

# Airline nationality requirements: protection or protectionism?

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# SYNOPSIS

- Nationality requirements in air law
  - Nationality requirements in traffic rights
  - Nationality requirements in carrier licencing
- Concept and conditions of nationality requirements
  - Purpose
  - Substantive ownership
  - Effective control
  - Principal place of business
- The future
- Criticism and thoughts

# NATIONALITY REQUIREMENTS IN AIR LAW



1. Nationality requirements in traffic rights
2. Nationality requirements in carrier licencing

# 1. Traffic rights

- Chicago Convention, Art 1: each State has complete and exclusive sovereignty over the airspace above its territory
- Chicago Convention, Art 6: No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State
- As a consequence, States have entered into a myriad of **bilateral agreements** among themselves, for the grant of **traffic rights**, i.e. the performance of scheduled air traffic

# Traffic rights: bilateral agreements

- Routes those carriers are permitted to serve: freedoms of the air, 3rd, 4th, 5th freedoms ...
- **Designation of carriers – single or multiple**
  - **owned & controlled by nationals of designating state = ownership and control clause, “O&C”** => limits to sole nationals of the states parties the benefits of the bilateral
- Points served
- Frequency and capacity
- Tariffs

N.B.: O&C is a discretionary requirement (states may waive it)

# Traffic rights: nationality clauses

- Traditional
  1. Each Party shall have the right to designate in writing to the other Party an airline to operate the agreed services [in accordance with this Agreement] and to withdraw or alter such designation.
  - 2.\* On receipt of such a designation, and of application from the designated airline, in the form and manner prescribed for operating authorization [and technical permission], each Party shall grant the appropriate operating authorization with minimum procedural delay, provided that:
    - a) substantial ownership and effective control are vested in the Party designating the airline, nationals of that Party, or both;

# Traffic rights: nationality clauses (cont'd)



- Transitional
  - a) the designated airline has its principal place of business (see (i) below) [and permanent residence] in the territory of the designating Party;
  - b) the Party designating the airline has and maintains effective regulatory control (see (ii) below) of the airline;

# Traffic rights: nationality clauses (cont'd)



- Fully liberal
  - a) the airline is under the effective regulatory control of the designating State;



# Traffic rights: nationality clauses (cont'd)



- Community O&C clause

**the airline is owned, directly or through majority ownership, and it is effectively controlled by Member States of the European Community or the European Free Trade Association and/or by nationals of such states.**

-> Result of the Open Skies judgements of 2002

## 2. Carrier licencing

2 types of authorisations required for **commercial** passenger, cargo or mail operations:

- Safety certification (air operator certificate, AOC)
  - Appropriate organisation and supervision of operations, ground handling and continuing airworthiness management
- Economic licencing (air carrier licence)
  - Financial fitness
  - Managerial capabilities
  - Insurance requirements
  - **Nationality requirements**

## Carrier licencing: int'l law

- ICAO Annex 6 contains SARPs on air operator certification
  - Air Operator Certificate (AOC)
    - Authorisation (and condition) to engage in commercial air transport
    - Demonstration by the operator of certain organisational, operational and airworthiness standards -> **safety certification**
    - Delivered by the State of the Operator, i.e. the State in which the operator has its principal place of business
    - Recognition by other contracting States if AOC issued under standards at least equal to standards of Annexes 6 and 19
- > Certification of compliance with safety requirements only; no international provisions on *economic* licencing**

# Carrier licencing: USA

- Economic authority
  - DOT
  - "fit, willing, and able" to conduct commercial airline operations
  - Managerial capabilities
  - Financial capabilities
  - Insurance coverage
  - **Nationality requirements**  
49 U.S.C. 40102 (a)(15):  
“[...] A corporation or association organized under the laws of the United States or a State [...] of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 percent of the voting interest is owned or controlled by persons that are citizens of the United States.”

