



РАБОЧИЙ ДОКУМЕНТ

ВСЕМИРНАЯ АВИАТРАНСПОРТНАЯ КОНФЕРЕНЦИЯ (ATCONF)

ШЕСТОЕ СОВЕЩАНИЕ

Монреаль, 18–22 марта 2013 года

Пункт 2 повестки дня. Рассмотрение основных вопросов и соответствующих рамок регулирования

Пункт 2.2 повестки дня. Владение авиаперевозчиками и контроль над ними

ОГРАНИЧЕНИЯ ДОСТУПА К РЫНКУ

(Представлено 22 государствами-членами², являющимися членами
Латиноамериканской комиссии гражданской авиации (ЛАКГА))

КРАТКАЯ СПРАВКА

В настоящем рабочем документе рассматривается вопрос о том, как некоторые государства в ходе двусторонних переговоров по-прежнему применяют к назначению авиакомпаний традиционный подход, основанный на критерии преимущественного владения и эффективного контроля. Это ограничивает доступ к рынку, что в свою очередь приведет к ограничению масштабов либерализации воздушного транспорта.

Действия: Конференции предлагается:

- a) учесть информацию и оценки, представленные в настоящем документе;
- b) одобрить выводы, представленные в п. 3;
- c) принять рекомендации, указанные в п. 4.

Справочный материал:

Справочный материал ATConf/6 размещен на вебсайте
www.icao.int/meetings/atconf6

1. ВВЕДЕНИЕ

1.1 Международный воздушный транспорт предпринял огромные усилия для того, чтобы стать конкурентоспособным сектором, и с этой целью некоторые правительства стран, находящихся на различных этапах развития, ввели, помимо других мер, нормативные положения и принципы, способствующие дерегулированию, расширению масштабов иностранных инвестиций и либерализации доступа к рынку.

¹ Вариант данного документа на испанском языке представлен Латиноамериканской комиссией гражданской авиации (ЛАКГА).

² Аргентина, Аруба, Белиз, Боливия, Бразилия, Венесуэла, Гватемала, Гондурас, Доминиканская Республика, Колумбия, Коста-Рика, Куба, Мексика, Никарагуа, Панама, Парагвай, Перу, Сальвадор, Уругвай, Чили, Эквадор и Ямайка.

1.2 В этой области происходит и эволюция коммерческой авиации, и поэтому Международная организация гражданской авиации (ИКАО) подготовила проект типовых статей для соглашений о воздушном сообщении, которые расширяют концепцию национальной принадлежности авиакомпаний с целью охватить место создания и основное место деятельности авиакомпаний, согласовывая тем самым национальные интересы и политику по содействию иностранным инвестициям с системой прав на воздушные перевозки, предусмотренных в двусторонних соглашениях.

1.3 Несмотря на вышесказанное, в некоторых государствах коммерческая политика в области воздушного транспорта по-прежнему предусматривает использование традиционного подхода, основанного на критериях преимущественного владения авиакомпаниями и эффективного контроля за их деятельностью, который может способствовать развитию международных воздушных сообщений даже в том случае, если эти критерии не обязательно соответствуют законодательству различных государств.

1.4 Этот вопрос является столь актуальным, что Международная организация гражданской авиации рассмотрела его в рабочем документе ATConf/6-WP/12, где анализируются некоторые аспекты и возможные варианты либерализации правил по владению авиаперевозчиками и контролю за их деятельностью в отношении назначения авиакомпаний в соответствии с двусторонними соглашениями о воздушном сообщении. Кроме того, в данном документе содержится предложение о многостороннем подходе.

2. ОПЫТ РЕГИОНА

2.1 Положение гражданской авиации в регионе меняется, и альянсы играют все более важную роль в развитии Латинской Америки. За последние несколько лет в регионе наблюдается чрезвычайное усиление этой тенденции.

