



Legal committee- Topic 1

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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 “ownership and control”. Maximizing benefits for the industry and the consumer.

1. Ownership and Control in Air Service Agreements.

The Chicago Convention confirmed the principle of complete and exclusive sovereignty of the States over their national airspace. As a consequence, national airspace is closed to foreign aircraft and its operators unless the State grants a specific permission. Such ‘special permissions’ are typically granted through Air Service Agreement, which makes that international air transport is, to a large extend, governed by these (mostly bilateral) Air Service Agreements (ASAs). An ASA contains provisions on traffic rights, rights to operate, frequency of services etc. But the rights thus acquired by a beneficiary State, need to be passed on to an airline, and most of the times the ASA foresees these rights, should 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”. Hence, States will only accept service from a foreign carrier of the beneficiary State, if that carrier is “substantially owned and effectively controlled” by the beneficiary State or by its citizens. Only a limited number of States have chosen to relax these ownership and control requirements.

During the coronavirus crisis, most airlines suffered severe financial losses which forced many governments to intervene economically in the form of recapitalisations, loans, and other financial support measures. While some States had previously opted to liberalise the ownership requirements and increasingly allowed foreign investment, the vast majority have since reverted to more traditional, restrictive approaches. This trend is particularly evident in States that provided significant financial support to their national carriers. The initial response to the crisis thus reflected a renewed emphasis on national sovereignty, raising important questions about the prospects for liberalisation of airline ownership and control.

A strict requirement of ownership and control limits significant foreign investment in an airline company, despite the industry’s substantial and ongoing need for capital.

These restrictions also prevent cross-border airline mergers and the establishment of subsidiary operations in foreign States.

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

Nevertheless, if liberalization of airline ownership 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.

In an intensely competitive market characterised 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.

At the core of international air law, the condition of ownership and control of airlines remains a fundamental principle from which few States deviate. But far from being a permanent concept, each State applies its own interpretation, often influenced by political considerations. It is therefore challenging to develop a single, universally applicable definition, as casuistry dominates this principle. Different countries have different approaches, which include political motives.

Definition of Ownership.

For publicly listed companies, “ownership” is defined as ownership of shares with voting rights. “Substantial ownership” is typically understood to mean that more than 50% of the ordinary shares must be concentrated in the hands of a single holder (single entity or group of nationals) but this threshold varies between States, ranging from 50% to 75%, or even 100% under particularly strict regimes.

Effective Control.

There is no universally accepted standard for what constitutes effective control of an airline. Consequently, regulators retain broad discretion to interpret this concept in accordance with national interests. The primary difficulty lies not in the absence of a definition, but in determining the existence of the “de facto” effective control.

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

3. Missed opportunity or emerging trend?

Even though the effects of the corona crisis and sustainability considerations could have been the triggering factor to reform the existing framework, there exists a return to economic sovereignty. Nevertheless, some States are reconsidering this approach and are increasingly embracing the notion of Principal Place of Business as a connecting factor.

4. Some questions to reflect on by the Delegates.

- What is the definition of ownership and control under the national law of your State. What criterium is used by your State to allocate traffic rights?
- What could be the underlying reasons 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. If so, how should the nationality be defined taking into account that the nationality is still the primary tool used by States to monitor and supervise access to their aviation market. Should ICAO play a role in developing such a definition?
- Would the Principal Place of Business be a more acceptable alternative, or are there other models that ICAO could endorse?

Delegates should bear in mind that access to international traffic rights is only one of the aspects of nationality. Your biggest challenge will be what to do with the fact that currently, nationality of an airline is also important because it determines which Authority regulates the airline, and which State ultimately bears responsibility for safety, security, and public interests. Nationality establishes a link between an airline and a specific State which is responsible for safety oversight and certification, compliance with ICAO Standards and Recommended Practices (SARPs) as well as security regulation and enforcement.

Delegates are invited to make recommendations to the Council hereby striking an appropriate balance between the legal role that nationality plays in ensuring regulatory oversight and safety and the restrictive effects that nationality entails in that it limits/impedes access to foreign capital, restricts cross-border mergers, and reduces potential efficiency gains through consolidation.

5. Selected Biography

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Guidelines

Guide to Canadian Ownership and Control in Fact of Air Travel, Canadian Transportation Agency, online: <https://otc-cta.gc.ca/eng/publication/guide-canadian-ownership-and-control-fact-air-transportation>.

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.