II

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Interpretative guidelines on Regulation (EC) No 1008/2008 of the European Parliament and of the Council — Rules on Ownership and Control of EU air carriers

(2017/C 191/01)

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1. **INTRODUCTION**

1. Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community [1] (hereafter 'the Regulation') is the basic legal act that organises the internal market in aviation [2]. This Regulation regulates the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services.

2. The Regulation establishes the concept of 'Community air carrier' (hereafter 'EU carrier') as the 'air carrier with a valid operating licence granted by competent licensing authority in accordance with Chapter II' (Article 2(11) of the Regulation). An EU carrier is entitled to operate any intra-EU air services (Article 15(1) of the Regulation), in particular the transport of passengers, cargo and mail without further authorisation.

[1] OJ L 293, 31.10.2008, p. 3.

[2] The Regulation is applicable to third countries where it has been incorporated into agreements concluded with the EU. At present, this is the case of the EEA Agreement (as regards Norway, Iceland and Liechtenstein) and the EU-Switzerland Air Transport Agreement (OJ L 114, of 30.4.2002). Similar agreements may be negotiated/apply in future. For the purposes of the interpretation of Article 4(f) provided in the present Guidelines, Switzerland, Norway, Iceland and Liechtenstein are to be considered as EU Member States and their nationals as nationals of EU Member States.

3. The Regulation sets the conditions for obtaining an operating licence as an EU carrier, including a nationality requirement. Article 4 of the Regulation establishes that 'An undertaking shall be granted an operating licence by the competent licensing authority of a Member State provided that: (…) (f) 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;'.

4. The two elements, i.e. ownership in excess of 50 % as well as effective control, by Member States or their nationals are distinct and cumulative, i.e. both have to be met at all times.

5. Third countries and their nationals are not eligible for majority owning or effectively controlling EU carriers, unless the EU has agreed otherwise with the third country concerned, i.e. through a corresponding (in general reciprocal) relaxation of ownership and control requirements. In case a carrier is no longer (more than 50 %) owned or effectively controlled by a Member State and/or by nationals of Member States it is no longer entitled to hold a license and could thus no longer take advantage of the liberalisation of the EU's aviation market.

6. The responsibility of assessing whether the provisions on ownership and control are complied with lies in the first place with the competent licensing authority, which is the authority of a Member State entitled to grant, refuse, revoke or suspend an operating licences in accordance with Chapter II of the Regulation (Article 2(2) of the Regulation). The Commission, however, has also the possibility to carry out its own assessment on the basis of the information obtained and may take a decision to request competent licensing authority to take the appropriate corrective measures or to suspend or revoke the operating license (Article 15(3) of the Regulation).

7. Ownership and control requirements for obtaining an operating licence, based on nationality criteria, are a common feature in the international aviation sector and can be found in other legislations outside the EU. Besides, requirements of the kind are normally included in the bilateral air service agreements too as a condition to be granted traffic rights. Such requirements are nowadays primarily designed to ensure that traffic rights exchanged under such agreements will be exploited effectively for the benefit of the participating parties and will not be exercised, either directly or through subsidiaries, by undertakings [1] from countries that are not party to the agreement. Moreover, they prevent such undertakings from operating services wholly within a State or group of States through subsidiaries established in that State or group of States.

8. On 7 December 2015, the Commission adopted an Aviation Strategy for Europe meant to ensure that the EU Aviation sector remains competitive and reaps the benefits of a fast-changing and developing global economy and aviation market [2].

9. The Aviation Strategy identified the need to bring more clarity for investors and air carriers alike on the application of the Regulation with respect to the provision on ownership and control. The Commission, in line with the wish expressed by the Member States and other stakeholders on several occasions, decided to adopt interpretative guidelines on the application of this provision.

10. Over the last years, the Commission has conducted several enquiries into cases where a third country (i.e. non-EU) investor acquired a significant stake in an EU carrier, with a view to determining compliance with the requirements of Article 4(f) of the Regulation.