2.2 Колумбия является свидетелем трех основных латиноамериканских альянсов. В начале 1990-х годов ее законодательство предоставило свободу для инвестиций иностранного капитала в колумбийские компании, в том числе авиатранспортные, причем в этих случаях компании не считают, что они потеряли свою национальную принадлежность или больше не находятся под действием законов страны. Благодаря этой либеральной схеме участия иностранного капитала государство получило значительное число инвестиций в различные сектора экономики, которые послужили стимулом и побудительным мотивом к росту и развитию экономики нации.

2.3 С учетом вышесказанного, ведомство гражданской авиации Колумбии включает в свои коммерческие соглашения о воздушных перевозках статью о назначении, которая исходит из концепции "национальная принадлежность по месту создания".

2.4 Несмотря на все вышесказанное, в случае коммерческих отношений в области воздушного транспорта с Канадой, Соединенными Штатами Америки и странами Европейского союза, которые продолжают применять критерии преимущественного владения и эффективного контроля, Колумбии пришлось прибегнуть к исключительным оговоркам в том, что касается применения нормативных положений, относящихся к концепции национальной принадлежности авиакомпаний, назначенных в этих государствах, с целью обеспечить, чтобы колумбийские авиакомпании могли выполнять полеты на территории упомянутых государств, в соответствии с

нашим законом об инвестициях иностранного капитала, который, в частности, способствовал слиянию авиакомпаний.

2.5 Статьи соглашений, заключенных Колумбией, в частности, с Соединенными Штатами Америки, Канадой, Испанией, Чили и Люксембургом, **прилагаются** к настоящему документу.

3. **ВЫВОД**

3.1 Критерий преимущественного владения и эффективного контроля становится все более устаревшим. Международный воздушный транспорт требует от авиаперевозчиков приспособлять их деятельность к динамически изменяющимся глобальным условиям, характеризующимся все более возрастающей степенью конкуренции, что обуславливает необходимость применения более широких критериев, которые способствуют либерализации владения авиаперевозчиками и контроля за их деятельностью.

3.2 Государства – члены ЛАКГА приветствуют инициативу ИКАО по исследованию возможности заключения между государствами международного соглашения с целью сделать требования по владению и контролю применительно к назначению авиакомпаний более гибкими и способствовать доступу к иностранному капиталу.

4. **РЕКОМЕНДАЦИИ**

4.1 На рассмотрение Конференции предлагаются следующие рекомендации:

- a) ИКАО следует принять соответствующие меры по подготовке возможного международного соглашения с той целью, чтобы государства либерализовали владение авиакомпаниями и контроль за их деятельностью;
- b) ИКАО следует продолжать содействовать предоставлению руководящих указаний в области владения перевозчиками контролем за их деятельностью, а также поощрять государства использовать их в своей нормотворческой практике;
- c) ИКАО следует обновить свой инструктивный материал, с тем чтобы он учитывал изменяющуюся ситуацию и отвечал требованиям государств.

APPENDIX

UNITED STATES OF AMERICA

Provisions included in the Memorandum of Consultations signed on 11 November 2010, with regard to Articles 3 and 4 related to the Authorization and Revocation of Authorization in the negotiated Air Transport Agreement:

“...The Colombian delegation proposed that the Agreement include a principal place of business standard in Articles 3 and 4, because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.

The U.S. delegation stated that it would be a significant departure from U.S. policy and practice not to include the ownership and control provisions currently in the 1956 U.S.-Colombia Air Transport Agreement, as amended. The U.S. delegation further stated that the U.S. Department of Transportation has authority to waive the ownership and control standards with respect to foreign airlines and has an established practice of waiving such standards for airlines when all countries involved are Open-Skies partners. The U.S. delegation confirmed that the agreement of Colombia to phase in an Open-Skies Agreement will constitute a positive consideration for the U.S Department of Transportation in responding to requests by Colombian airlines for a waiver of the substantial ownership and effective control provisions of the U.S. – Colombia Air Transport Agreement, in particular with respect to investments from Open-Skies partners. Such requests will receive fair and expeditious treatment...”

