

EU Consultation for a Possible EC Proposal to Revise or Replace Regulation (EC) No 868/2004

Position Paper by the Arab Air Carriers Organization

I. Foreword

Following our review to the questionnaire published by the European Commission on 29 October 2013 as part of the work the Commission is conducting in the context of a possible EC proposal to “better protection of EU air carriers against unfair practices from non-EU air carriers”, please find below our general view on the consultation followed by specific comments on specific questions as stipulated in the consultation.

II. General Observations

1. We would like to first relay our appreciation to the European Commission for publishing a consultation prior to submitting a proposal on the revision or replacement of Regulation (EC) No 868/2004. This motion by the European Commission opens the opportunity for stakeholders from outside the EU to give their views on this very important issue hopefully bringing a more balanced approach to the direction of such a policy, if revised.
2. However, although the consultation seeks the views of all relevant stakeholders, the content and nature of the questions and the suggested answers/options are subjective rather than objective and, with the exception of Question No 2.1, assume that there’s injury caused to EU carriers as a result of unfair practices in the supply of air services from non-EU countries to and from the EU market, without any substantiated evidence of such injury or unfair practices.
3. We’re concerned that the questions seem to be more inclined towards securing the interest of EU carriers rather than the EU air transport stakeholders in general and the consumer in particular.
4. We truly see this consultation as a chance for some carriers to try and secure unnecessary protectionist treatment via a possible revision of regulation 868/2004. We

urge the Commission to be mindful of such a possibility. If the Commission reaches the view that regulation 868 needs change, we envision the consultation as a tool to lead to a legislation that is in the interest of the wider EU community, namely legislation that is not discriminatory and that is not intended to introduce restrictions on development of air services between the EU and the world at large.

5. In the same token, if a revision is to be done, it is important that the new regulation complies with procedural and substantiated legal norms. In this context, we would envision a regulation that is carefully drafted and which includes definitions that are fair and balanced, and in line with international conventions and standards.
6. Additionally, it is our view that if any extreme options in the consultation are considered for the proposal and potentially adopted, it could trigger disputes with non-EU countries similar to the one following the inclusion of international aviation in the EU Emissions Trading Scheme. Any measure that substitutes a bilateral process with unilateral action will have an adverse effect on consumer interest, bilateral relationships and the economy at large.
7. We would like to add that any changes to the regulation need be studied extensively so as to avoid undermining the sovereignty of a third country hence being deemed extraterritorial under international law.

III. Specific Comments

Below you can find our specific comments on the questions in the consultation.

1. Questions in Section 2.1:

- This section, except for the first question, assumes that there are unfair practices in the supply of air services from non-EU countries to and from the EU which is causing injury to EU carriers, although there is no substantiated evidence of such unfair practices.
- The Commission is requesting the participants to provide information if they have been subject to unfair practices by competitors or authorities from a non-EU

country. Such a request is clearly addressed to EU carriers while in our opinion, questions in a public consultation by the Commission need to be objective and not subjective to a particular category of respondents. We would also like to stress the need for thorough scrutiny when the Commission is analyzing responses to such questions in the consultation.

2. Questions in Section 2.2:

- Questions in this section indicate that the European Commission is considering changing Regulation 868/2004 into a regulation which would bring in tools to identify subsidies granted by a third country, determine the existence of unfair practices, be able to prove injury, initiate a procedure even if there isn't sufficient evidence already available, effectively impose cooperation of 3rd countries and their airlines, and to increase the investigative powers for the European Commission. In our opinion, as a matter of procedural norm, investigations must be supported with evidence, we do not believe that the European Commission lacks power to investigate and appropriate tools already exist to assist with any analysis (such as economic analysis). In particular we would like to highlight the following legal norms when dealing with complaints:
 - Complaints to be substantiated with an appropriate level of evidence (to avoid spurious investigations that are costly and time consuming);
 - Any decisions to be based on solid evidence (using tools readily available in competition cases, such as economic analysis);
 - Obligatory consultation provisions with relevant non-EU governments that attempt to resolve any concerns arising under the regulation prior to implementing trade sanctions; and
 - If all else fails, appropriate sanctions that apply only to airlines that have been proven to infringe regulation 868. Such sanctions must be

proportionate to the injury caused and must not include any revocation or limitation of traffic rights.

- Further to the previous point, if the commission opens the door for EU carriers to initiate a procedure even if there's no sufficient evidence available, it would start an array of complaints by carriers for the wrong reasons attempting to limit competition artificially in the name of unfair practices.

3. **Questions in Section 3:**

As policy objectives, the Commission gives 3 options as follows:

- More effective protection to EU carriers
- Reinforce competitive position of EU aviation industry
- Deter unfair practices

We believe that the first two bullet points would lead effectively to disputes with 3rd countries. These bullets also open the door for retaliatory measures by 3rd countries to try to achieve the same objectives included in these bullet points that can only create greater disputes which have been until now efficiently addressed through the bilateral Air Services Agreements in-between states, competition law, and the current regulation 868/2004.

4. **Question 4.3:**

- This question indicates that the European Commission is considering widening the scope of Regulation 868/2004 to cover a wider range of alleged unfair practices e.g. discrimination in setting charges. We are totally against any discrimination in the charges set by airports. Arab airports have consistently adhered to the ICAO principles of non-discrimination in their user charges policies. Any focus on unfair practices at airports should also include the policy towards slots which effectively prevents some non-EU airlines from exercising the traffic rights included in the ASAs with EU countries.

- We are extremely concerned by announcements citing the competitive disadvantage of some European airports vis-à-vis airports elsewhere in the world. These voices are citing the low user charges, applied indiscriminately, as a cause of competitive advantage vis-à-vis European airports which impose much higher user charges. This line of thinking is very counterproductive in implicitly calling for higher user charges by airports outside Europe rather than correctly calling for lower user charges in the European airports, adding that airport charges, applied indiscriminately – even if low or high – should not be considered an unfair practice.
- The option of widening the scope of the definition of subsidy and of injury needs to be studied thoroughly as a wider definition could become an endless list of possibilities and subjective perspectives, which may possibly lead to misuse.

We also note that the Commission is asking views on whether there needs to be a fair competition clause in the bilaterals as one of the tools to ensure that EU carriers do not face unfair practices by airlines from non-EU countries. In this area it is of course needless to mention that any fair competition clause proposed by the Commission needs to be mutually agreed with the partner country and should not be imposed.

Thank you again for opening the opportunity for all stakeholders to give their views on the possible revision of Regulation (EC) 868/2004.

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