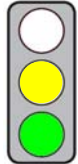


## KEY ISSUES

**Objective of the Communication:** The Commission presents its vision of the EU's future external aviation policy in order to strengthen the competitiveness of European airlines.

**Parties affected:** Airlines, Member States



**Pros:** (1) The Commission's approach to agree on a global regulation of CO<sub>2</sub> emissions from air traffic at ICAO level can help prevent a unilateral distortion of competition at the expense of EU airlines.

(2) The further liberalisation of regulations on ownership and control of airlines increase the attractiveness of Europe as a business location.

**Cons:** The Commission should clearly distance itself from protectionist measures.

## CONTENT

### Title

**Communication COM(2012) 556** of 27 September 2012: The **EU's External Aviation Policy** - Addressing Future Challenges

### Brief Summary

#### ► Background and targets

- The Commission is assessing the development of the EU's external aviation policy since 2005, with particular regard to the international competitiveness of EU airlines.
- In the EU, aviation contributes 365 billion (2.4%) Euro to Gross Domestic Product (GDP) and provides 5.1 million jobs.
- Global air transport is expected to grow by 150% (5% annually) until 2030.
  - The main area of growth is taking place outside the EU, in particular in Asia and there mainly in the Middle East.
  - The market share of European airlines will decrease from 29% (in 2003) to 20% (in 2025).
- EU airlines "are fighting to survive in a tough international market" (p. 2) and are projecting a loss of 1.1 billion US Dollars in 2012.
- The Commission proposes a "major and rapid transformation" in the EU's external aviation policy (p. 2) in order to (p. 11):
  - strengthen the international competitiveness of European airlines;
  - create benefits for consumers; and
  - improve public safety and environmental protection.

#### ► EU authorisation for negotiations on aviation agreements

- Air transport agreements regulate the legal relationships in particular regarding traffic rights
  - bilaterally between a Member State and a third country, or
  - at EU level between all Member States and a third country.
- The Commission criticises (p. 4 et seq.) that
  - at bilateral level the Member States
    - unilaterally pursue national interests without taking account of EU-wide impacts and
    - grant traffic rights to third countries "without commensurate return";
  - at EU level the coordination between the Commission, Member States and aviation sector is inadequate.
- The Commission proposes that
  - it be granted sole authorisation to negotiate pending negotiations on the European Common Aviation Area with neighbouring countries (ECAA; see [CEP Policy Brief](#)),
  - a general authorisation for negotiations on further "comprehensive" aviation agreements with neighbouring countries and important third countries (e.g. Turkey, China, India), whereby the Commission estimates the potential value of such an agreement to be around 12 billion Euros annually, and
  - all parties are involved in negotiations with third countries, including the affected airlines.

- ▶ **Liberalisation of ownership and control of airlines**
  - Most third countries still maintain rules stipulating that airlines must be majority owned and controlled “by their own nationals”. Thus they deny air carriers
    - access to international capital markets and
    - economic consolidation through cross-border mergers and acquisitions.
  - EU airlines by contrast can be owned by any EU interest.
  - The Commission proposes
    - concluding bilateral agreements between the EU and third countries on the liberalisation of national restrictions with regard to ownership and control of airlines, and
    - promoting such liberalisation multilaterally, in particular within the framework of the International Civil Aviation Organization (ICAO).
- ▶ **“Fair” competition between the European airlines**
  - State aid granted by Member States to European airlines departing from regional airports distorts competition within the EU.
  - The Commission proposes revising the Commission guidelines for airport financing and the granting of start-up aid for airlines departing from regional airports.
- ▶ **“Fair” competition with airlines from third countries**
  - International competition is being distorted at the expense of European airlines through
    - “unfair” subsidies (p. 2),
    - unfair practices, e.g. overflight restrictions, and
    - a lack of transparency in the financial performance reporting of airlines in third countries.
  - The EU Regulation concerning protection from subsidisation and unfair pricing practices by airlines from third countries [Regulation (EC) No. 868/2004] has never been applied. According to the aviation sector, it “is not properly adapted to the specificities of the aviation service sector” and therefore not practicable (p. 8).
  - The Commission proposes
    - “defending” the industry against subsidies and “unfair competition” (p. 7),
    - developing “most appropriately” at EU level standard “fair competition clauses” to be included in the respective bilateral air services agreements with third countries, in particular with the Gulf States (p. 8);
    - revising the Protection Regulation [(EC) No. 868/2004].
- ▶ **Cost adjustment between airlines from the EU and from third countries**
  - Higher production costs put European airlines at disadvantage in competition with third countries. The reasons for higher production costs are:
    - national taxes, such as the German aviation tax;
    - higher fees for air traffic control and airport fees;
    - higher labour costs;
    - compensation payments to passengers due to delays; and
    - the internalisation of costs for CO<sub>2</sub> emissions within the framework of the European emissions trading system (EU-ETS): since 2012 airlines must acquire emission certificates for the entire air route when flying from or to an EU airport; however, the USA and other third countries have prohibited their airlines from participating in EU-ETS.
  - The Commission proposes:
    - agreeing on a global regulation of CO<sub>2</sub> emissions from air traffic within the framework of the ICAO;
    - “further analysis” of national taxes levied on the aviation industry; (p. 8) and
    - creating a level playing field for negotiations with third countries on aviation agreements, e.g. through the compliance with international labour and environmental standards.