Provisions of the Agreement:

“...Article 3 Authorization

Each Party, on receipt of applications from an airline of the other Party, in the form and manner prescribed for granting authorizations and technical licences, shall grant the appropriate authorizations and licences with minimum procedural delay, provided:

- a. substantial ownership and effective control of that airline are vested in the other Party, nationals of that Party, or both;*
- b. the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transport by the Party considering the application or applications; and*
- c. the other Party is maintaining and administering the provisions set forth in Article 6 (Safety) and in Article 7 (Aviation Security).*

*Article 4
Revocation of Authorization*

1. Either Party may revoke, suspend, limit or impose conditions on the operating authorizations or technical licences of an airline where:

- a. that airline is not an airline of the other Party under Article 1(4);*
- b. substantial ownership and effective control of that airline are not vested in the other Party, the other Party's nationals or both; or*
- c. that airline has failed to comply with the laws and regulations referred to in Article 5 (Application of Laws) of this Agreement.*

2. Unless immediate action is essential to prevent further non-compliance with subparagraph 1(c) of this Article, the rights established by this Article shall be exercised only after consultation with the other Party.

3. This Article does not limit the rights of either Party to withhold, revoke, suspend, limit or impose conditions on the operating authorization or technical licence of an airline or airlines of the other Party, in accordance with the provisions of Article 6 (Safety) or Article 7 (Aviation Security)..."

CANADA:

Provisions included in the Memorandum of Consultations signed on 16 March 2012 with regard to the negotiated Air Transport Agreement:

"...Authorization of Designated Airlines

With respect to Article 5 paragraph 1) c) (Withholding, Revocation, Suspension and Limitation of Authorization) of the Agreement, the delegations had a detailed exchange of views.

The Colombian delegation proposed that the Agreement include a "nationality by establishment" standard for Article 5 paragraph 1) c), because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.

The Canadian delegation stated that it would be a significant departure from Canadian policy and practice to not include provisions on substantial ownership and effective control in an air transport agreement. The Canadian delegation further stated that Canada may waive its discretion to take action with respect to authorizations of designated airlines of other Parties, where such airlines are not substantially owned and effectively controlled by the Party designating the airline, or its nationals, and has waived such discretion in the past.

In this regard, the Canadian delegation confirmed that the Government of Canada undertakes, that, on a permanent basis, it will not take action under Article 5 paragraph 1) c) with respect to authorizations to be issued by Canadian aeronautical authorities to airlines designated by Colombia on the date of receipt by Canada of the Colombian Diplomatic Note as per paragraph 8 above, based on their ownership and control structure on that date and so long as: the aeronautical authorities of Colombia exercise the necessary oversight to ensure compliance by its designated airlines with the provisions of the Agreement; and the designated airlines maintain their principal place of business in Colombia.

In keeping with the close and positive relations between Canada and Colombia, Canada will give positive consideration with regard to waiving Article 5 paragraph 1) c) for airlines designated by Colombia in the future..."

"...Authorization of designated airlines

- 1. With respect to Article 5 paragraph 1) c) (Withholding, Revocation, Suspension and Limitation of Authorization) of the Agreement, the delegations had a detailed exchange of views.*
- 2. The Colombian delegation proposed that the Agreement include a "nationality by establishment" standard for Article 5 paragraph 1) c), because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.*
- 3. The Canadian delegation stated that it would be a significant departure from Canadian policy and practice to not include provisions on substantial ownership and effective control in an air transport agreement. The Canadian delegation further stated that Canada may waive its discretion to take action with respect to authorizations of designated airlines of other Parties, where such airlines are not substantially owned and effectively controlled by the Party designating the airline, or its nationals, and has waived such discretion in the past.*
- 4. In this regard, the Canadian delegation confirmed that the Government of Canada undertakes that, on a permanent basis, it will not take action under Article 5 paragraph 1) c) with respect to authorizations to be issued by Canadian aeronautical authorities to airlines designated by Colombia on the date of receipt by Canada of the Colombian Diplomatic Note as per paragraph 8 above, based on their ownership and control structure on that date and so long as: the aeronautical authorities of Colombia exercise the necessary oversight to ensure compliance by its designated airlines with the provisions of the Agreement; and the designated airlines maintain their principal place of business in Colombia.*
- 5. In keeping with the close and positive relations between Canada and Colombia, Canada will give positive consideration with regard to waiving Article 5 paragraph 1) c) for airlines designated by Colombia in the future...."*

