



At the core of airline foreign investment restrictions: A study of 121 countries

Jan Walulik

Centre for Antitrust and Regulatory Studies, Faculty of Management, University of Warsaw, Szurmowa 1/3 St., 02-678 Warsaw, Poland



ARTICLE INFO

Article history:

Received 3 February 2016

Received in revised form

3 April 2016

Accepted 1 May 2016

Available online 24 May 2016

Keywords:

Airline ownership

Airline establishment

Airline liberalization

Airline privatization

Investment restrictions

Foreign investment

ABSTRACT

There is a growing discrepancy between the success of economic liberalization in international air services and the remaining limits to trans-border airline investment, especially the constraints embedded in national airline establishment regimes. The discussion on this problem should be backed with adequate legal research concerning the actual state of regulations and government actions regarding airline investment. The aim of this article is, therefore, to deliver practical information on these limitations worldwide, along with careful annotations. The paper portrays the world-wide scale and extent of the discussed restrictions by presenting regulations on airline ownership and control in 121 states and territories. Normative characteristics of the airline nationality requirements are discussed based on the above material, key rulings and literature. This includes an analysis of legal construction of the limitations, their sources and addressees, relations of the ownership and control tests and the role of discretionary regulatory policy. The study shows that airline investment rules worldwide generally remain restrictive and that the potential for reform is outside the ownership and control-based system rather than within it.

© 2016 Elsevier Ltd. All rights reserved.

1. Introduction

Born in uncertain times of global conflicts and economic depression, the airline sector developed a highly restrictive model of regulations at the national and international level where air carrier governance and activities were subject to state concessions and intergovernmental *quid pro quo* exchange. Free-market principles were first introduced in national aviation industries in late 1970s and only after a decade liberalization in air transport transcended state boundaries and spread into the international forum. This trend is well established now and has hugely transformed worldwide aviation markets. However, this reform has been uneven and incomplete in many aspects.

Possibly the most striking inconsistency is that while economic regulation in international air services has been largely relaxed, the structural regulation limiting trans-border airline investment still remains in power as a relic of the outgoing mercantilist aviation regime. This apparent contradiction has become a bone of contention in inter-governmental air transport negotiations (e.g. in case of EU–U.S. agreement) and one of key issues in academic debate on airline liberalization for almost three decades.

Numerous papers have touched upon the airline national

ownership and control requirements. This discussion has embraced the roots of the problem, policy and normative justifications of investment restrictions, the resulting legal and economic complications, and possible remedies thereto. In particular, it is agreed that these restrictions have limited airline financing opportunities, contributed to government ownership and resulting political dependence and finally artificially fragmented airline market and networks.¹ Vast majority of studies point for the need of furthering liberalization and deregulating ownership constraints.²

However, it seems that the present debate is not backed with adequate legal research concerning the actual state of regulations and government actions regarding airline ownership and control in international and domestic forum. The former area was investigated by the International Civil Aviation Organization (ICAO) in its surveys relating to member states' procedures for designation of national carriers and authorization of foreign carriers in international air services.³ Liberalization of ownership and control clauses in air services agreements was examined by the World Trade Organization (WTO) within its Quantitative Air

¹ For a wide discussion of business implications of airline ownership and control see Walulik (2017).

² For a digest of areas in civil aviation where liberalization is welcome see: Havel (2009), Lykotrafiti (2015).

³ ICAO (2003, 2007).

E-mail address: JWalulik@wz.uw.edu.pl

Services Agreements Review (QUASAR) program.⁴ The nationality restrictions in domestic airline establishment and investment systems were covered by the ICAO and the International Air Transport Association (IATA) inquiries.⁵ Some additional information on state limits in trans-border airline investment was gathered in cross-sectoral Organization for Economic Co-operation and Development (OECD) reviews⁶ and in liberalization reports prepared for the IATA's Agenda for Freedom initiative.⁷ Yet, the above studies encompassed only a small number of states, lacked deeper normative analysis, and have become partially obsolete.

Future discussion on airline economic liberalization needs to be reinforced with a wider and profounder legal examination of ownership and control requirements in aviation. Particular attention must be given to the aspect of domestic airline establishment regimes. Most commentators agree that any deregulation of ownership and control criteria in international relations will be void if it is not accompanied with a corresponding shift in the internal laws and policies of the engaged parties. Thus national airline establishment regimes constitute the core of investment restrictions in aviation and are the key for real liberalization in air transport.

