that any interested party, a third country or a third country entity has supplied false or misleading information, that information shall be disregarded.

2. Where the information submitted by an interested party, a third country or a third country entity concerned is not ideal in all respects, it shall nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

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3. If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons thereof and shall be granted an opportunity to provide further explanations within the specified time limit. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.

4. […]

Article 8

Disclosure

1. The third country, the third country entity and the third country air carrier concerned, as well as the complainant, the interested parties, Member States and the Union air carrier(s) concerned shall receive disclosure of the essential facts and considerations on the basis of which it is intended to adopt redressive measures, or to terminate proceedings without adopting redressive measures, no later than one month before the Committee referred to in Article 15 is convened in accordance with Articles 12(2) or 13(1), or one month before the Commission transmits its proposal referred to in Article 13(1a) to the Council.

2. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission. Where the Commission intends to base such a decision on any additional or different facts and arguments they shall be disclosed as soon as possible.

3. Additional information provided after disclosure shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 14 days, due consideration being given to the urgency of the matter. A shorter period may be set whenever an additional final disclosure has to be made.

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Article 9

Duration of proceedings and suspension

1. […].

1a. The proceedings shall be concluded within a maximum of eighteen months. The period necessary for the proceedings may be prolonged in duly justified cases. In case of a suspension of the investigation as set out in Article 4(2.0) and 4(2a), that period of suspension shall not be counted within the duration of the proceedings.

2. […]

3. The Commission shall suspend the proceedings where the third country or the third country entity concerned has taken decisive steps to eliminate~~:~~

(a) […];

(b) the practice distorting competition or the injury to the Union air carrier(s) concerned.

4. If the practice distorting competition, or the injury to the Union air carrier(s) concerned has not been eliminated following a reasonable period of time, the Commission may resume the proceedings.

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CHAPTER III
VIOLATION OF APPLICABLE INTERNATIONAL OBLIGATIONS

Article 10

Conclusion of proceedings

[…]

CHAPTER IV
PRACTICES DISTORTING COMPETITION

Article 11

Determination of injury

1. A finding of injury for the purposes of this Chapter shall be based on evidence and shall take account of the relevant factors, in particular:

   (a) the situation of the Union air carrier(s) concerned, notably in terms of aspects such as frequency of services, utilisation of capacity, network effect, sales, market share, profits, return on capital, investment and employment;

   (b) the general situation on the affected air transport services market(s), notably in terms of level of fares or rates, capacity and frequency of air transport services or use of the network.

   Where the injury to the Union air carrier(s) concerned is caused by factors other than the practice distorting competition, they shall not be attributed to the practice under scrutiny and shall be disregarded.

2. […]

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3. The Commission shall select an investigation period during which the injury has allegedly taken place and analyse the relevant evidence over that period.

4. […]

Article 12

Termination of proceedings without redressive measures

1. Unless the Commission continues the investigation on its own initiative, the Commission shall terminate the investigation without redressive measures being adopted where the complaint is withdrawn.

2. The Commission shall, by means of implementing acts, terminate the investigation conducted in accordance with Article 4 without redressive measures being adopted where:

   (a) the Commission concludes that either of the following is not established:

      (i) the existence of a practice distorting competition, adopted by a third country or a third country entity;

      (ii) the existence of injury to the Union air carrier(s) concerned;

      (iii) the existence of a causal link between the injury and the practice considered;

   (b) the Commission concludes that adopting redressive measures in accordance with Article 13 would be against Union interest;

   (c) the third country or third country entity concerned has eliminated the practice distorting competition;

   (d) the third country or third country entity concerned has eliminated the injury to the Union air carrier(s) concerned.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).

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3. The decision to terminate the investigation in accordance with paragraph 2 shall be accompanied by a statement of the reasons thereof and shall be published in the *Official Journal of the European Union*.

Article 13

Redressive measures

1. Without prejudice to Article 12, the Commission shall, by means of implementing acts, adopt the redressive measures referred to in point (a) of paragraph 2**,** if the investigation conducted under Article 4 determines that a practice distorting competition, adopted by a third country or a third country entity, has caused injury to the Union air carrier(s) concerned.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).

1a. Without prejudice to Article 12, on the basis of a proposal from the Commission, the Council shall, by means of implementing acts, adopt operational redressive measures referred to in point (b) of paragraph 2, if the investigation conducted under Article 4 determines that a practice distorting competition, adopted by a third country or a third country entity, has caused injury to the Union air carrier(s) concerned.

1(b) The redressive measures referred to in paragraphs 1 and 1a shall not direct the Union or the Member State(s) concerned to violating air transport, air services agreements or any provision on air transport services included in a trade agreement concluded with the third country concerned.

2. The redressive measures referred to in paragraphs 1 and 1a shall be imposed on the third country air carriers(s) benefiting from the practice distorting competition and may take the form of either of the following:

(a) financial duties;

(b) any operational measure of equivalent or lesser value, such as suspension of concessions, of services owed or of other rights of the third country air carrier.

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3. The redressive measures referred to in paragraphs 1 and 1a shall not exceed what is necessary to offset the injury to the Union air carrier(s) concerned.

3(b) The redressive measures shall not consist of suspension or limitation of traffic rights granted by a Member State to a third country under an air transport, an air service agreement or any provision on air transport services included in any other agreement concluded with that third country.

4. […]

5. The decision to conclude the investigation with the adoption of redressive measures referred to in paragraphs 1 and 1a shall be accompanied by a statement of the reasons thereof and shall be published in the *Official Journal of the European Union.*

Article 14

Review of redressive measures

1. The redressive measures referred to in Article 13 shall remain in force only as long as, and to the extent that, it is necessary in view of, the persistence of the practice distorting competition and the ensuing injury. To this end, the review procedure set out in paragraphs 2, 3 and 4 shall apply. The Commission shall regularly provide a written report to the Council on the effectiveness and impact of redressive measures.

2. Where circumstances so warrant, the need for the continued imposition of redressive measures in their initial form may be reviewed, either on the initiative of the Commission or of the complainant or upon a reasoned request by the Member State(s) concerned, the third country or the third country entity concerned.

3. In the course of its review, the Commission shall assess the continued existence of the practice distorting competition, of the injury and of the causal link between the practice and the injury.

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4. The Commission shall, by means of implementing acts, repeal, amend or maintain, as appropriate, the redressive measures set out in Article 13(2a). Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 15(2).

4a. On the basis of a proposal from the Commission, Council shall, by means of implementing acts, repeal, amend or maintain, as appropriate, the redressive measures set out in Article 13(2b).

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CHAPTER V
FINAL PROVISIONS

Article 15

Committee procedure

1. The Commission shall be assisted by a committee. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.

Article 16

Repeal

Regulation (EC) No 868/2004 is repealed. References to the repealed Regulation shall be construed as references to this Regulation.

Article 17

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

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