Opinion of the European Economic and Social Committee on the 'Proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community'

(COM(2016) 818 final — 2016/0411(COD))

(2017/C 345/21)

Rapporteur: **Jacek KRAWCZYK**

Consultation	European Parliament, 16.2.2017
	Council of the European Union, 13.2.2017
Legal basis	Article 100(2) of the Treaty on the Functioning of the European Union
Section responsible	Section for Transport, Energy, Infrastructure and the Information Society
Adopted in section	14.6.2017
Adopted at plenary	5.7.2017
Plenary session No	527
Outcome of vote (for/against/abstentions)	135/1/1

1. **Conclusions and recommendations**

1.1. The proposed amendment to Regulation (EC) No 1008/2008 (the proposal) is limited in scope to Article 13(3)(b). The amendment, if approved, would preface this paragraph with the words 'unless otherwise provided for in an international agreement concluded by the Union …'

1.2. The Committee endorses the Commission's intention to seek to resolve a conflict in the legislation between Article 13(3)(b) of Regulation (EC) No 1008/2008 and the EU-USA Air Transport Agreement (ATA) on wet-lease agreements. Eliminating inconsistencies and limitations on wet-lease agreements which are not reciprocal, or in those which are not provided for in the ATA and remain unclear, would limit opportunities for EU airlines and possibly give rise to excessive and divergent interpretations. The Commission should take seriously concerns that undue wording could actually deviate from the intentions of the EU Aviation Strategy and pave the way for new unintended hybrid business models.

1.3. Given the highly technical nature of the proposal and its limited scope, and in view of further proposed broader clarifications of Regulation (EC) No 1008/2008 on Public Service Obligations (PSOs) and ownership and control provisions, singling out this specific amendment might seem questionable. However, the Commission had already set aside the time-limitation on the wet-lease arrangements in its Evaluation Roadmap ([1]) for separate scrutiny. Furthermore, specific aspects of the ATA and the protracted discussions on this issue at the ATA Joint Committee (Joint Committee) mean that it does warrant a distinct resolution. Finally, this issue is of such a specific nature that it should not be dealt with in the same context as politically complex issues such as, for example, ownership and control. Addressing this proposed amendment on a standalone basis is therefore justified. We note the Commission did not consider an impact assessment to be necessary on this occasion. However the EESC recognises concerns over the proposal raised by trade unions and other civil society organisations.

([1]) Evaluation of Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community, dated 21 November 2016 (DG MOVE/Unit E4, see chapter C1).

1.4. The EESC expresses concern that, without further clarifications of the proposed introductory sentence to Article 13 (3)(b), negotiators and possibly stakeholders could construe the amendment as opening the door for abandoning restrictions on 'extraordinary circumstances' as a matter of policy, thereby impacting not only the intended negotiation of a new wet-lease agreement with the USA, but with any given third country as well. The EESC is confident that if the highly restrictive nature of the suggested amendment both in terms of scope and substance is clarified in an appropriate manner, inclusive consultations with the broadest possible range of stakeholders, both from industry and civil society, will ensure that unintended consequences of the amendment to Article 13(3)(b) of Regulation (EC) No 1008/2008 can be avoided and the discussions limited to the EU-USA wet-lease agreement. It is important that the Commission, when consulting stakeholders, ensures that all relevant parties including the recognised social partners and other civil society organisations are included.

1.5. The EESC is looking forward to the more extensive future review of Regulation (EC) No 1008/2008 that has been announced and underlines the need for an inclusive consultation with the broadest possible range of stakeholders, both from industry and civil society. The EESC is prepared to actively promote such a debate.

1.6. Given the absence of reliable data from both sides on the current use of wet leasing, when actually negotiating a wet-lease agreement, both sides should ask for all wet-leases to be registered with the Joint Committee for statistical purposes. This register should possibly include records of social conditions to ensure not only fair employee working conditions but also travellers' rights, which might be influenced.

2. **Regulatory context**

2.1. The proposed amendment to Regulation (EC) No 1008/2008 is intended to be limited in scope to Article 13(3)(b) and ATA. This paragraph in its current wording stipulates that, in addition to meeting all safety standards equivalent to those imposed by the Community ([2]), a Community carrier's right to wet-lease aircraft registered in a third country is limited to meeting seasonal capacity needs ([3]) or overcoming operational difficulties ([4]) or is limited in situations of exceptional need to a period of seven months which can be renewed for a further seven months ([5]). The amendment, if approved, would preface this paragraph with the words 'unless otherwise provided for in an international agreement concluded by the Union …'. The suggested wording therefore does not impact on the rights of the licensing authority, nor the essential requirement to meet the Community's safety standards.