Provisions of the Agreement:

“..ARTICLE 3

Designation

Each Party shall have the right to designate, by diplomatic note, an airline or airlines to operate the agreed services on the routes specified in this Agreement for that Party and to withdraw a designation or to substitute another airline for one previously designated.

ARTICLE 4

Authorization

1. Following receipt of a notice of designation or of substitution pursuant to Article 3 of this Agreement, the aeronautical authorities of the other Party shall, consistent with the laws and regulations of that Party, issue without delay to the airline so designated the required authorizations to operate the agreed services for which that airline has been designated.

2. The Parties confirm that, upon receipt of such authorization, the designated airline may begin at any time to operate the agreed services, in whole or in part, provided that the airline complies with the provisions of this Agreement.

ARTICLE 5

Withholding, Revocation, Suspension and Limitation of Authorization

1. Notwithstanding paragraph 1 of Article 4, the aeronautical authorities of each Party shall have the right to withhold the authorizations referred to in Article 4 of this Agreement with respect to an airline designated by the other Party, and to revoke, suspend or impose conditions on such authorizations, temporarily or permanently:

(a) in the event of failure by such airline to qualify under the laws and regulations normally applied by the aeronautical authorities of the Party granting the rights;

(b) in the event of failure by such airline to comply with the laws and regulations of the Party granting the rights;

(c) in the event that they are not satisfied that substantial ownership and effective control of the airline are vested in the Party designating the airline or its nationals; and

(d) in the event the airline otherwise fails to operate in a manner consistent with the conditions set out in this Agreement.

2. The rights enumerated in paragraph 1 of this Article shall be exercised only after consultations between the aeronautical authorities of the Parties in conformity with Article 21 of this Agreement, unless immediate action is essential to prevent infringement of the laws and regulations referred to above or unless safety or security requires action in accordance with the provisions of Articles 7 or 8 of this Agreement. ...”

SPAIN:

Provisions included in the Memorandum of Understanding signed on 24 January 2012, with regard to the negotiated Air Transport Agreement:

"...With regard to the Community Clauses included in Articles 3 and 4 of the ASA (Designation of Airlines and Revocations), the Colombian delegation requested clarification of the concept of "establishment" used by Spain. The Spanish Party accordingly provided information about the principles that European Union airlines have to comply with, in order to become established in Spain and thus be able to use the traffic rights agreed between Spain and third countries.³ Notwithstanding the above, both delegations agreed to exchange, by diplomatic note, relevant information on the application of the "establishment" criteria for airlines used in the respective countries..."

PROVISION OF THE AGREEMENT ON DESIGNATION OF AIRLINES

"...3. The Aeronautical Authorities of one of the Contracting Parties may require that the airlines designated by the other Contracting Party demonstrate that they are in a position to fulfil the obligations prescribed in the Laws and Regulations that are normally and reasonably applied by these Authorities for operating international air services, in compliance with the provisions of the Convention.

4. The granting of the operating authorizations mentioned in paragraph 2 of this Article shall require:

4.1 In the case of an airline designated by the Kingdom of Spain:

4.1.1 it is established on the territory of the Kingdom of Spain under the European Union Treaties and has a valid operating licence in accordance with European Union law; and

4.1.2 effective regulatory control of the airline is exercised and maintained by the EU Member State responsible for issuing its Air Operator's Certificate and the relevant Aeronautical Authority is clearly identified in the designation, and

4.1.3. the airline is owned, either directly or through majority ownership, and effectively controlled by Member States of the European Union and/or nationals of EU Member States, and/or other States listed in Annex II and/or nationals of these other States.