11. The Commission has only adopted one formal decision on the compliance with the provisions on ownership and control following the investment of Swiss Air in Sabena (hereinafter 'Swissair/Sabena decision' [3]). This decision was adopted on the basis of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers [4] (hereafter 'Regulation 2407/92'), the predecessor to the Regulation. The Commission found that under the terms of the agreement between the Belgian State and Swissair, Sabena complied with the requirements on ownership and control established in Regulation 2407/92. The Commission considered that the criteria of ownership and effective control must be interpreted and applied in the overall context of Regulation 2407/92. In particular, each and every individual case must be assessed in the light of the objective of safeguarding the interests of the Union's air transport industry which implies, in particular, that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Union's liberalised internal air transport market. In other words, such companies may benefit from the internal market, by way of participation in an EU carrier, only within the ownership and control limits set out in the Regulation.

(1) Throughout the present Guidelines, the Commission will use the term 'undertakings' within the meaning defined in Article 2(3) of the Regulation.

(2) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2015) 598 final of 7.12.2015.

(3) Commission Decision 95/404/EC of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena) (OJ L 239, 7.10.1995, p. 19).

(4) OJ L 240, 24.8.1992, p. 1.

12. Further, the Commission stated 'that any evaluation of the consequences of a substantial investment by a third-country air carrier in a Community carrier should also take into account the broader context in which that investment is taking place and, in particular, the Community's aviation relations with the third country in question' ([1]). In that particular case the broader context was marked by the ongoing negotiations between the Community and Switzerland in order to lift the existing restrictions on ownership and control on a reciprocal basis. In view of this broader context, the Commission considered that the agreements between the Belgian State and Swissair 'appear essentially to be of a transitional nature' ([2]).

13. The purpose of these guidelines is to provide guidance for the assessment of the compliance of an undertaking applying for or holding an operating licence with the Regulation's provision on ownership and control, based on the experience gained by the Commission in its assessments of cases over the past years. It also takes into account the analysis carried out in the Swissair/Sabena decision, as well as best practices developed by the competent licensing authorities at national level. These guidelines set out how the Commission understands the Regulation on this point and how it considers it should be applied. They are not intended to create new legal obligations and are without prejudice to the competence of the Court of Justice of the EU for its binding interpretation.

2. THE PROCEDURAL ASPECTS

14. Chapter II of the Regulation contains provisions on the operating licence. Article 3(2) of the Regulation provides that 'the competent licensing authority shall not grant or maintain an operating licence where any of the requirements of this Chapter are not complied with'. Ownership and effective control by Member States or their nationals form part, among others, of the requirements that must be met for obtaining and maintaining the licence. The responsibility for assessing whether this requirement (both component parts) is met lies primarily with the competent licensing authority which grants the operating licence to the air carrier.

15. According to Article 8(2) of the Regulation 'the competent licensing authority shall closely monitor compliance with the requirements of this Chapter'. According to Article 8(7) of the Regulation 'in relation to Community carriers licensed by it the competent licensing authority shall decide whether the operating licence shall be resubmitted for approval in case of change in one or more elements affecting the legal situation or a Community air carrier and, in particular, in the case of a merger or takeover'. In accordance with Article 8(5) EU air carriers are to notify in advance these changes to the competent licensing authority.

16. A competent licensing authority might be confronted with a request for a licence (or the scrutiny of an existing license) in circumstances in which another undertaking, belonging to the same group as the undertaking concerned by the case, already holds an operating license, issued by another competent licensing authority. The authority dealing with such a case should take due account of the assessment conducted by the other authority, in particular where the relevant ownership structure is the same. However, it remains obliged to itself assess the merits of the case, in accordance with the provisions of Chapter II of the Regulation. As a matter of good practice, an authority that has certain doubts or questions in respect of the previous assessment should contact the other authority involved in order to obtain more information or discuss the matter

17. As regards possible scrutiny by the Commission, reference is made to Articles 15(3) and 26(2) of the Regulation.

18. According to Article 15(3) 'If the Commission […] finds that the operating licence granted to a Community air carrier is not in compliance with the requirements of this Regulation it shall forward its findings to the competent licensing authority which shall send its comments to the Commission within 15 working days.

    If the Commission, after examining the comments of the competent licensing authority, maintains that the operating licence is not compliant, or no comments have been received from the competent licensing authority, it shall, in accordance with the procedure referred to in Article 25(2), take a decision, to request the competent licensing authority to take the appropriate corrective measures or to suspend or revoke the operating licence. The decision shall set a date by which the corrective measure or actions by the competent licensing authority shall be implemented. If the corrective measures or actions have not been implemented by that date the Community air carrier concerned shall not be entitled to […] [operate intra-EU air services]'.