2.2. The EU's only international agreement with a third country of relevance in this context is the ATA with the USA. It should be clarified through Interpretative Guidelines that the rationale for the amendment as suggested is to remedy conflicting legislation in Article 13(3)(b) and the ATA. If this is clarified accordingly, then the suggested amendments would therefore only have relevance for one specific international air service agreement, and not contain basic changes to the policy and regulations covering wet-lease arrangements in general.

2.3. As the Commission points out in its Explanatory Memorandum to the proposal, the initiative has a very specific aim and a limited scope; therefore, the Commission is not proposing an impact assessment. Given the concerns about possible excessive interpretations of the suggested amendment, and resulting discussions with the USA and possibly other third countries in the medium-term, the Commission should consider substantiating its proposal not to include an Impact Assessment. It needs to be absolutely clear that the impact of the suggested modification to Regulation (EC) No 1008/2008 would result from the content of the commercial wet-lease agreements between the parties, and not from the proposed legislative change.

([2]) Art. 13(3)(a), Reg. (EC) No 1008/2008.
([3]) Art. 13(3)(b)(ii), Reg. (EC) No 1008/2008.
([4]) Art. 13(3)(b)(iii), Reg. (EC) No 1008/2008.
([5]) Art. 13(3)(b)(i), Reg. (EC) No 1008/2008.

2.4. The Commission's Roadmap on the 'Establishment of unrestricted wet-lease agreements between the EU and the USA through a wet-lease agreement between the parties' ([6]) highlights the background for this legislative proposal, which aligns the agreed principles of cross-border transferability of aircraft between the EU and the USA and thereby overcomes a stalemate in the discussions between the EU and the US in the Joint Committee.

2.5. The proposal meets the Community airlines' industry requirements. The ATA that was signed in 2007 provides for an open wet-lease regime between the two parties. The time to overcome operational difficulties and to deal with seasonal capacity constraints is limited by terminology; the limitation of two periods of 7 months for 'exceptional needs' can be seen in a historical context ([7]), but appears arbitrary and undermines commercial opportunities to redeploy aircraft efficiently to new operators. Given that the usual term of a typical wet-lease agreement is 36 months, the 7 + 7 months limitation imposes legal and commercial uncertainties on EU carriers.

2.6. The Commission claims that the proposed amendment does not have a significant impact on labour requirements. Wet-lease agreements in general are a highly sensitive subject for labour organisations. The cost constraints imposed by non-EU carriers based in countries with low social standards and subsequent cost bases — and even differences in social legislation within the EU — have made wet leasing a key area for constant monitoring by the social partners. If a Pandora's Box were to be opened by unintended and unfounded interpretations of this amendment, the wet-lease issue could quickly escalate into a major issue, and instead of remaining a 'technical correction' of conflicting legislation. Labour requirements will thus have to be evaluated in light of future developments, both in the EU-US talks on a wet-lease agreement under the umbrella of the ATA, and in subsequent market practice.

2.7. By referring to international agreements, the proposed wording of the amendment paves the way for a specific agreement on wet leasing between the EU and the USA without having to reopen negotiations on the whole of the ATA. The option pursued by the Commission is therefore one which will resolve conflicting provisions in a targeted, efficient and swift manner, as well as re-establishing planning stability for the commercial parties and avoiding possible retaliation from US parties. However, this can only be achieved if the Commission clarifies appropriately that the amendment is designed to enable negotiations with the USA by resolving a conflict in the legislation relating to that one country.

2.8. The EESC has commented positively in the past on the ATA and its implementation. As stated in the previous EESC opinion, 'an Open Aviation Area concept (…) permits wet leasing of aircraft under non-discriminatory, transparent conditions' ([8]).

3. **Assessment of the proposal**

3.1. The Commission has assessed various options for resolving the issue ([9]).

3.1.1. Amending the existing ATA would be very time-consuming. Past experience reveals that the Parties to the ATA agreed to apply the ATA provisionally as of March 2008; the Council's decision following ratification by the Member States' Parliaments was taken in 2016. It would be disproportionate and unjustifiable, given the opportunities the industry might lose, if such a tedious procedure were to be unravelled for the purpose of amending the wet-lease provisions.