4.2. In the case of an airline designated by the Republic of Colombia:

4.2.1 it has its main office on the territory of the Republic of Colombia and is authorized in accordance with the applicable law of the Republic of Colombia; and

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¹ The establishment criteria of Spain include, amongst other requirements:

- Stable and permanent organizational structure;
- Respect of European and national legislation, with regard to air transport (in particular related to safety and security) and social and taxation matters;
- Material and human resources for developing the activity, especially with regard to safety.
- Submission of an Operational Plan.³

⁴

4.2.2 effective and continuous regulatory control of that airline is held and maintained by the Republic of Colombia; and

4.2.3. it has a valid operating licence in accordance with the national legislation of the Republic of Colombia.

5. *Once an airline has been designated and authorized in this manner, it may at any time begin to operate the agreed services in accordance with the provisions of this Agreement..."*

LUXEMBOURG:

Provision included in the Agreed Minutes on 20 January 2012, with regard to the negotiated Air Transport Agreement:

"....(Establishment criteria

Luxembourg delegation explained the establishment criteria of Luxembourg

The establishment criteria of Luxembourg include inter alia:

stable and permanent organizational structures;

respect of the appropriate EU law and national legislation, such as safety and security regulations for air transport, fiscal and social law;

conformity with EU law, in particular on non-discrimination and proportionality;

establishment and permanent presence of management, staff responsible for safety, crew and other personnel)..."

PROVISION OF THE AGREEMENT ON DESIGNATION OF AIRLINES

"...Designation and Authorization

Either Contracting Party shall have the right, by written notification through diplomatic channels to the other Contracting Party, to designate one or more airlines to operate international air services on the routes specified in the annex and to substitute another airline for an airline previously designated.

On receipt of such a notification, each Contracting Party shall, without delay, grant to the airline(s) so designated by the other Contracting Party the appropriate operating authorizations subject to the provisions of this article, unless it is not satisfied that:

in the case of an Airline designated by Luxembourg:

it is established in Luxembourg under the European Union Treaties and has a valid operating licence in accordance with European Union law, and

effective regulatory control of the Airline is exercised and maintained by the EU Member State responsible for issuing its Air Operator's Certificate and the relevant Aeronautical Authority is clearly identified in the designation, and

the Airline is owned, directly or through majority ownership, and is effectively controlled by Member States of the European Union or the European Free Trade Association and/or by nationals of such States;

in the case of an airline designated by the Republic of Colombia:

it is established in the territory of the Republic of Colombia and has a valid operating licence in accordance with applicable law of the Republic of Colombia, and effective regulatory control of the airline is exercised and maintained by the Republic of Colombia.

and that:

the Government designating the Airline is maintaining and administering the standards set forth in Article 6 (Safety) and Article 7 (Aviation Security);

the designated airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operations of international air transportation by the Contracting Party considering the application or applications.

Upon receipt of the operating authorization of paragraph 2 of this article, the designated airline(s) may at any time begin to operate the agreed services, in part or in whole, provided that it complies with the provisions of this agreement...”

CHINA

Memorandum of Understanding from 18 May 2012

2. Airlines Designation

1. The Colombian delegation proposed that the Agreement include a “nationality by establishment”, because pursuant to the Colombian Constitution and law, foreign capital investment in airlines must be facilitated and, for such reason, the nationality of a Colombian airline is not determined by its ownership and control, but rather by its place of establishment.

2. The Chinese delegation stated that it would be a significant departure from its policy and practice to not include provisions on substantial ownership and effective control in an air service agreement. Nonetheless, in keeping with give positive consideration on a case by case basis with regard to waiving Articles 3 and 4 for airlines designated by Colombia, or its nationals, provided that the aeronautical authorities of Colombia exercise the necessary oversight to ensure compliance by its designated airlines with the provisions of the ASA; and the designated airlines are established and maintain their principal place of business in Colombia.