19. Article 26(2) of the Regulation provides that 'the Commission may obtain all necessary information from Member States, which shall also facilitate the provision of information by air carriers licensed by their competent licensing authorities'.

([1]) See point XI, p. 27 of Swiss/Sabena decision.
([2]) Swissair/Sabena decision, point XI.

3. **BURDEN OF PROOF**

20. As the second subparagraph of Article 8(1) makes clear, undertakings that request the issuance of a license bear the burden of proving compliance with Article 4(f) and the other requirements of the Regulation. The same applies where, after the licence has been issued, the competent licencing authority has reasons to verify whether those requirements continue to be fulfilled.

21. It is up to the interested undertaking to make sure that sufficient proof is made available to the competent licensing authority. In this context, it needs to be borne in mind that Article 10(1) compels that authority to 'take a decision on an application as soon as possible, and not later than three months after all the necessary information has been submitted, taking into account all available evidence'. This means that, without prejudice to the authority's duty to conduct the procedure in good faith, an undertaking has every interest in submitting evidence available to it as soon as possible, failing which it may have its request for a license rejected.

4. **NATIONALITY**

22. Only natural persons can have the nationality of a Member State. In the case of an undertaking which it is owned and/or effectively controlled partially or fully by one or more intermediate entities that are not natural persons, the Commission considers that the nationality requirement of Article 4(f) of the Regulation is to be understood as relating to the natural persons who own and/or effectively control those entities at the final level of the ownership and control line.

23. The Regulation establishes in Article 4(f) that '[…] nationals of Member States [shall] own more than 50 % of the undertaking and effectively controls it […]'.

24. Certain difficulties may arise when the persons concerned have more than one nationality and the nationality of a Member State is not from origin. It is in principle for each Member State to lay down the conditions for the acquisition and loss of its nationality. However, as confirmed in settled case-law of the Court of Justice of the EU ([1]), when exercising their competence in the area of nationality, Member States must have due regard to Union law. In other words, the conditions and procedures for obtaining and forfeiting citizenship of the Member States are regulated by the national law of the individual Member States, subject to respect for Union law.

25. Member States are to use their prerogative to award nationality in the spirit of sincere cooperation with other Member States and the EU (Article 4(3) TEU). Account should be taken of the norms and obligations by which they are bound under international law and the criteria upon which Member States traditionally build their nationality laws. These principles require in particular the existence of a genuine connection between the applicant and the country or its nationals.

5. **OWNERSHIP**

5.1. **General approach**

26. As regards the ownership, Article 4(f) of the Regulation provides that an undertaking shall be granted an operating licence by the competent licensing authority, provided that 'Member States and/or nationals of Member States own more than 50 % of the undertaking'.

27. The Commission considers that this ownership requirement is complied with if at least 50 % plus one share of the capital of the undertaking concerned is owned by Member States and/or nationals of Member States.

28. In this context the Commission understands capital as the equity capital of an undertaking. It is thus crucial for the assessment of compliance with the ownership requirement to establish which capital of the undertaking qualifies as equity capital.

29. In the Sabena/Swissair decision the Commission held that the question whether a particular type of capital qualifies as equity capital can only be answered on a case-by-case basis in the light of all relevant circumstances. If, however, capital does not confer upon its holders any of the following two rights to an appreciable extent, it must generally be disregarded in determining the ownership situation of an undertaking under Article 4(f):

   (a) the right to participate in decisions affecting the operations of the undertaking; and

   (b) the right to obtain a share of the residual profits or, in the event of liquidation, in the residual assets of the undertaking after all other obligations have been met (in other words, the shares reflect the risk and rewards of normal business).

([1]) Case C-135/08, 2.3.2010, Rottmann, paragraphs 39, 45, 48.

30. While the competent licensing authority should always analyse in detail complex structures, the Commission considers that a detailed analysis is in particular required when the following issues arise:

(a) existence of different classes of shares with different values and characteristics exist;

(b) existence of warrants or options that risk rendering ineffective the 'equity capital' attributes of a class of shares ([1]);

(c) existence of institutional investors where the final beneficial owner, in line with paragraph 44, cannot be readily identified.

31. As emerges from paragraph 22 above, the Commission considers that the ownership in an undertaking, the shares in which are owned by another entity (other than a natural person; hereafter the 'intermediate entity'), must be assessed in light of the nationality of the persons (or the identity of the States) holding the shares in that other entity.

