

WORLDWIDE AIR TRANSPORT CONFERENCE: CHALLENGES AND OPPORTUNITIES OF LIBERALIZATION

Montreal, 24 to 29 March 2003

- Agenda Item 2: Examination of key regulatory issues in liberalization**
2.1: Air carrier ownership and control

LIBERALIZING AIR CARRIER OWNERSHIP AND CONTROL

(Presented by Greece (on behalf of the European Community and its Member States and by the Member States of ECAC))²

SUMMARY

In view of the economic situation of many airlines, the need to make international financial resources more accessible for aviation and the wish of the air transport industry to have the same commercial freedom enjoyed by other sectors of the economy, the European Community and its Member States request the Conference to endorse three key principles. States should accommodate any other State that wishes to liberalize its ownership and control restrictions unilaterally or as part of a group of like-minded partners. In addition, given appropriate assurances on safety, ICAO Members should give due consideration to the designation by States of airlines based in a third country. Finally, the European Community (EC) and its Member States urge ICAO Members to work together, whether in groups of like-minded States or multilaterally, to develop a common approach to liberalizing ownership and control requirements, while safeguarding high standards in aviation.

Action by the Conference is in paragraph 3.

¹ French and Spanish versions are provided by the European Commission.

² Albania, Armenia, **Austria**, Azerbaijan, **Belgium**, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, **Denmark**, Estonia, **Finland**, **France**, **Germany**, **Greece**, Hungary, Iceland, **Ireland**, **Italy**, Latvia, Lithuania, **Luxembourg**, Malta, Moldova, Monaco, **Netherlands**, Norway, Poland, **Portugal**, Romania, Serbia and Montenegro, Slovakia, Slovenia, **Spain**, **Sweden**, Switzerland. The former Yugoslav Republic of Macedonia, Turkey, Ukraine, **United Kingdom**. (The 15 Member States of the European Union (EU) appear in bold.)

1. THE NEED FOR CHANGE

1.1 There is increasing pressure to change the standard provisions on ownership and control that are contained in the majority of bilateral agreements. These clauses require airlines to be owned and controlled by the nationals of the designating State. They were designed to ensure that two States signing a bilateral would enjoy reciprocal benefits and that they would maintain strict regulatory control.

1.2 A recent judgement by the European Court of Justice found that the standard clauses on ownership and control in most air services agreements concluded by European Union (EU) Member States conflict with the provisions on the freedom of establishment in Community law. The Community and its Member States are considering what changes will be needed in their bilateral relations with other ICAO Members as a result of this judgement.

1.3 There are good public policy reasons for change

1.3.1 The current ownership and control regime appears not to have brought equal economic benefits. In spite of strict reciprocity enforced through the ownership and control rules, many States have carriers that are in poor financial health and unable to play their part in developing the wider economy and providing global connections. Development of the sector has been uneven. The constraints on ownership imposed under the bilateral system prevent national airlines from strengthening their position through cooperation across borders and foreign inward investment. Strict ownership and control rules are damaging more airlines than they help.

1.3.2 Normally, States do not have a national carrier that is capable of taking advantages of all the bilateral traffic rights that are available to them, leaving some routes unflown. Hemmed into agreements that restrict the entry of foreign capital into the airline business, these States cannot take measures to stimulate air transport on international routes by seeking inward investment or the designation of foreign airlines.

1.3.3 The strict application of ownership and control rules can also have competition implications. Whereas consumers and the wider economy can benefit from competition between airlines, national ownership and control requirements reduce the pool of potential competitors. Competition authorities must make their decisions about individual cases, but where the national airlines of two parties to an agreement have entered into cooperative arrangements, governments may wish to stimulate the market by allowing a wider range of air carriers to compete.

1.4 On the economic side, the industry would also benefit from a change in approach

1.4.1 Many airlines believe that change is desirable. Increasingly, airlines want to be given the same economic freedoms as other industries. Airlines want the same freedom to raise foreign capital, to expand outside their home markets and to build businesses that are more economic in scale.

1.4.2 In recent years, many other sectors of the economy, including sensitive, strategic businesses with elaborate regulatory regimes such as telecommunications and financial services, have seen ownership and control restrictions lifted and amended. They now operate in a substantially more open environment than aviation. Many airlines want to be treated in a similar manner.