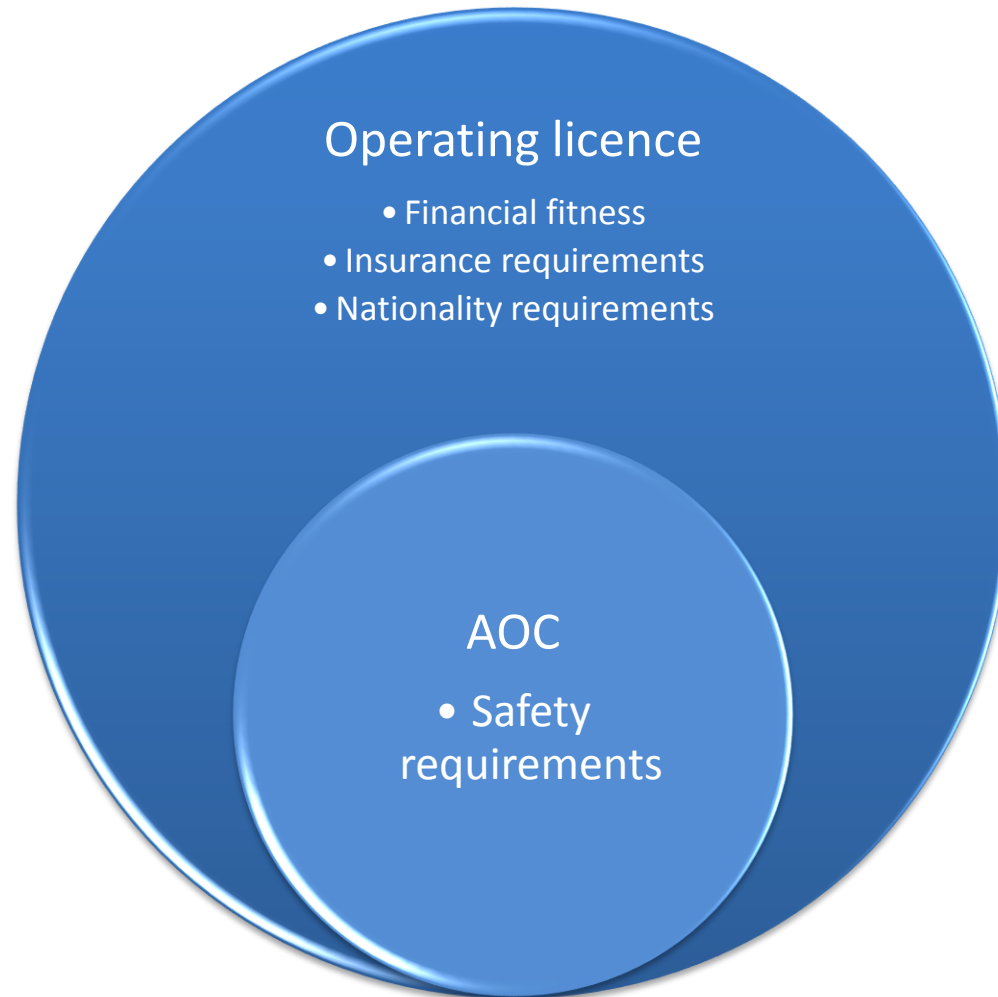
## Carrier licencing: USA (cont'd)

- Safety authority
  - FAA
  - Air Carrier Certificate
  - = AOC

# Carrier licencing: EU

- Operating licence
  - Governed by Reg 1008/2008
  - Granted by Member States to their carriers
  - Economic & safety authority – conditions (Art 5):
    - Valid AOC (= safety)
    - Financial fitness
    - Insurance coverage
    - **Nationality requirements**
      - **Principal place of business** in the Member State of licencing
      - **Ownership & control**: “Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party”

## Carrier licencing: EU (cont'd)



## Carrier licencing: EU (cont'd)

- Reg 1008/2008 enables holders of operating licences to service any and all routes within the EU, without any prior authorisation being required (Art 15)

=> Full traffic rights within EU (1st-9th freedoms)



# **NATIONALITY REQUIREMENTS: CONCEPTS AND CONDITIONS**

1. Purpose
2. Substantive ownership
3. Effective control
4. Principal place of business

# 1. Purpose

Why nationality requirements (O&C) in bilaterals and in licencing?