Consequently the aim of this article is to provide comprehensive normative analysis of airline establishment systems worldwide. To be complete, such study should base on a wide range of national regimes. Therefore the starting-point of the research presented here is a global comparative legal study on state limits in airline foreign investment. Relevant data was acquired from legal acts and supplemented by means of a survey and literature digest. Detailed methodology and direct results of this inquiry are offered in the Appendix. This presentation of regulations on airline ownership and control in 121 states and territories portrays the world-wide scale and extent of the discussed restrictions.

Based on the collected material the normative characteristics of airline nationality requirements are discussed in the article. This begins with an analysis of the construction of ownership and control constraints, their legal sources and addressees. Various arrangements of the ownership test and control tests are reviewed and commented. The dissertations feature the meaning and relations of the tests and the role of regulatory policy in their application. Practical examples available from the gathered comparative material are accompanied with a digest of key rulings and literature. These findings are appended with an overview of trends noticeable in the deliberated area. Finally, the considered legal nature of the air carrier investment and establishment regimes enables to lay down some recommendations regarding international aviation relations and their liberalization.

2. Construction of airline investment regimes

Laws limiting foreign investment are not uncommon in many industries, especially in network infrastructures and public utilities. However, in the airline sector these restrictions are based on a particularly complex set of regulations and policies. A brief outline of air carrier regulatory environment will be necessary to explain the construction of airline investment/establishment regimes and to specify the field of further analysis.

Air carrier establishment systems include sets of laws and policies which determine the administrative consent necessary for a local enterprise to undertake domestic and international airline activity. Minimum technical requirements, which are harmonized at the ICAO level, are implemented by states and verified by national civil aviation authorities in the air operator certification process (AOC). More important are the economic conditions. These criteria are a matter of national choice. However for several reasons⁸ most states have decided to condition their permission for airline activity upon a particular national share in air operator's ownership and control. Thus in most cases air carrier establishment regimes govern airline foreign investment.

The situation of internationally operating air carriers is more complex. International activity of an air transport enterprise is subject not only to its certification and licensing in the home state, but also to its designation by the home state for international services, and its authorization by the accepting state. Consequently the airline's status depends on three regimes: (1) national establishment laws and policies; (2) national designation policies; and (3) the provisions of international agreements⁹ and policies of other states regarding the authorization of foreign-designated airlines (Fig. 1).

Fundamentally, fulfillment of the requirements introduced in the national investment/establishment regime (1) is a precondition for air carrier's domestic activity and its international designation (2). This relation is generally an internal issue. However, the state regime and policy is influenced at least in two ways by the international regulations and policies (3). Firstly, the national investment/establishment regimes and designation policies for internationally-operating airlines obviously need to be compatible with international agreements and contracting parties' policies concerning authorization of air carriers, which usually require that the airlines are substantially owned and controlled by the designating states or their nationals. Secondly, with respect to both internationally and internally operating carriers, the airline investment/establishment regimes may be either directly harmonized at the international level, or the right of establishment or foreign investment may be granted in international agreements.

Accordingly, airline investment/establishment systems include all ownership and control legal restrictions which are directly binding upon air carriers within their domestic regimes, irrespective of the level (national/international) at which these regulations are introduced. In addition, it must be recognized that airline investment and establishment is dependent on regulatory policies. These policies are pursued at the national level and serve for implementation of the above internal and international legal conditions for investment and establishment.

3. Airline investment regulations

3.1. Sources of investment restrictions

National laws are the primary source of regulations relating to airline investment and establishment. However, these domestic laws do not form a single model across different countries. The study of 121 regimes has revealed that legal norms concerning air carrier ownership and control may be set forth in dissimilar forms, at various levels of legislation and need not be embedded in sector-specific aviation acts.

The most extreme situation is when a limitation on foreign

⁴ See WTO (2006b).

⁵ ICAO (2001). The results of these surveys, presenting ca. 20 national regimes, are available in the WTO reports: WTO (2005, 2007b). Similar findings were presented in earlier papers. See: van Fenema (2000), Chang and Williams 2001, 2002 Chang et al. (2004).

⁶ See: OECD (2013a, 2014b) and OECD investment policy country analyses.

⁷ See: InterVISTAS-EU Consulting Inc. country liberalization studies.

⁸ For a digest of justifications see Lelieur (2003).

⁹ For a digest of designation and authorization clauses in air services agreements see ICAO Bilateral Template Air Services Agreement included in ICAO Doc. 9587.

Download English Version:

<https://daneshyari.com/en/article/1064790>

Download Persian Version:

<https://daneshyari.com/article/1064790>

[Daneshyari.com](https://daneshyari.com)