32. In this context, the considerations set out in paragraphs 22-24 above apply, in the same way, in respect of shares held in the intermediate entity.

33. Specific problems may arise where both the stake held by EU shareholders in the intermediate entity and the stake held by the latter in the air carrier represent less than 100 % of the respective shares.

34. The following case may serve as an example: EU shareholders own 55 % of company A (the rest being owned by third countries or third country nationals; hereinafter: third country shareholders), and company A in turn owns 60 % of carrier B, the remaining 40 % shareholding in carrier B being owned by third country shareholders.

35. Here, the question is whether EU shareholders 'own more than 50 % of the undertaking'.

36. As explained in paragraph 28 above, 'ownership' translates into rights to participate in decisions affecting the operations of the undertaking, as well as pecuniary rights, namely to obtain a share of the residual profits or, in the event of liquidation, in the residual assets of the undertaking after all other obligations have been met.

37. As regards the right to participate in decisions affecting the operations of the undertaking, a situation such as the one described above should normally be considered compliant with Article 4(f) of the Regulation, assuming that all shares involved carry the same voting rights and that no specific arrangements prevent the EU shareholders from controlling the votes company A exercises in respect of B, thanks to its majority shareholding.

38. Insofar as pecuniary rights are concerned, account should be taken of the fact that, even where the relevant stake in the carrier is held directly by EU shareholders, and not via an intermediate entity, such rights may be subject to specific internal arrangements. Those may include privileges of third country shareholders compared to EU-shareholders. As explained in Swissair/Sabena, such situations do not necessary disqualify under Article 4(f) of the Regulation, provided that the (pecuniary) rights in question lie with the EU shareholder 'to an appreciable extent'.

39. The same principles should apply where pecuniary rights are affected by the fact that the participation of the EU shareholders in the carrier passes through an intermediate entity and that the participation at each stage represents less than 100 % of the share capital.

40. Should, in the above example, profits distributed by the carrier B and proceeds from the residual assets in case of B's liquidation accrue to EU shareholders in the proportion to the diluted shares (where all the shares in company A and in the carrier B are of the same class), the pecuniary rights may still be considered sufficient for the purposes of Article 4(f) of the Regulation.

41. Cases of the like should however be considered individually, taking account of all circumstances, and in particular all the arrangements affecting the relevant rights and obligations.

42. In order for the above assessment to be carried out, licence holders or applicants should provide evidence to the licensing authority on the rights attached to different classes of shares as well as on the final beneficial owner of the shares.

([1]) The existence of options or warrants that may alter the balance of shareholdings at some point in the future will not be relevant to the issue of ownership in the present. However, there may be certain complex structures where the existence of options will risk rendering ineffective the 'equity capital' attributes of a class of shares. These will merit close examination. In any event, options may be an immediate issue in relation to control if their existence confers on a minority shareholder an ability to impose its demands on the undertaking.

5.2. **Ownership issues in publicly quoted undertakings and institutional investments**

43. Particular challenges for the assessment of the ownership requirement could arise in relation to undertakings which are publicly quoted on the stock market or owned by investment institutions, as shareholdings may vary from day to day and there may be several stages of ownership. The undertaking should at every stage be able to demonstrate that the majority of shares are owned by EU shareholders.

44. Where shares are held by a nominee, trust, fund or any other institutional investors, the ownership requirement may be satisfied where the nominee or trustee or other registered owner is a Member State or a national of a Member State. Account should however be taken of all elements that may point to a different person being the owner from an economic point of view, i.e. the final beneficiary of the rights referred to above. This will in particular depend upon the agreements or other arrangements committing such institutional investors.

6. **EFFECTIVE CONTROL**

6.1. **General approach**

45. Article 4(f) of the Regulation stipulates that an undertaking shall be granted an operating licence by the competent licensing authority provided that 'Member States and/or nationals of Member States […] effectively control' the undertaking.

46. The notion of effective control is defined in Article 2(9) of the Regulation as:

    '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;'.

47. As explained in the Swissair/Sabena decision, this provision requires an assessment of the position of Member States and/or their nationals in respect of whether, on balance, they have a decisive influence over the management of the undertaking concerned in a way that goes beyond the influence of the third country shareholders. This analysis is informed by the possibilities available to the EU shareholder to positively influence strategic business decisions of the undertaking.

