



ASSEMBLY — 35TH SESSION

ECONOMIC COMMISSION

Agenda Item 27: Regulation of international air transport services, and outcome of the fifth Worldwide Air Transport Conference

ADVANCING THE LIBERALISATION OF OWNERSHIP AND CONTROL

(Presented by the International Air Transport Association (IATA))

SUMMARY

Airlines need the freedom to change. The liberalisation of ownership and control rules would be a major step towards creating a global aviation industry. ATConf/5 marked an important step forward that has been confirmed in changes in national policies in recent years. This advance is only a step on the way. New catalysts for change should be welcomed and like-minded States urged to adopt more liberal policies and to give their policies the maximum transparency. Action by the Assembly is in paragraph 4.

1. BACKGROUND

1.1 The 5th ICAO Worldwide Air Transport Conference (ATConf/5) was an important event. For the first time, governments agreed on a global framework of objectives, principles and policies for the liberalization of international air transport. This agreement came at a time when the airline industry faced its worst crisis ever due to a changing world economy and various external shocks. The rise in fuel prices in 2004 once again underlines the fragility of the airline business and the need for airlines to take appropriate measures to ensure long-term financial sustainability.

1.2 IATA argued that there was an increasingly urgent need for governments to grant airlines the same degree of freedom to adjust to global change as enjoyed by other industries. The most important step that governments could take in this direction was to liberalise bilateral ownership and control rules and to remove national restrictions.

¹ All language versions provided by IATA.

1.3 The Conference went a long way to meeting the industry's request. It adopted a recommendation on liberalising air carrier ownership that endorsed the notions of "principal place of business" and "effective regulatory control" as alternatives to "substantial ownership and effective control" generally used in air service agreements. It also encouraged States to be flexible in responding to the use by other States of non-traditional criteria, having full regard to the need for safety and security.

2. PROGRESS SINCE THE CONFERENCE

2.1 The key question is whether these recommendations have led to changes since ATConf/5. The ICAO questionnaire on States' policies, practices and positions regarding ownership and control of September 2003 suggests that there has been progress and that transparency of policy positions will gradually bring together the practical nucleus of like-minded States that the industry is seeking. By mid-May 2004, 48 States had replied to the questionnaire. This must be considered a good response rate.

2.2 A review of the replies (see Table attached) to the ICAO questionnaire indicates:

- a) Over one third of the States do not require a carrier they designate to be majority owned and effectively controlled by nationals of their country (Q. 1). This reflects the requirements of European Community law, but six non-EU States also fell in this category.
- b) While 83% of States apply substantial ownership and effective control to the designation of foreign carriers, between 44 and 69% are also prepared to accept less restrictive criteria (including principal place of business and effective regulatory control) including acceptances on a case-by-case basis (Q. 2).
- c) Two thirds of States are ready to apply relaxed criteria to "community of interest" groupings and over half will in the future be prepared to develop a common policy with partner States (Q. 2(b) and 4(b)).
- d) Over two-thirds of States (Q. 3(a)) are willing in the future to accept criteria other than traditional ownership and control, some on a case-by-case basis.
- e) One in four States would be willing in the future to issue an individual statement of policy for accepting designations of foreign carriers (Q.4(a)). This was one of the suggestions made by IATA at ATConf/5 as a means of creating a nucleus of like-minded States.

2.3 Although these new policies have not yet worked their way into revised bilateral agreements, States in all regions have made decisions to permit the operation or establishment of airlines under new criteria. In this regard, the continued development of regional agreements or agreements between "like-minded" countries are playing a pivotal role.

2.4 Prior to AT Conf/4 in 1994, the European Union (EU) and the Andean Pact were the only regional plurilateral agreements. Subsequently, seven further regional groups² were established and one

² Groups created since 1995 are: the CARICOM Air Service Agreement of 1996 (14 Caribbean States), the Fortaleza Agreement of 1997 (6 South American States), the Banjul Accord of 1997 (6 West African States), the CLMV Agreement of 1998 (Cambodia, Lao PDR, Myanmar, Viet Nam), an agreement in 1998 among 16 ACAC Member States, an agreement in 1999 between six States of the Economic and Monetary Community of Central Africa

multilateral agreement known as the MALIAT (Multilateral Agreement on the Liberalization of International Air Transportation) of 2001 whose signatories include nine States in Asia and North and South America. The MALIAT sought to modify the standard ownership and control clause with a view to providing new opportunities for investment in the airlines covered by the agreement.

2.5 Other moves to liberalize ownership and control are taking place on an *ad hoc* basis. These include acceptance by Australia of the principle of right of establishment and numerous trans-border arrangements in Latin America.