## Policy Context

In 2002, in its “open sky” judgements the ECJ declared unlawful the bilateral aviation agreements of eight Member States with the USA because the EU was responsible for individual aspects (C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, C-476/98). Thereupon, the negotiation and implementation of aviation agreements between Member States and third countries was regulated with the participation of the EU [Regulation (EC) No. 847/2004], and in 2005 the Commission defined three areas (“pillars”) for EU external aviation [COM(2005) 79]: (1) Pursuant to the “open sky” judgements, bilateral aviation agreements between EU Member States and third countries are to be brought in line with EU law, in particular to ensure the freedom of establishment of European airlines through the elimination of requirements regarding national ownership and control; (2) Neighbouring countries in the south and east of the EU are to be integrated into the Common European Aviation Area (ECAA; see [CEP Policy Brief](#)); (3) The EU should on the basis of individual mandates be empowered to negotiate with important third countries on comprehensive aviation agreements.

## Options for Influencing the Political Process

Leading Directorate General:  
Consultation procedure:

DG Mobility and Transport  
A consultation procedure is not provided.

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

The Commission has identified the main problems that the European aviation industry has in global competition. Remarkably, it also addresses home-grown problems caused by the European and Member State regulations.

Protecting the European aviation industry from “unfair” subsidies and unfair practices is appropriate in principle, for subsidies from third countries can create lower prices for aviation services in the short-term, but in the long run they can lead to an increase in prices due to the competition being less intense. However, **the Commission** should make clear how it wishes to proceed. It **should clearly distance itself from protectionist measures**, as these reduce the number of international flights in particular, burden tax payers with costs in case of subsidies and thus have a negative impact on the economy.

Protectionist measures that would “protect” the aviation industry from “unfair” subsidies would also distort cross-sector competition and in particular intermodal competition with other transport modes. This applies irrespective of the fact that the various burdens imposed today on the respective transport modes are already different, for instance tax exemption for kerosene but a tax levy on fuels for car mineral oil.

Whether or not “fair competition clauses” in aviation agreements contribute to ensuring a level playing field between the airlines of the negotiating countries cannot be assessed until the Commission has clarified which issues such competition clauses should comprise.

The Commission should take into account that some of the identified cost-enhancing disadvantages to European airlines, e.g. the amount for collectively agreed labour costs, were created by the market and therefore do not justify state protection measures. Other disadvantages are politically desired burdens. This applies in particular to national taxes and fees, but it also applies to the internalisation of external costs such as CO<sub>2</sub> emissions.

**The Commission’s approach to agree at ICAO level on a global system for CO<sub>2</sub> emissions from air transport** is appropriate, for the climate **can** only be protected effectively at a global level. A solution at ICAO level would **eliminate the current unilateral competition distortion that disadvantages European airlines**. Although the emissions trading system practiced in the EU (EU-ETS) is in principle an efficient economic policy tool, it discriminates against airlines operating at international level that have their aviation hub in the EU, in particular vis-à-vis airlines with hubs in neighbouring countries such as Turkey, for the former fly from and to EU airports more often. This leads to considerable surplus loads, in particular in the case of long-distance flights from third countries to the EU, or vice versa. Besides, the USA and other states refuse to recognize the EU-ETS in aviation and prohibit their airlines from participating in it; to what extent the competent Member States will collect the resulting penalties remains to be seen.

#### Impact on Efficiency and Individual Freedom of Choice

The Proposal in future to negotiate with important third countries at EU level can have a positive impact on the European aviation industry, since the EU has a stronger negotiating position than individual Member States mainly due to its large market.

Involving all affected parties in negotiations with third countries leads to high negotiation costs and can make finding a compromise very difficult due to having to coordinate so many participants. However, it does increase the likelihood of an agreement being accepted, since it takes account of the interests of as many affected parties as possible.

#### Impact on Growth and Employment

Competitive advantages for foreign airlines which lead to a larger share of the market compared to EU airlines have a negative impact on growth and jobs in the industry. However, intensified international competition leads to a positive long-term impact on growth and employment in secondary industries using aviation services if flight services of the same quality are offered for lower prices or of higher quality at the same prices.

#### Impact on Europe as a Business Location

The further **liberalisation of the regulations on ownership and control of airlines**, which enable related investments from third countries, **increases the attractiveness of Europe as a business location**, since foreign investors could then also participate in such enterprises.

## Legal Assessment

### Competence

The EU may adopt “appropriate measures” for aviation in general and for international aviation in particular (Art. 100 (2) in conjunction with Art. 91 (1) lit. a TFEU).

Moreover, since the Lisbon Treaty in 2009 the EU may explicitly conclude international treaties with third countries if this is provided for in the EU Treaties or in a binding EU legal act, if it is necessary for implementing one of the targets of the EU Treaties, or if otherwise EU rules would be compromised and/or their scope changed (Art. 216 (1) TFEU). This corresponds to the long-standing ECJ case law, according to which the exclusive competence of the EU applies to fields which are already regulated by EU law (AETR Decision, No. 22/70), or if an international Treaty must be concluded with third countries (e.g. “Open Sky” judgement C-476/98). Whether or not these requirements have been met is to be examined case-by-case, though in the case of aviation agreements the tendency is to affirm that they have. In any case, the Commission must grant one mandate each for carrying out negotiations with third countries (Art. 218 (2) and 3 TFEU).

### Subsidiarity

Granting sole mandates to the Commission as a “general rule” for negotiations on “comprehensive” aviation agreements with third countries can increase negotiating power in the individual case and is therefore in line with the principle of subsidiarity.

### Proportionality

Unproblematic.

### Compatibility with EU Law

Unproblematic.

### Compatibility with German Law

Unproblematic.

## Conclusion

The Commission’s approach to agree on a global regulation of CO<sub>2</sub> emissions from air traffic at ICAO level can help prevent a unilateral distortion of competition that puts EU airlines at a disadvantage. The further liberalisation of regulations regarding ownership and control of airlines increases the attractiveness of Europe as a business location. The Commission should clearly distance itself from protectionist measures.