48. Strategic business decisions pertain notably to the appointment of senior management, the adoption of the budget and/or of the business plan and regarding major investments or market-specific rights.

49. In this context, one would first have to identify where such decisions are taken, and on which terms. This implies an analysis of the undertaking's corporate governance, to be conducted in an overall view of the functioning of the undertaking.

50. In a second step, other issues capable of influencing the decision-making on important strategic business matters should be considered. These issues include shareholder rights, financial links and commercial cooperation between the undertaking and any third country shareholder. More detailed guidance on these assessment criteria will be provided below. However, it is impossible to draw up an exhaustive list of elements potentially relevant to the analysis in a given case. Therefore, elements other than those mentioned here may be relevant too, depending on the circumstances of the case at hand.

51. As explained in the Swissair/Sabena decision, effective control has to be exercised by Member States or their nationals exclusively. This would obviously not be the case where Member States or their nationals merely have veto rights and no rights that allow them to positively influence the management of the undertaking concerned.

52. A number of factors may contribute to allowing positive influence by EU shareholders, such as initiative powers or mechanisms of early or privileged access to information within the undertaking.

53. The general principles outlined above must be applied having regard to all the considerations of fact or law involved. Each and every individual case must be assessed on its own merits.

54. Cases in which an analysis of Article 4(f) of the Regulation is needed often also involve the application of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1] ('Merger Regulation'), having regard to the terms of the latter Regulation. Since the definitions of control in the respective Regulations present certain similarities, it appears useful to add the following clarifications.

55. First, it is important to note that, in respect of the EU shareholder, 'joint control' for the purposes of the Merger Regulation and 'effective control' within the meaning of the Regulation are not mutually exclusive, as emerges from the Swissair/Sabena decision.

56. Secondly, the control requirement of Article 4(f) of the Regulation is not met where the third country shareholder detains sole control over the undertaking [2]. In such case, the undertaking cannot, by definition, be effectively controlled by EU shareholders within the meaning of the Regulation.

57. Since the issues raised by the Merger Regulation, on the one hand, and the ownership and control requirement of the Regulation, on the other hand, present a number of similarities, notwithstanding the differences between the two regimes, the Commission assesses, where relevant, the cases in parallel under both regimes. To this end, the Commission services in charge will of course cooperate closely.

6.2. **Assessment criteria**

58. No guidance can anticipate upon all possible constellations of control of an undertaking, having regard also to the differences between national rules on corporate governance. Any assessment has to be done on a case-by-case basis, looking at the legal and factual position in each individual case.

59. Against this background, the present guidelines provide some general principles for the assessment and highlights certain issues that may give rise to concerns, requiring a more detailed analysis against the criterion of effective control [3].

6.2.1. *Corporate governance*

60. The first step in the assessment of effective control consists in analysing the corporate governance of the undertaking. Corporate governance in this context means the processes and procedures through which the undertaking adopts decisions relevant for the conduct of its business.

61. The analysis of corporate governance should consider both the legal and the factual elements at hand.

62. The analysis should identify the decision-making bodies of the undertaking, their competences and their composition, relevant rules regarding nomination, election, remuneration and dismissal, the nature of the decisions they take, their decision-making procedures, including quorum requirements and voting rules (majorities, consensus), any prerogatives accorded to other bodies (regarding, for example, proposals, nominations, consultation, binding or non-binding opinions, recommendations, consent).

63. This mapping should cover all decision-making bodies, in particular the assembly of shareholders, the executive body (e.g. Board of Directors, Management Board), the controlling bodies (e.g. Supervisory Board), key personnel (management staff entitled to adopt decisions relevant for the conduct of the business) and internal committees (advisory or not).

64. The analysis should evaluate how Member States and/or their nationals are represented in the decision-making bodies and how their rights available in this context allow them to determine the strategic decisions, having regard to the procedure under which they are to be adopted. In this context, the analysis should also look at the quorum required for decision-making.

65. In respect of decision-making, the analysis of veto rights of any third country shareholders is of particular importance. Extensive veto rights for those shareholders on matters important for the running of the business might impact the EU shareholders' ability to exercise effective control over the undertaking. A closer global assessment of the respective rights of the EU and third country shareholders would thus have to be conducted on a case-by-case basis.

[1] OJ L 24, 29.1.2004, p. 1.

[2] This situation arises where, within the meaning of Article 3(1)(b) of the Merger Regulation, only 'one' person acquires control over the undertaking.