1.5 The Chicago framework is no obstacle to a more flexible approach on ownership and control

1.5.1 ICAO has made a number of concrete suggestions for a more flexible approach and there are many instances of flexible ownership and control rules being applied. There are examples of countries sharing a joint national carrier which is owned by a mixture of national shareholders. There are national carriers that have been purchased by foreign owners, but which have kept their traffic rights with the consent of their home State's bilateral partners. There are examples of regional agreements that have seen the development of regional markets with regional ownership and control regimes - such as the European Community. All these developments provide examples of how the ownership and control regime can be amended to the benefit of consumers, governments and the industry and all have been carried out among ICAO Members.

1.6 States have already changed their domestic investment policies in other sectors

1.6.1 Continuing to enforce strict reciprocity in this field effectively gives States a veto on one another's internal economic policy. The strict enforcement of requirements that airlines be owned and controlled by the nationals of a State prevents that State from liberalizing their own internal investment rules. This is now unimaginable in other sectors of the economy. For example, it is hard to conceive of a situation where a State would withdraw interconnection rights from a foreign telephone company because it had been taken over by a foreign firm.

2. WHAT STEPS ARE NECESSARY

2.1 On an *ad-hoc* basis, many States have taken a broad interpretation of the application of the clauses in existing agreements. As noted above, there are examples of carriers with ownership from several States and of carriers which are wholly owned by interests foreign to their home State.

2.2 The fundamental change in position should be a consistent shift by States towards a more flexible attitude towards ownership and control

2.2.1 This approach should be taken more widely to allow States to make changes to their domestic policies on investment, ownership and control in the airline industry. States should have the chance to work alone or with others to set new standards for inward investment in their airlines and to allow the opening of their industries to foreign capital or foreign airlines. Where States wish to make changes to their domestic policy in order to allow their industry to restructure or to expand, other States should take a benign view, as long as sufficient reassurance can be provided that standards, in particular safety standards, will be properly maintained.

2.3 States may wish to change their domestic rules on investment in different ways, but all require acceptance by their foreign partners

2.3.1 Changes in ownership and control come in a variety of forms. However, they all require the State's bilateral partners to accept the designation.

2.4 A general acceptance of a more flexible line is required

2.4.1 Making good progress with the restructuring and development of the industry, harnessing international expertise and investment, seems likely to require a substantial number of States to accept designations of carriers without regard to their eventual ownership. International carriers fly many routes to many States. They depend on a full portfolio of routes for successful operations. Therefore, if a change in ownership is to occur, a broad acceptance of that change is needed.

2.4.2 The ownership and control clauses in the agreements that govern international routes to and from the EU prevent airlines from engaging in restructuring activity that might result in a change in the nationality of their owners. The EU and its Member States will need to work with their partners to agree upon new, more flexible formulas.

2.5 For acceptance of such developments, full assurances on safety are required

2.5.1 There is a clear need to ensure that safety standards are preserved. It must be clear at all times which State is responsible for safety oversight and, moreover, it must be clear that this State is capable of this role taking account of the operations of the airline concerned. It is possible that the airline might be effectively overseen at its home base, if that is different from the designating State, but this will require that the designating State, the State of the operator and the accepting State are content with the arrangements. Thus, there is a need to verify that the appropriate mechanisms are in place to ensure adequate safety oversight. It must be ensured that these mechanisms are established at an appropriate level and contain provisions on the applicable safety rules in each of the States and on the means of safety oversight. They should duly take into account the ICAO structures and the means agreed to audit their implementation.

3. ACTION BY THE CONFERENCE

3.1 Thus far, States have pursued changes in their ownership and control rules in an *ad hoc* manner. It is important to maintain this flexibility so that changes are properly matched to the economic needs, political priorities and safety oversight capacities of individual States. Any universal system is likely to limit those States that want to make rapid progress and commonly endorsed texts may become a straitjacket for an industry that needs flexibility as it tries to cope with a hostile and constantly changing economic climate. The Conference should avoid being too prescriptive.

3.2 Accordingly, the European Community and its Member States call upon the Conference to provide a general endorsement of the following principles:

- a) States should seek to accommodate other States who wish to improve the situation of their own industry, stimulate new air services or allow their industry to expand abroad by relaxing their domestic investment rules or by working with a group of States towards the same end.
- b) States should give due consideration to the designation of any airline on an international route and the conditions thereof.

- c) States should give consideration to developing common approaches, be it multilateral, plurilateral or regional, in order to achieve a general acceptance of a more flexible line towards the application of ownership and control rules, with a view to permitting the gradual normalisation of the airline industry in this respect, while ensuring that safety standards are secure.

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