3.1.2. The EU cannot legally make US-specific derogations from the provisions of Regulation (EC) No 1008/2008 to meet EU and US requirements with respect to wet leasing. Member States are bound by all the provisions of EU Regulations.

3.1.3. A joint agreement on reciprocal restrictions, although clear, would contradict the spirit of the Agreement and harm the airline industry's commercial interests.

([6]) Roadmap dated 7 March 2016 DG MOVE/E.1.

([7]) The limitation was introduced in Regulation (EC) No 1008/2008 to avoid the ambiguity of preceding EU Regulations (EEC) No 2407/92, (EEC) No 2408/92 and (EEC) No 2409/92 (which (EC) No 1008/2008 replaced) on the exact meaning of exceptional needs.

([8]) OJ C 306, 16.12.2009, p. 1.

([9]) EC Roadmap for the Establishment of unrestricted wet-lease arrangements between the EU and the US through a wet-lease agreement between the parties, page 7.

3.1.4. The preferred solution, as underscored repeatedly by stakeholders, is a wet-lease agreement between the EU and the USA which would fully comply with the ATA and not contradict national or EU provisions. All issues pertaining to the details of such an agreement have been under discussion since January 2014. It is to be expected that consensus could be achieved rapidly. There is an understanding that such a technical agreement would be based on current traffic rights, as per the ATA, and not create new rights or alter existing ones. The Commission should clarify appropriately that the intention of the amendment is not to change, modify or add further traffic rights between the EU and the USA. Such an agreement would, however, necessitate an amendment to Article 13 of Regulation (EC) No 1008/2008, which established a 7 + 7 month limitation for wet-leases on EU carriers wet leasing from non-EU airlines. The intended wording fully complies with the requirement to reflect that Article 13 should only apply to the extent that the conditions contained in 13(b) are not otherwise provided for in an international agreement.

3.2. The Commission's evaluation concludes that the proposed action is appropriate, proportionate and legally feasible, as well as being in the interest of the Member States and the EU industry, with no downsides for any stakeholder.

4. **Background**

4.1. The Commission's proposal deals only with wet leasing. Wet leasing is usually a means of providing capacity during peak traffic seasons, annual heavy maintenance checks and overcoming ad hoc operational difficulties within the fleet. A wet-lease is a leasing agreement in which one airline (lessor) operates the flights providing the aircraft and crew to another airline (lessee). The aircraft is operated under the air operator certificate and therefore under the operational responsibility of the lessor.

4.2. Wet-lease arrangements are considered industry-wide to be an asset in operational flexibility which should not be arbitrarily restricted. Along with the EU airline sector and most, if not all, Member States, the US airline sector and the US administration expect a resolution to the issue for current and future operations of wet-leased aircraft under the bilateral relationship.

4.3. The Commission's proposal should not modify the policies or principles pertaining to wet leasing. It should aim solely to resolve a regulatory conflict between EU Regulation (EC) No 1008/2008 and the ATA.

4.4. The EESC strongly recommends that the Joint Committee gather statistics on the wet leasing that takes place under ATA. This register should possibly include records of social conditions to ensure not only fair employee working conditions but also travellers' rights, which might be influenced.

5. **Specific comments**

5.1. The EESC accepts the Commission's rationale for amending Regulation (EC) No 1008/2008 to allow for unrestricted wet leasing agreements on reciprocal basis between EU and US carriers on international flights under the ATA. However the proposed new wording must not permit — neither under the ATA nor under any future air traffic agreement with a third country — a long-term wet-lease arrangement for reasons other than those included in Article 13 of the Regulation. The EESC agrees that the proposal relating to the ATA is a more flexible arrangement — on a reciprocal basis — for wet leasing during periods of typically up to 36 months. Such arrangements would have no impact on social conditions. However, the EESC would be very concerned if the proposed amendment to wet-lease restrictions was used to secure longer-term sub-contracting arrangements to drive down labour or consumer conditions/rights. We therefore urge the Commission when concluding the terms of the envisaged EU-US wet-lease agreement to include wording that prohibits such practices. The proposal must not be interpreted as a means to lease aircraft by airlines, which may either deliberately or accidentally avoid long-term national social legislation.

Brussels, 5 July 2017.

The President
of the European Economic and Social Committee
Georges DASSIS