[3] For the assessment of joint control under the Merger Regulation, the provisions of the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1) are relevant.

66. The ability of a given shareholder to veto certain decisions does not necessarily imply that effective control lies with this shareholder. It should be verified whether these veto rights affect only certain decisions of limited importance, or rather the main strategic decisions. The question is whether, in an overall assessment of the various shareholders' rights, the Member States or their nationals have decisive influence over strategic business decisions, as explained in point 47 above. Such an overall assessment, based on multiple factors, should be done on a case by case basis.

67. A third country shareholder can have veto rights without this necessarily leading to the loss of effective control of the EU shareholder.

68. One possible scenario is where veto rights of third country shareholders are necessary and proportionate to the objective of protecting the value of the minority investment. Typically, such veto right will relate to amendments to the articles of association or a similar constitutive document, an increase or reduction of capital, an issuance of bonds convertible in shares, a change of rights attached to shares, to listing or public offering, to a distribution of dividends, to a cessation of business or a substantial change of business, to decisions on merger, demerger or liquidation. As such, this does not imply that the EU shareholders do not detain effective control.

69. A more in-depth assessment may have to be conducted where veto rights of the third country shareholders concern other matters, in particular decisions likely to significantly influence or to block the conduct of the undertaking's business, such as asset acquisitions, investments, an extension or acceptance of financial instruments like guarantees or loans, contracts, business transactions with persons affiliated to the undertaking or one of the shareholders.

70. Elements that may give rise to such an in-depth assessment, depending on the object of the decision to be taken, are for example: casting votes, decisions subject to consensus, a right of the third country shareholders to nominate persons for certain (important) positions, a requirement that (important) decisions be preceded by proposals or recommendations by those shareholders, stipulations whereby, at the request of those shareholders, no vote takes place, 'vote en bloc', etc.

71. As regards decisions taken in the shareholder meetings of the undertaking, the shareholder structure, attendance of the shareholder meetings and voting patterns in these meetings may have to be taken into account. In cases where the ownership of the undertaking is widely spread and a single third country shareholder is one of the largest shareholders, that shareholder might be in a position to have its proposals voted, even with a share significantly below 50 %. The attendance rate of Member States' shareholders at the shareholder meetings and the voting patterns of those shareholders may therefore need be assessed, in order to determine whether, de facto, they effectively control the undertaking.

72. In particular, a stake in an undertaking held by a third country or a third country national of more than 30 % may, as a general rule, require an in-depth assessment by the competent licensing authority. In cases where the ownership of the undertaking is widely spread and a single third country shareholder is one of the largest shareholders, a lower stake might also require an assessment.

73. Whether persons occupying key positions within the undertaking have links to the third country shareholder may be relevant, too, in this context. The same is not true for the nationality of these persons, however. Their nationality has no own indicative value for the purposes of determining whether the undertaking is effectively controlled by Member States and/or their nationals, all the less in a global industry such as aviation. Relevant can only be whether Member States and/or their nationals are in control of the processes leading to the adoption of important decisions, among which may be the appointment or dismissal of key personnel.

6.2.2. *Shareholders' rights*

74. An assessment of the shareholders' rights in the context of the assessment of effective control is necessary, because extensive shareholders' rights held by third country shareholders could lead, de facto, to a situation where the latter, rather than the EU shareholder(s), effectively control the undertaking, possibly via the influence that the former exert on the latter. This may for example concern the ability to obtain concessions on matters which, on their face, and having regard to the corporate governance agreed upon, appear to be controlled by the EU shareholder(s).

75. Some examples of shareholders' rights that generally deserve closer scrutiny are described below.

6.2.2.1. Right to veto a transfer of shares

76. A right of a third country shareholder to veto the transfer of shares held by a Member State shareholder in the undertaking should be examined in detail. It is common that, following the investment by a third country shareholder, there is a period where a transfer of shares by either party is not permitted or is conditional upon the agreement of the other party. As long as this period does not exceed the usual practices of the sector, it can normally be seen as a safeguard for the stability of the investment and hence as not affecting the position in terms of effective control. Even in such cases, however, specific circumstances may require closer scrutiny. In particular, where the limitation applies only in favour of the third country shareholder, this may indicate an imbalance, in the sense that the EU shareholders may depend to an important extent on him, whereas the opposite may not be true.

