

Sustainability and Foreign Investment in Airlines

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Overview

- What is “economically sustainable air transport”?
- What are the legal restrictions on foreign investment?
- How do the restrictions affect sustainability?
- Is commercial reality outrunning these restrictions?
- Should the law change; if so, will competition suffer?
- What role should ICAO play?



Economic Sustainability = ?

- Does **NOT** mean--
 - Every airline has a right to exist in perpetuity
 - Every major city is entitled to a hub airport
- Rather, economically sustainable air transport--
 - Is a means to an end, meeting passenger/shipper needs
 - Serves a nation's long-term economic interests
 - Must accommodate change
 - Is best built on a partnership of all stakeholders



Restrictions on Ownership/Control

- **Type 1:** Country limits foreign ownership and control of its own airlines
 - U.S. law: 25% foreign ownership, no “actual control”
 - EU law: majority ownership and effective control
- **Type 2:** Nationality clauses in ASAs
 - Rights in ASAs are limited to airlines “substantially owned and effectively controlled” by Parties’ nationals
 - Limitation inhibits cross-border ownership/control



Why the Restrictions?

- States bar foreign ownership/control of their airlines:
 - Always have done so...
 - Clarity of safety/security oversight
 - National security concerns
 - Protect service to remote areas and in emergencies
 - Objections by airline labor to change
- States keep the nationality clause:
 - Free-rider concerns
 - Retain flexibility in a time of change
 - It's in all our agreements...



Restrictions Hurt Sustainability

- Limit access to capital and management expertise
- Limit economies of scale and scope
- Fragment air service and thwart consumer demand
- Pose barriers to entry and exit:
 - Make market entry impossible or more expensive
 - May induce excess capacity
 - May invite state aids (and market distortion)



Commercial Reality

- Notwithstanding the legal restrictions, effective “cross-border airlines” are **mushrooming**:
 - Express delivery: UPS, FedEx, DHL
 - In Europe: AF/KL, LH/SR/OS/SN, BA/IB = IAG
 - Airline “families”: Grupo TACA, LAN Airlines, Air Asia
 - Mergers: TACA + Avianca, LAN + TAM=LATAM



Legal Accommodations

- EU “horizontal agreements”
- Holding companies
- Case-by-case waivers of nationality clauses
- Implicit threat of ASA termination



Better Legal Fixes?

- Replace “nationality clause”
 - But thousands of agreements to amend
- Individual policy pronouncements by States
 - But hit-or-miss, not binding
- IATA Agenda for Freedom
 - But not binding, few countries have endorsed
- ICAO multilateral convention
 - But work needed; are States interested?



Will Competition Suffer?

- Restrictions maintain many separate airlines
- If restrictions eased, will competition decline?
 - Reduction in number of competitors
 - Threat of oligopoly?
- Key role for competition authorities
 - Strike the balance between benefits and downsides of mergers and joint ventures
 - Focused on consumer welfare



Roles for ICAO?

- Explore options available to States; guidance material
- Develop multilateral convention for reciprocal waiver of nationality clauses ?
- Foster exchanges among competition authorities?
 - Share data and analyses
 - Consider how to avoid disparate results



Thank you!

- Questions?

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