AIR SERVICES AGREEMENT

ARTICLE 3 DESIGNATION AND AUTHORISATION

1. Both Parties shall have the right to designate, through a written notification to the other Party, one or more airlines for purposes of allowing those airlines to operate the agreed services on the routes specified under this Agreement.

2. Once a Party receives from the other Party the designation and application for the designated airline in the mode and manner prescribed for authorization and operation, the said Party shall grant the relevant authorization to operate in the shortest span of time and the minimum filing steps possible provided that:

a) the substantial ownership and effective control of the designated airline remains vested in the designating Contracting Party or its nationals;

b) the Party designating the airline has and maintains effective regulatory control of the airline;

c) the Party designating the airline is in compliance with the provisions set forth in Article 7 (Safety) and Article 8 (Aviation Security);

d) the designated airline is qualified to meet other conditions prescribed under the laws and regulations normally applied to the operation of international air transport services by the Party receiving the designation.

3. Among the regulatory control evidence, they should provide information such as if the airline holds a license or a valid operating permit issued by the designating aeronautical authority in the form of an Operator Certificate (AOC) that meets the criteria of the designating Party for the operation of international air services, such as proof of ability to meet public interest requirements and obligations of service guarantee, and that the designating Party has and maintains surveillance programs for safety and security aviation in compliance with ICAO standards.

THE NETHERLANDS

Memorandum of Understanding signed on 17 January 2012

AIR SERVICES AGREEMENT

Article 3 Designation and Authorization

1. Either Contracting Party shall have the right, by written notification through diplomatic channels to the other Contracting Party, to designate one or more Airlines to operate International Air Services on the routes specified in the Annex and to substitute another Airline for an Airline previously designated.
2. On receipt of such a notification, each Contracting Party shall, without delay, grant to the Airline(s) so designated by the other Contracting Party the appropriate operating authorizations subject to the provisions of this Article, unless it is not satisfied that:

- a. in the case of an Airline in the European part of the Netherlands is designated by the Kingdom of the Netherlands:
 - i. it is established in the Territory of the Kingdom of the Netherlands under the European Union Treaties and has a valid operating licence in accordance with European Union law, and
 - ii. effective regulatory control of the Airline is exercised and maintained by the EU Member State responsible for issuing its Air Operator's Certificate and the relevant Aeronautical Authority is clearly identified in the designation, and
 - iii. the Airline is owned, directly or through majority ownership, and is effectively controlled by Member States of the European Union or the European Free Trade Association and/or by nationals of such States;

- b. in the case of an Airline in the Caribbean part of the Netherlands is designated by the Kingdom of the Netherlands:
 - i. it is established in the Caribbean part of the Netherlands and has a valid operating license in accordance with the appropriate legislation for the Caribbean part of the Netherlands,
 - ii. effective regulatory control of the Airline is exercised and maintained by the Netherlands,
 - iii. the Airline is owned, directly or through majority ownership, and is effectively controlled by residents of the Caribbean part of the Netherlands with Dutch nationality;

- c. in the case of an Airline is designated by the Republic of Colombia:
 - i. it is established in the Territory of the Republic of Colombia and has a valid Operating Licence in accordance with applicable law of the Republic of Colombia, and
 - ii. effective regulatory control of the Airline is exercised and maintained by the Republic of Colombia.

- and that:

- d. the Government designating the Airline is maintaining and administering the standards set forth in Article 16 (Safety) and Article 17 (Aviation Security);

- e. the Designated Airline is qualified to meet the conditions

prescribed under the laws and regulations normally applied to the operations of international air transportation by the Contracting Party considering the application or applications.

3. Upon receipt of the operating authorization of paragraph 2 of this Article, the Designated Airline(s) may at any time begin to operate the Agreed Services, in part or in whole, provided that it complies with the provisions of this Agreement.

— KOHEЦ —