6.2.2.2. Pre-emption rights

77. A pre-emption right is a right under which an existing shareholder is given the first option in case the other shareholder wants to sell its shares. Pre-emption rights are common business practice and, if they do not go beyond what is necessary to protect shareholders' investment, do not raise any particular issues with respect of effective control. However, some forms of pre-emption rights might have an effect similar to a veto right regarding the transfer of shares. This is likely to be the case where the third country shareholder has the right to fix the sales price for the shares in question.

6.2.2.3. Right of the third country shareholder to sell its shares

78. In order to protect the value of their investment and to protect their influence in the undertaking against dilution, minority shareholders frequently negotiate some form of a put option. Such a put option gives the minority shareholder concerned the right to sell its shares back to the undertaking (the air carrier) or to sell them to the other shareholders upon the occurrence of a specified event at a specified price. Should this be the case, such pre-emption rights would have to be taken into account in the overall assessment of effective control.

79. Where such put option is conferred upon a third country shareholder, this may impact effective control by the EU shareholder(s), as the exit of the former could financially and commercially destabilise the undertaking. This could create a situation in which the third country shareholder has leverage over the EU shareholder(s) to an extent that the latter fails to detain effective control.

80. The impact of the put option will depend on the applicable conditions which should therefore be carefully scrutinised. A very far-reaching put option allowing the third country shareholder to call on it in a large number of events, may enable the latter to obtain concessions from the undertaking or the remaining shareholders on matters that the third country shareholder normally cannot decide or veto. No particular issues arise where the put option is limited to what is necessary and proportionate to protect the third country shareholder against dilution of its shares, whereas other cases require closer scrutiny.

6.2.2.4. Right to purchase additional shares

81. Call options or conversion options enable the third country shareholder to either buy more shares in the undertaking or to convert debt or quasi-equity into shares. Any additional voting or other rights that that such shareholder would acquire as a result of the exercise of a call option or of a conversion option should be scrutinised in terms of their potential impact on effective control of the undertaking.

6.2.2.5. Conditions for the investment

82. If a third country shareholder makes its investment subject to conditions, these may need to be scrutinised in detail in terms of their impact on effective control. While no particular issues arise as long as the conditions are necessary and proportionate to the protection of the value of the investment, other conditions may require more in-depth scrutiny.

83. With regard to conditions related to regulatory clearance or other matters that can be considered as falling within the remit of public policy, they will normally not have an impact on effective control.

84. Conditions imposed by the third country shareholder related to the undertaking's financial matters, such as auditing of the annual accounts, solvency, debt-restructuring or consultation on key matters prior to the finalisation of the investment, should normally not have an impact on effective control, as they concern the financial situation of the undertaking before the investment takes place and thus the value of the investment for the third country shareholder.

85. Investment conditions related, in particular, to the business plan of the undertaking, to the appointment of key personnel or to the conclusion of a cooperation agreement might entirely or partially limit, *de jure* or *de facto*, the powers of the decision-making bodies of the undertaking. The conditions imposed should be taken into account in the overall assessment of the effective control. There may be cases in which important strategic decisions are imposed by the third country shareholder as conditions for its investment, in such a manner that on-going influence within the undertaking's decision-making bodies, as available to EU shareholders in accordance with the agreements made, becomes deprived of practical effect. This issue has to be considered in the overall context, in light in particular of the precise means and procedures through which the EU shareholder is entitled to exercise its influence within the undertaking.

6.2.3. *Financial links between the undertaking and the third country shareholder*

86. The question whether the financial contribution of the third country shareholder results in absence of effective control by Member States' shareholders has to be assessed in light of the financial dependence such contribution implies in the concrete case. Such dependence may mean that the latter is de facto deprived, in whole or in part, of the capability to influence the operation of the undertaking via its decision-making bodies. Typical to such situations are cases in which, due to the dependence of the undertaking from financing provided or maintained by the third country shareholder, the latter is in a position to obtain concessions in strategic areas, even though, legally, the Member States' shareholder would have the means to refuse such concession.

87. To assess the degree of financial dependence, it should first be determined whether the third country shareholder contributed to the financing of the undertaking in proportion to its shareholding ([1]). In that case, and unless specific circumstances prevail, it could be considered that the third country shareholder did not gain influence on the operations of the undertaking beyond what is inherent in the rights it holds in respect of the operation of the undertaking, as a consequence of the shares acquired and the agreements made.

