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Agenda Item 2: Examination of key issues and related regulatory framework
Agenda Item 2.2: Air carrier ownership and control

AIR CARRIER OWNERSHIP AND CONTROL CLAUSES IN BILATERAL AIR SERVICES AGREEMENTS

(Presented by Ireland on behalf of the European Union (EU) and its Member States[1] and other Member States of the European Civil Aviation Conference[2] (ECAC))

EXECUTIVE SUMMARY

The objective of this working paper is to highlight the need to provide new impetus for the liberalisation of air carrier ownership and control clauses in the framework of bilateral Air Services Agreements (ASAs) and to present the positive experience European States have gained over the last decades in this respect. The Sixth Worldwide Air Transport Conference should thoroughly address this topic under economic and regulatory perspectives and, based on the discussions, agree that ICAO should encourage Member States to take more liberal approaches towards nationality requirements in ASAs and develop a framework which sets the course for future liberalisation.

Action: The Conference is invited to:

a) review the information and assessments and proposals presented in this paper;
b) have an open discussion on the opportunities of a liberalisation of restrictive O&C provisions in air transport in general; and
c) agree to the recommendations presented in paragraph 5.

References:	ATConf/6 reference material is available at www.icao.int/meetings/atconf6.

1. INTRODUCTION

1.1 Despite the progress made worldwide towards a more liberal regulatory regime for international air transport, ownership and control (O&C) rules for air carriers are often restrictive. Many

[1] Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

[2] Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Georgia, Iceland, the Republic of Moldova, Monaco, Montenegro, Norway, San Marino, Serbia, Switzerland, The former Yugoslav Republic of Macedonia, Turkey and Ukraine.

countries still maintain rules in ASAs stipulating that air carriers of a Contracting Party must be majority owned and effectively controlled by the nationals of the Contracting Party designating the air carrier.

1.2 These provisions impose an artificial industry structure on the air carrier sector that does not exist in other industries. Both cross-border consolidation and general access to capital markets, which are seen by many as a pre-requisite for the air carrier industry's economic sustainability, are restricted if an air carrier does not want to jeopardise the potential to fully exercise its (traffic) rights under the relevant ASAs. Furthermore, by limiting the number of potential market entrants, O&C provisions may prevent full benefits of competition unfold.

2. EUROPE'S EXPERIENCE WITH OWNERSHIP AND CONTROL LIBERALISATION

2.1 Over the last decades, many EU and ECAC States have made significant progress within Europe in order to adapt O&C provisions for air carriers to the requirements of a globalised and competitive economic environment. Key policy elements were facilitation of cross-border air carrier financing and simultaneous liberalisation of market access, as well as promotion of regulatory convergence. These reforms were followed by substantial gains for air carriers, consumers and the wider economy, respectively.

2.2 The European Community started to deregulate its single aviation market in 1987. Under the provisions of the "third package" coming into effect in 1993, O&C of European air carriers was opened to all EU nationals, provided that an air carrier complied with safety, financial and operational requirements. The EU Single Aviation Market includes today 27 countries, soon to be extended to one more with the accession of Croatia in 2013.

2.3 O&C liberalisation, on a reciprocal basis and in parallel with full regulatory harmonisation based on EU aviation legislation, was further extended to countries of the European Economic Area (EEA) and Switzerland.

2.4 The principle of "EU designation" has been included into ASAs between EU Member States and partner countries since 2002, either through the amendment of bilateral ASAs or via "horizontal" agreements negotiated by the European Commission. Also the EEA Member States, Iceland and Norway, have negotiated and included this principle in bilateral ASAs. The "EU designation" clause is widely accepted and currently approved by 117 partner States. Accordingly, almost 1,000 bilateral ASAs reflect a liberal attitude towards O&C requirements.

2.5 The successful liberalisation process was not least based on the political willingness and flexibility on the side of partner countries in line with the conclusions of the Fifth Worldwide Air Transport Conference (ATConf/5), in which liberalisation on a regional basis was explicitly included[3].

2.6 Switzerland, using the concept of "principal place of business", is still adjusting its bilateral ASAs with partner countries. Without taking into account the bilateral arrangements between Switzerland and all EU Member States, almost 60 bilateral ASAs have been adapted at the time of writing.

2.7 The liberalisation process within Europe has been accompanied by intensified cross-border consolidation activities strengthening the air carriers' financial sustainability and competitive

[3] Cf. Doc 9587, A4-3 et. seqq.

position. Importantly, it has been shown that the relaxation of O&C restrictions can achieve substantial efficiencies and network gains whilst maintaining benefits of competition.

