



WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)

SIXTH MEETING

Montréal, 18 to 22 March 2013

Agenda Item 2: Examination of key issues and related regulatory framework

Agenda Item 2.2: Air carrier ownership and control

RELAXING THE RULES FOR AIRLINE DESIGNATION

(Presented by 54 Member States¹, Members of the African Civil Aviation Commission (AFCAC))

1. INTRODUCTION

1.1 This paper, which is presented on behalf of the 54 African States, provides Africa's strategy for sustainability of air transport, based on the harmonization of the authorization and designation of airlines based in line with a common set of criteria and the need for flexibility in order to facilitate Airline access to international capital markets. The common set of criteria is based on the YD eligibility criteria.

1.2 This provides eligible airlines with the possibility to gain access to the international capital market, and also encourage cooperation via consolidation, mergers and acquisition as well as cross border investments.

1.3 With globalization and liberalization of the industry, in particular airline privatization, alternative ownership and control models have emerged. The ICAO proposed clause for the designation of carriers however seem to be the most favoured (CONF/5-2003). The proposed clause permits designation subject to the requirement of incorporation, principal place of business and effective regulatory control as attributed to the designating State.

1.4 In practice, States have considerable latitude and discretion in the interpretation of what constitutes *substantial ownership* or interpreting what constitutes *effective control*. To give meaning to the concept of effective control, the key question is who actually exercises a decisive influence on the

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airline, in particular (a) the right to use all or part of the assets of the airline (the financial test) and (b) on the composition, voting or decision making powers in the governing bodies of the airline, the management and the running of the airline (the management test). Hence some analysts posit that such provisions are just aero political clauses in Air Service Agreement, which in practice means that judgment is made according to the precise facts of every case, particularly in closed bilateral negotiations.

1.5 Given the prevalence of the traditional ownership and control criterion in BASAs, globally, airlines have developed several cooperation and partnership strategies including global alliances, mergers and acquisition, joint ventures, minority ownership, franchise operations, subsidiaries, code-sharing and in some cases operation of multiple hubs, as ways of getting around the ownership restriction.

1.6 Where ownership and control restrictions have been removed, there is evidence that the airlines, consumers and employees have benefited. For consumers, the possibility of closer integration between currently nationality-tied airlines and the emergence of new entrant airlines, all with better access to global capital sources, offers the potential for more competition, greater network connectivity and better value services to consumers. For airlines, access to foreign capital and management resources, combined with opportunities for restructuring, provides options already available to most other global industries, but denied to airlines. For employees, liberalization of ownership and control rules should enable efficient airlines to grow, increasing sustainable employment opportunities.

2. OWNERSHIP AND CONTROL WITHIN THE YD REGULATORY FRAMEWORK

2.1 The Yamoussoukro Decision (YD) is the continental agreement with the aim of gradual liberalization of scheduled and non-scheduled intra African air transport; a **Regulatory** framework for intra-African air service agreement. Its provisions on ownership and control, adopted the ICAO proposed clause in replacing “substantial ownership and effective control” by the concept of “principal place of business and effective regulatory control”. The importance of this provision lies in the opportunities it creates for increased access to international foreign equity participation in African airlines and the possibly of encouraging the restructuring of African airlines through cross border capital injection and consolidations.

2.2 **Designation and authorization:** Article 6 of the Decision provides the right of States to designate in writing:

- a) at least one airline to operate the intra-African air transport services;
- b) the right to designate an Eligible Airline from another State party to operate air services on its behalf; and
- c) the right to designate an Eligible African multinational airline in which it is a stakeholder.

3. MAIN CHALLENGES

3.1 There are regulatory challenges that demand guidance materials to enable the fair application of the rules relating to the relaxation of the Air carrier ownership and control clause or replacing it with effective regulatory control.

3.2 Establishing “effective regulatory control”, is quite a complex issue with several considerations to be made. We have differences in applicable national regulations in the establishment of airlines, with many States still retaining the need for substantial ownership by nationals. To give recognition to the provisions of a clause on ownership and control, States will need to amend their national laws in synchronization with the relaxation of eligibility criteria and designation provisions.

3.3 The use of traditional ownership and control criterion in BASAs, limit the opportunities of many airlines access to global markets. Guidance is required on how States can take advantage of the new eligibility provisions to enable States and their airlines exploit the available global markets.

4. AFRICAN CURRENT EXPERIENCE

4.1 The major intra-Africa airlines are in 100 per cent State ownership and most of these airlines are influential in determining State policies on the ownership clause. Amongst the first ten African airlines operating in the African skies, Egypt Air, South African Airways, Royal Air Maroc, Air Algérie, Ethiopian Airlines and Tunis Air are 100 per cent State owned carriers. Among the first five, Kenya Airways is the only African Carrier with majority private sector ownership with the following share structures: the airline is owned by individual Kenyan shareholders (30.94 per cent), KLM (now Air France-KLM) (26 per cent), Kenyan government (23 per cent), Kenyan institutional investors (14.2 per cent), foreign institutional investors (4.47 per cent) and individual foreign investors (1.39 per cent). However ownership is still in the hands of nationals of Kenya.

4.2 A number of cross-border airline investments have been recorded, in particular the creation of Asky Airlines, a West African regional airline based in Lome, Togo, with 49 per cent Ethiopian Airlines equity holding, together with other African private investors. Kenya Airways also has 41.23 per cent equity holding in a Tanzanian private airline, Precision Air. The Aga Khan Fund for Economic Development has supported the establishment of new airlines across Africa: Air Uganda, Air Mali, and Air Burkina, through the provision of equity. The Aga Khan group (AKFED) also has a 15 per cent stake in the new airline, Air Cote D’Ivoire, with the Air France-KLM Group holding 20 per cent.

4.3 In terms of strategic cooperation and partnership, among the five major African airlines, South Africa Airways, Egypt Air and Ethiopian Airlines are members of the Star Alliance whilst Kenya Airways is a member of the Sky Team. The AKFED set of aviation companies are also operated under the Group *Celestair* Alliance. This provides for sharing of resources and expertise across the various airlines, in particular in the renewal of aircraft fleet. Several African airlines also have code-share agreements; South African Airways has code-share agreements with Airlink, Air India, Air Mauritius, Emirates, Jetblue Airways, Lam Mozambique Airlines, Qantas (One World) and Virgin Atlantic Airways.

5. CONCLUSIONS

5.1 The YD was conceived in 1999, during a period when the current experience in liberalization never existed. Given the latitude and discretion that States have in the application of

ownership and control in their national regulations, this should pose minimum concerns as States can always waive such provisions for intra-African ASA.

5.2 The eligibility criteria are crucial for both designation for international air traffic and access to global market. It would be necessary for guidance materials to be developed by ICAO, in order to help States in the designation of eligible airlines.

5.3 To enable a fair application of the relaxation of ownership and control rules, there is need for regulatory convergences through a harmonized set of competition rules, consumer protection regulations, powers and means of enforcement and a mechanism for dispute settlement. Safety and security oversight are cardinal in accepting an airline as eligible. Therefore convergence in the regulatory system of airline licensing is important, if the eligibility criteria are to be applied successfully.

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