



Guidance note on ownership and control criteria applicable to applicants/holders of an Operating Licence issued under Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community

Introduction

The conditions for granting an operating licence are set out under Article 4 of Regulation (EC) No. 1008/2008 on common rules for the operation of air services in the Community (the “Regulation”). The ownership and control requirements of Article 4 (f) require that an undertaking shall be granted an operating licence by the competent licensing authority provided that,

‘Member States¹ 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.’

The decision as to whether any applicant does or does not comply with Article 4 (f) rests with the licensing authority of the Member State concerned. The tests of ownership and control are separate and both have to be met to achieve compliance. If an applicant/licence holder cannot satisfy this provision it will either not be granted a licence or have its licence revoked.

Ownership

The concept of ‘**ownership**’ is not defined in the Regulation. However, in Commission Decision 95/404/EC of 19th July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena), the Commission took the view that the majority ownership requirement is complied with if at least **50% plus one share** of the capital of the air carrier concerned is owned by Member States and/or nationals of Member States.

The concept of **ownership** of an undertaking is based on the notion of **equity capital**. Holders of such capital normally have the right:

¹ This requirement should be read as including the EEA States (Norway, Iceland and Liechtenstein) and Switzerland and their nationals.

(i) to participate in decisions affecting the management of the undertaking, and
(ii) to share in 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 risks and rewards of normal business.

The concept of 50% plus one share is a general rule and it is important to note that when evaluating ownership, the IAA does not take ownership structures at face value and will analyse in detail complex structures. Licence holders/applicants must explain the rights attaching to different classes of shares and the IAA needs to know who the real owners of the shares are. It is important to distinguish between legal ownership and beneficial ownership when evaluating compliance with this requirement. In this regard, the IAA “looks through” the structure to evaluate who the ultimate beneficiaries are.

When judging ownership, the beneficial owner or beneficiary of shares held by **nominee/trust companies** will also require to be provided to the IAA. If the nominee/trust company is a pension or investment fund, it can sometimes be assumed that the shareholders are going to be based in the country where the shares were sold. However, every case will be different and will need to be examined in detail by the IAA.

With regard to **publicly quoted companies**, the IAA acknowledges the difficulty involved here as the true beneficial owners of the shares can often be several stages removed from the investment in the airline and shareholdings can vary from day to day. However, air carriers licensed by the IAA **must** ensure that there is sufficient information available for the IAA to be satisfied that they are in compliance with Article 4 (f). They should also make every effort to keep track of shares being purchased and sold so as to ensure that the majority of the shares remain in EU hands at all times. The IAA may require that a company’s Articles of Association provide for the control of nationality of shareholdings and to require nationality declarations by shareholders. Publicly quoted companies will also have to be assessed by the IAA on a case-by-case basis. The IAA may require a company to provide additional information as necessary in order to demonstrate that ownership and control requirements are met.

In order to verify nationality for the purposes of ownership and control, the IAA will require copies of **passports** (for individual shareholders) certified by a competent judicial/administrative authority and/or an **organisation chart** (for corporate structures) which shows all companies and all relationships within the corporate structure. The organisation chart must include ownership percentages to show any interest any other entities have in the licence holder/applicant. Copies of official company documentation may also be required.

It is important to note that nationality is viewed as **citizenship** of a Member State and not the jurisdiction in which the relevant individual resides.

In addition, details of issued shares in the company are required, including:

- Legal and beneficial ownership
- Whether the shares are fully paid up
- Whether the shares are listed
- Classes of shares

- Voting rights attaching to the shares

Failure to provide details of the beneficial owners of shares may affect the validity of an Operating Licence and may result in a decision by the IAA to regard the nationality of any owners not verified as EEA to be non-EEA.

Control

While the evaluation of ownership is dependent on an assessment of the ultimate beneficiaries of a licence holder, the evaluation of effective control is not as straightforward. Effective control is defined in Article 2 (9) of the Regulation as follows:

“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.”*

In evaluating effective control, consideration is not only given to direct control, which normally follows share ownership, but also to where control may not be in direct proportion to ownership if some shares have more votes attached to them than others, or if conditions included in certain agreements or contracts confer on a lender, lessor or others powers which confer the possibility of directly or indirectly exercising a decisive influence on the licence holder. A large single shareholder may have particular influence due to the sheer size of its shareholding, especially if other shareholders are thinly spread, are professional or small investors or if there is no device to ensure that they exercise their voting powers in concert.

