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Legal committee– Topic 2

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[1] This paper reflects the author's personal views and cannot be considered as the views of ICAO.

TOWARDS A COMMON DEFINITION OR TOWARDS THE REMOVAL OF THE NOTION OF "OWNERSHIP AND CONTROL"

MAXIMIZING THE BENEFITS FOR THE INDUSTRY AND THE CONSUMER

1. Air Service Agreements contain the requirement of Ownership and Control.

The Chicago Convention confirmed complete and exclusive sovereignty of the States over their national airspace. As a consequence national airspace is closed for foreign aircraft and its operators unless the State grants a special permission. Such 'special permissions' are mostly granted in the form of Air Service Agreement, which makes that International Air Transport is, to a large extend, governed by these (bilateral) Air Service Agreements (ASA). ASAs contain provisions on traffic rights, rights to operate, frequency of services etc. But the rights thus acquired, almost all of the times need to be passed on to airlines which are majority owned and controlled by citizens of the beneficiary State.

According to ICAO, 90% of the Air Services Agreements contain a "nationality clause" whereby States will only accept service from a foreign carrier (the carrier of the other bilateral contracting State), if that carrier is "substantially owned and effectively controlled" by the other bilateral contracting State or by its citizens. Not a lot of States have decided to relax these ownership and control requirements. During the coronavirus crisis, most airlines incurred immense losses which forced many governments to intervene economically. While some countries had previously chosen to liberalise foreign investment in their airlines, the vast majority now seem to prefer to maintain traditional restrictions. This trend becomes more visible in the case of countries that carried out massive recapitalisations or gave loans to "their" airlines. The first instinctive response to the corona crisis was unfortunately highlighted by the return of the principle of sovereignty. This return raises a number of questions about the prospects for liberalisation of airline ownership and control.

The requirement of ownership and control prevents significant foreign investment in an airline company, even though most airlines have a substantial need for capital.

The consequence of these strict rules is also easy to see in other respects: airlines cannot merge across borders or cannot establish subsidiary operations in other States.

As a consequence, alternatives, such as global alliances, have been developed by the airline industry to mitigate and circumvent national airline ownership restrictions.

However, if liberalization of the ownership clause for airlines could be achieved, it would have considerable financial and operational benefits in the airline industry, including cutting down costs by consolidating redundant operations and reducing inefficient overlapping competition.

Wanting to stay competitive on an ultra-competitive market dominated by high fixed costs, operators are in an almost constant search for capital which might only come from foreign investment.

2. Towards a common definition of Air Carrier Ownership and Control

Thus, at the cornerstone of air law, the condition of ownership and control of airlines remains a fundamental principle from which few States depart. But far from being a permanent concept, it can be interpreted differently by each State. It is therefore difficult to develop a single definition, as casuistry dominates this principle. Different countries have different approaches, which include political motives.

Definition of Ownership.

For a listed company, ownership is defined as ownership of shares with voting rights.

Substantial ownership generally means more than 50% of the ordinary shares must be concentrated in the hands of a single holder, but this threshold varies from State to State, ranging from 50% to 75%, or even 100% in the strictest cases.

Effective Control.

There is no universal standard for what constitutes effective control of an airline. Thus regulators are free to interpret this concept according to national interest. The problem with this concept is not the absence of a definition, but the difficulty of exactly defining the "de facto" effective control.

To do this, States will analyze on a case to case basis whether the condition of ownership and control is met.

3. Missed chance or emerging trend

Even though the effects of the corona crisis and sustainable development could have been the triggering factor to adapt the framework, there is instead an important come back to economic sovereignty. Nevertheless, some countries seem to be rethinking this concept and are embracing the notion of Principal Place of Business as triggering factor..

4. Some questions to be addressed by the delegates.

If your State is using the nationality clause for airlines, what is the definition of ownership and control? If your State does not require airlines to be majority owned and controlled by your State, what criterium does it use to attribute traffic rights?

What could be the reason for maintaining the nationality clause? Think in terms of security and safety (1), social rights (2) and economic rights (3).

Is it desirable to have a worldwide unilateral approach to the ownership and control requirement? How then should we define the nationality clause which remains to this day the

most effective tool used by States to monitor and supervise access to their aviation market? Should ICAO write such a definition?

Would it be more acceptable to us the requirement of Principles Place of Business as an alternative or are there other alternatives which can be endorsed by ICAO?

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Guidelines

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COMMISSION NOTICE of 8.6.2017 Interpretative guidelines on Regulation (EC)1008/2008 - Rules on Ownership and Control of EU air carriers; C(2017) 3711 final.