3. CATALYST FOR CHANGE

3.1 The EU represents an important group of like-minded States and must be viewed as a major catalyst for change. EU aviation rules now apply to 29 countries and will gradually also apply to other adjacent countries to some degree or another. IATA's position at ATConf/5 was that any widespread renegotiation of bilateral Air Service Agreements (ASAs) would prove a complicated process. This difficulty might be overcome by unilateral declaration, or plurilateral (bloc-to-bloc) arrangements. An agreement between the EU and the United States offers such an opportunity.

3.2 In the "Open Skies" case (5 November 2002), the European Court of Justice (ECJ) found that nationality clauses in ASAs concluded by European Union States infringed Community Law by limiting the freedom of establishment of Community carriers.

3.3 Following on this ruling, the European Commission was given specific mandates regarding external aviation relations. These are a *Horizontal Mandate* to negotiate with all other third countries on a restricted basis to amend the nationality clauses in ASAs that limit the freedom of establishment of Community companies, and another to negotiate a single comprehensive agreement for an *Open Aviation Area (OAA)* with the United States in place of existing bilateral agreements. (*This was written in May 2004 while the EU-US negotiations were still in progress*).

3.4 The "Open Aviation Area" negotiations offer the greatest potential for major change and might provide a new blueprint for international air transport by leading to full liberalisation between two important trading partners, creating a single market. Depending on the scope of an eventual agreement, this might act as a catalyst in other regions and attract the participation of other countries.

3.5 The Court ruling resulted in the European Commission being given a mandate to renegotiate the nationality clauses, and in placing EU Member States under an individual obligation to amend their 1,500-2,000 ASAs by replacing "National Ownership" clauses with a "Community Ownership" clause. Other States are not under any obligation to accept this change and will wish to take into account commercial interests established over time.

3.6 The draft EU standard designation clause (as of May 2004) proposed for inclusion in revised ASAs goes far towards meeting the proposal made by IATA at ATConf/5 to separate the notions of ownership and effective regulatory control. Under this clause, airlines designated by a non-EU State must be (a) "established in the territory" of the third country and licensed in accordance with the applicable law; and (b) the third country shall have and maintain "effective regulatory control" of the airline. This wording is more liberal

(CEMAC), an agreement in 1999 among 20 States of the Common Market for Eastern and Southern Africa (COMESA) and the Yamoussokro II Ministerial decision of 1999 involving 52 African States.

than other formulations in referring to “establishment” rather than “principal place of business”.

3.7 Notwithstanding the role of regional groupings in relaxing restrictions on ownership and control, IATA believes that global solutions to this, and to other aviation issues, should remain the long-term objective. The Recommendations of ATConf/5 provide useful guidance in this respect.

4. **ACTION BY THE ASSEMBLY**

4.1 The Assembly is invited to:

- a) note the liberalising changes in States’ policies regarding ownership and control since the Fifth Worldwide Air Transport Conference;
- b) endorse the recommendations of Fifth Worldwide Air Transport Conference;
- c) encourage States to put these recommendations into practice at their earliest convenience; and
- d) urge like-minded States that are prepared to adopt more liberal criteria, to communicate their willingness to ICAO to ensure the greatest transparency.

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APPENDIX

**SUMMARY OF REPLIES TO ICAO STATE LETTER ON OWNERSHIP
AND CONTROL (SC 5/6-03/88, 26 SEPTEMBER 2003)**

IATA Summary of 48 replies received by ICAO as of May 2004

	QUESTION	YES	NO	CASE BY CASE
1.	When designating your airline to operate the agreed services under an air services agreement, do you require it to be substantially (or majority) owned and effectively controlled by nationals of your country?	29	17	3
2.	In dealing with the designation of foreign airlines, which of the following criteria do you accept:			
a)	Substantially (or majority) owned and effectively controlled by the designating party or its nationals (the traditional approach)	40	1	5
b)	Substantially (or majority) owned and effectively controlled by one or more States that are parties to an agreement or within a redefined regional grouping (e.g. a "community of interest" carrier)	16	5	17
c)	Incorporated and having its principal place of business or permanent residence in the territory of the designating party	18	6	11
d)	Having its principal place of business in the territory of and effective control by the designating party (without the ownership 1 requirement)	11	13	10
e)	Having its principal place of business in the territory of and effective regulatory control by the designating party	19	9	7
f)	Any other criteria (please describe)	3	5	1
3.	In dealing with airline designations in the future, are you willing to accept criteria other than the traditional national ownership and control:	3	2	3
a)	For both yourself and the foreign partner?	25	6	7
b)	For the foreign partner but maintain traditional criteria for yourself?	6	22	5
c)	What economic regulatory conditions will you impose for such acceptance? (Please describe)	5	4	2
4.	Are you willing to consider the following positive action in facilitating liberalization of air carrier ownership and control:	1	1	1
a)	Issuing an individual statement of policy for accepting designations of foreign air carriers?	12	15	2
b)	Developing a common policy with partner States? (Please indicate, if possible, with which partner(s))	23	6	2
c)	Any other action? (Please describe)	-	5	1

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