- “double-pronged citizenship purity test, quantitative (‘substantial ownership’) and qualitative (‘effective control’)” (HAVEL)
- Originally: national security
- Today essentially: economic protectionism



## 2. Substantive ownership

- No definition in bilaterals – no definition in EU law
- Generally understood as meaning a  $> 50\%$ -stake
- Some states have adopted legislation defining substantive ownership
  - USA:  $> 75\%$ -stake



### 3. Effective control

- No definition in bilaterals
- Factual condition, to be appreciated on a case by case basis
- “[...] the power, direct or indirect, actual or legal, to set policy and direct or manage the execution thereof” (VAN FENEMA)
- “[...] all or a percentage of the Board members, Chairmen, CEOs etc. having to be nationals and/or residents of the country concerned” (VAN FENEMA)



## Effective control (cont'd)

- Under EU law – Reg 1008/2008
  9. 'effective control' means a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:
    - (a) the right to use all or part of the assets of an undertaking;
    - (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking;

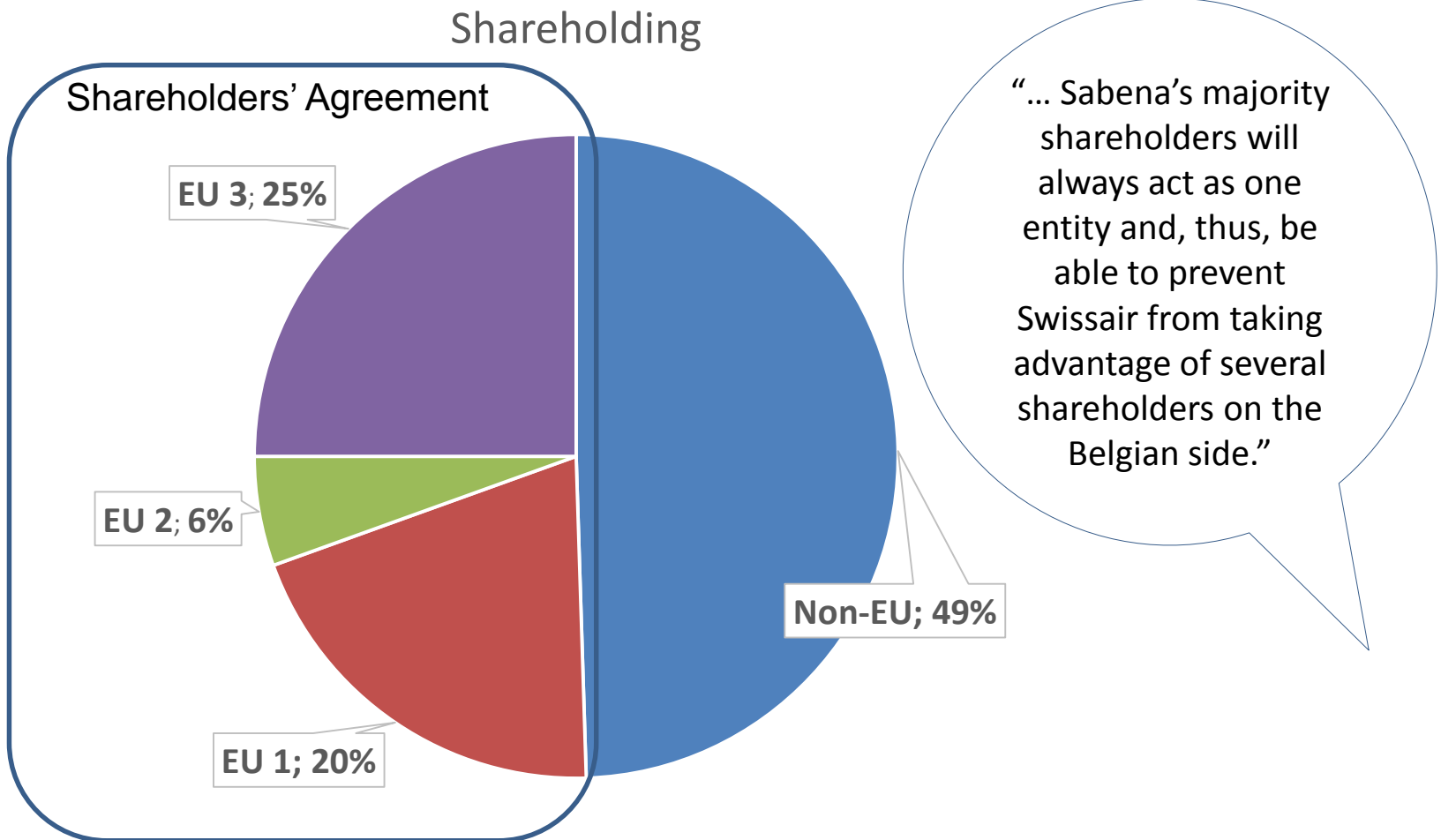
# Swissair/Sabena decision, 19.07.1995, 95/404/EC