2.8 With the number of routes with more than one competitor multiplied, consumers have profited from reduced fares. Furthermore, along with a 140 per cent increase of intra-EU air routes between 1992 and 2010, passengers benefitted from an increased supply of services. In terms of employment, empirical analyses suggest that the reforms to establish a single European aviation market have created so far 1.4 million additional jobs.

3. DISCUSSION

3.1 Many different countries all over the globe have already made significant efforts towards the liberalisation of traditional nationality clauses and have gained positive experience both on a bilateral and regional level. One example is the remarkable flexibility shown by many partner countries in the course of the implementation of the EU designation principle. Nevertheless, such a liberal approach to O&C issues is still the exception.

3.2 Legal O&C restrictions in bilateral ASAs preventing airlines from restructuring capital on a global level have been identified as one reason for the airline industry's low profitability. Taking into account that the airline industry generates substantial value for consumers as well as the overall economy, bilateral frameworks should facilitate a positive economic climate for the industry to attract necessary long-term investment. Refraining from restrictive O&C provisions would remove market distortions between economic sectors and could, therefore, be a logical step towards the "normalisation" of the industry. In parallel, liberalisation of traffic rights would usefully support this process as outlined in EU/ECAC Working Paper "Liberalisation of market access" (ATConf/6-WP/54).

3.3 Experience with relaxing O&C requirements has shown that there are policy instruments in order to maintain both high safety and security standards and to control the risk of market concentration while facilitating access to capital by air carriers. Clear rules on the maintenance of effective regulatory control, effective competition laws, and efforts towards regulatory convergence are key elements to achieve these objectives.

3.4 The reluctance by States to relax air carrier O&C restrictions in bilateral ASAs seems to be linked to different concerns regarding, for example, national security, foreign policy or employment considerations for their own air carriers. While it is for States' discretion to decide on O&C requirements for their own air carriers[4], there is no convincing argument for not allowing the other Contracting Party, on the basis of reciprocal flexibility, to designate any of its air carriers that does no longer fulfil this requirement.

3.5 In order to openly discuss the above mentioned concerns, the Sixth Worldwide Air Transport Conference (ATConf/6) provides a unique opportunity. ATConf/6 should recall the continuing and large number of remaining O&C restrictions, and should encourage ICAO Member States to liberalise O&C clauses at least in the sense that the other Contracting Party to an ASA should be allowed to designate any of its air carriers, on the basis of reciprocal flexibility.

3.6 This path towards further liberalisation can be pursued by different means. Amending bilateral ASAs, waiving restrictions unilaterally or reciprocally, or liberalising O&C requirements on intra-regional or region-to-region basis are appropriate policy measures in a short- and middle-term

[4] See EU-ECAC Working Paper ATConf/6-WP/50 "National restrictions on air carrier ownership and control".

perspective. A long-term objective, nevertheless, should be a multilateral or plurilateral agreement, initiated at ICAO level, which is non-discriminatory, easy to handle and modify, and open to all States.

3.7 While ICAO's Template Air Services Agreement (TASA) proposes States a wide range of options, and although there is consensus that States should promote O&C liberalisation at their discretion, conclusions of ATConf/5 clearly aim at a more liberal interpretation of respective articles in bilateral ASAs.[5] Ten years on, ATConf/6 could go a step further by recommending that O&C restrictions should become the exception, while a more liberal approach should, over time, become the general rule.

4. CONCLUSIONS

4.1 In light of the discussions above, the following may be concluded:

a) the European experience shows that the liberalisation of O&C has contributed significantly to increasing economic efficiency and consumer benefits. At the same time, States can revert to adequate regulatory instruments, in order to maintain high safety and security standards and to address possible anti-competitive market concentration; and

b) although there has been certain progress since ATConf/5 on a bilateral and regional level, traditional, restrictive nationality clauses are still widely used in ASAs. On a bilateral, regional and/or multilateral level States can take different approaches to foster liberalisation.

5. RECOMMENDATIONS

5.1 EU and ECAC Member States present the following recommendations to ATConf/6 for further consideration:

a) ICAO is invited not only to promote and extend existing guidance material but to encourage its Member States to take a more liberal approach towards O&C requirements in bilateral ASAs;

b) ATConf/6 could be an adequate forum for ICAO Member States in order to launch initiatives to waive nationality clauses in their ASAs voluntarily and on the basis of reciprocal flexibility; and

c) ICAO is invited to take the necessary steps to develop a framework for a multilateral or plurilateral agreement.

— END —

[5] e.g. the replacement of restrictive O&C articles with more liberal concepts such as "principal place of business" (Cf. Doc 9587, A4-4).