88. In this assessment, the level of contribution of the third country shareholder should be compared to the contribution of other shareholders and of sources external to the undertaking. All modes of financing, in the widest sense, should be taken into account, such as capital increase, loans, guarantees, bonds, debt waivers, bails ([2]) and grants. Not only contributions following the investment by the third country shareholder should be taken into account, but also contributions that existing shareholders and external sources provided in preparation for the sale of shares in the undertaking (the sale that resulted in the entry of the third country shareholder).

89. If the third country shareholder contributed to the financing of the undertaking in excess of what corresponds to its shareholding, this would need to be taken into account in the overall assessment.

6.2.4. *Commercial cooperation*

90. Commercial cooperation may consist in an operational cooperation between two undertakings (air carriers), such as code-sharing, or may take the form of a joint venture or the purchase and sale of goods and services between the third country shareholder and the undertaking.

91. To the extent the undertaking is dependent on such cooperation with the third country shareholder, the latter will gain corresponding influence over the former. Therefore, where such cooperation exists, it must be assessed whether the ensuing dependence is such that the EU shareholder can be forced to support strategic decisions by the third country partner.

92. Some cooperation agreements could contain specific decision-making processes through which the two undertakings take decisions concerning this cooperation, in particular in the case of joint ventures.

93. In case the commercial cooperation constitutes a condition for the investment of the third country shareholder, this conditionality should be assessed in light of the considerations set out above.

94. If terminating or breaching the commercial cooperation agreement can trigger the exit of the third country shareholder, such a shareholder right should equally be assessed as described above.

([1]) E.g. an undertaking having a total share capital of EUR 100 million, of which EU shareholders hold a stake of EUR 60 million and third country shareholders a stake of EUR 40 million. The EU shareholders have provided to the undertaking a long-term loan at market conditions of EUR 6 million, which corresponds to 10 % of their equity stake. In order to maintain a balance of the financial links, the third country shareholders therefore may only contribute a maximum additional funding (beyond their capital/equity stake) of 10 % of their equity stake (i.e. EUR 4 million).

([2]) E.g. an investor issuing a guarantee to a bank and the bank therefore is willing to grant a loan.

7. **MONITORING AND POSSIBLE MEASURES EFFECTIVE CONTROL**

95. As regards monitoring of compliance by the undertakings, the minimum legal duties of competent licensing authorities are set out in Article 8(2) of the Regulation. Beyond those duties, the authorities may find it appropriate to verify the situation in terms of shareholdings more frequently, e.g. on a monthly or trimestral basis or even at shorter intervals, depending on the third country shareholding proportion.

96. In this context, undertakings which are publicly quoted on the stock market or owned by investment institutions, in particular, must ensure that there is sufficient information available for the competent licensing authority to be satisfied that they comply with the requirement of Article 4(f) of the Regulation. To this end, undertakings may wish to keep track, in as far as possible, of shares being purchased and sold. Provisions could be included in the undertakings' articles of association or Statutes which permit the directors to control the nationality of shareholders, and to require nationality declarations by significant shareholders.

97. The third country shareholder is responsible for making available to the competent licensing authority all the information requested during the assessment of the licence to prove that the requirements of Article 4(f) of the Regulation are met (cf. Section 3 above).

98. The competent licensing authority must ensure confidentiality of all business secrets received during the assessment.

99. As far as 'effective control' is concerned more particularly, the following additional considerations apply.

100. In the course of its activities, the competent licensing authority might come to the conclusion that certain elements detected do not entail the loss of effective control by Member States or their nationals but that possible future developments related to these elements could lead to that consequence. In those cases, the competent licensing authority may have to monitor, in the context of its regular scrutiny, i.e. of compliance of the undertaking concerned with the requirements of the Regulation, the evolution in particular of these elements. The aim is for that authority to become aware as soon as possible of any situation in which the EU shareholder(s) no longer detain(s) effective control and the requirements of the Regulation would therefore no longer be met.

101. Where the competent licensing authority has certain doubts of this kind, it would need to follow them up. Where they cannot be dispelled otherwise, the authority would need to bring them to the attention of the undertaking concerned.

102. If as a result the undertaking concerned decides to enact certain changes, with respect to its corporate governance or other relevant aspects a notification or re-notification under the Merger Regulation may become necessary in accordance with the provisions of that Regulation.