Swissair to take a 49.5%-stake in Sabena, cooperation agreement + loan => EC Commission **approved**

- O&C in Reg 2407/92 is the same concept as O&C in bilaterals
- Substantial ownership = at least 50% + 1 share in equity capital
- Effective control: ultimate decision-making power in the management of the airline:
  - Business plan
  - Annual budget
  - Major projects

# Swissair/Sabena decision, 19.07.1995, 95/404/EC (cont'd)



# Swissair/Sabena decision, 19.07.1995, 95/404/EC (cont'd)



Board of directors = management body -> composition is of key importance

- 12 members
  - 6, all EC citizen, appointed by Belgian shareholders
  - 5 appointed by Swissair
  - Chairman to be proposed jointly; if no agreement, Swissair's proposal prevails, subject to the shareholders' meeting vote (Belgian majority!)



# Swissair/Sabena decision, 19.07.1995, 95/404/EC (cont'd)



## Cooperation agreement

- Comprehensive cooperation on network, marketing and sales, reservation systems, etc
- Reg 2407/92 does not prevent EC carriers from cooperating commercially with non-EC carriers on a long-term strategic basis
- In terms of effective control, only the **transfer of decision-making powers** would be problematic

# Swissair/Sabena decision, 19.07.1995, 95/404/EC (cont'd)



## General considerations

- Belgian State has possibility of reversing the entire transaction by exercising a call option on all shares held by Swissair!
- General context of relations between Switzerland and the EC

## 4. Principal place of business

- Replaces the O&C requirement in more liberal bilaterals
- Under Reg 1008/2008, the carrier shall have its PPB in the state it holds its operating licence from; definition:

‘principal place of business’ means the head office or registered office of a Community air carrier in the Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised.

Place where are exercised:

- The principal financial functions
- The operational control

# THE FUTURE

- Towards a loosening of the O&C requirements?
  - 2014, Commissioner Kallas: “outdated and harmful”
  - 2003 ICAO Worldwide Air Transport Conference: more liberalisation -> transitional and liberal designation clauses
  - Since 2002 EU horizontal agreements with a community O&C clause
- But: Middle-Eastern carriers...
  - Challenges in the EU and the US by competitor airlines
  - Ongoing EU Commission investigations on Etihad’s acquisition of minority stakes in Air Berlin, Alitalia, Air Serbia
  - FOCA investigation in Switzerland on Etihad’s acquisition of a minority stake in Darwin (re-branded as “Etihad Regional”) -> green light

# CRITICISM AND THOUGHTS



- O&C is a form of protectionism unique to air transport; no such restrictions in other industries
- What is O&C exactly protecting?
  - Security? ...
  - Continuity of air transport as an essential public service? But: without foreign investments many airlines would have gone bankrupt
  - European economy by keeping airline's profits for the sole benefit of Europeans? But: why, in that case, allowing foreign shareholding up to 50%?
- Effective control requirements mostly ineffective; a foreign “saver”, even if only EU nationals sit on the airline's board, will more than often have a strong influence on the carrier's decisions

- Who is insisting on O&C requirements to be kept? The competitors of the airlines benefitting from foreign investments...

Thank you for your attention!

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