The IAA adopts a holistic approach in evaluating the effective control position of an existing Operating Licence holder/applicant for an Operating Licence, considering for example:

- The composition of a company’s Board- nationality of the investors they represent will be examined along with any particular requirements for a Board quorum which may restrict the extent to which decisions can be taken. The procedures in place for avoiding deadlock will also be looked at along with who the casting vote falls to.
- Management Structure- Appointments to Senior Management positions will be examined to establish background and any relevant industry experience in order to establish the level of effective control/decisive influence over the company. These are key decision makers in the company and so should exercise a great deal of control.

- Internal control systems and lines of reporting- who is really making the decisions?
- The rights of respective shareholders/share right provisions- rights attached to different classes of shares will be examined in detail.
- Key Legal documents such as Articles of Association/Shareholders Agreement providing minority shareholder protection provisions which give it a right of veto on matters which would normally be within the powers of a company's Board to decide. For example, in the case of Shareholders Agreements, the IAA looks for provisions which give non-EU investors control such as Reserved Matters/Rights. In the Swissair/Sabena case referred to earlier, the European Commission noted certain basic veto rights which reflect a normal degree of minority shareholder protection as prescribed by Company Law in most Member States such as amendments to the Memorandum and Articles of Association, increases or decreases in its share capital as well as any liquidation, merger or split up of the company. However, concerns will arise if veto rights extend to things like the Budget or the day to day running of the business. The intention should not be to run the business but to retain basic rights to prevent certain things from happening which could jeopardise the minority shareholders investment.
- The IAA will also look at various other provisions contained in key legal documents which may speak to effective control such as provisions dealing with transfer of shares, pre-emption rights, drag and tag rights, call and put options, liquidation preference, dividend/economic rights etc.
- Lease Agreements- unusual, non-standard lease terms will be looked at.
- Business Plan- an owner who can speak to the business plan demonstrates control over the business- i.e. where it has come from, how it will evolve and how changes will be handled. If the majority shareholder cannot change the business plan, they do not have effective control. It is important that the majority shareholder can implement the business plan in full and pursue new business opportunities. If the business plan has been developed by the minority shareholder, the IAA will need to query how the majority can exercise effective control over the business.
- Debt/Loan Agreements and rights with regard to future financing.
- Consultancy/Advisor agreements may require to be looked at.
- Term Sheet/Subscription Agreement- setting out structure and terms of proposed deal (applies to existing licence holders planning a change in ownership structure).
- Any other side/ancillary agreements.

The above list is not intended to be exhaustive in terms of the areas the IAA will look at when determining where effective control lies but endeavours to set out the context and the rationale for the areas we look at. The effective control requirement can only be

examined on a case by case basis as each individual case must be assessed on its own merits. For example, some minority shareholder protection provisions may be acceptable on their own but when read in conjunction with other provisions could mean that the minority shareholder exercises a level of control over the licence holder which must be examined further by the IAA. The IAA will ask the questions- can the business survive without the minority shareholder? What will happen if the minority investor leaves?

The IAA will seek to establish what level of control the majority shareholder exercises over the company in reality. For example, its independence from the support of the minority shareholder to operate the business and make decisions is a key issue. The majority shareholder must always be in a position to exercise control. Effective control cannot be exercised together with minority, Non-EEA shareholders (i.e. joint control). The majority shareholder must have an active role as opposed to being merely a passive investor and must not be dependent on the support of non-EEA investors in relation to the running of the business.

IAA Assessment Process

When evaluating compliance with the ownership and control requirements, whether in relation to new applications for an Operating Licence or in the case of existing licence holders planning a change in ownership structure, the IAA will examine the particular structure and associated documents in detail. Following this examination, the relevant company will be informed whether the proposed structure meets the requirements of the Regulation. The company may be invited to address certain issues or provide further detail/explanation but it is not the IAA's intention to examine countless rounds of documents until a structure can be agreed. Licence holders/Applicants should be aware of the relevant ownership and control requirements and present a structure to the IAA that complies with the requirements.

The IAA may require the company and its legal representatives/advisors to provide a signed undertaking which confirms that there are no undeclared agreements which confer powers outside the disclosed legal documents.

In certain complex cases, the IAA may require to consult or seek advice from the European Commission or its European Union Member State counterparts in relation to compliance with the ownership and control requirements.

Ongoing Compliance

In order for the IAA to be satisfied that licensed Irish air carriers are at all times in compliance with the requirements of the ownership and control provisions of the Regulation, annual compliance checks are carried out where air carriers are required to provide an up to date list of the shares issued by the company, the nationality of the holders of the shares and details of the current Board members.

For air carriers planning a change in ownership of any single shareholding which represents 10% or more of the total shareholding of the Community air carrier or of its

parent or ultimate holding company, Article 8 (6) of the Regulation requires the submission of a revised business plan along with the data referred to under point 2 of Annex I to the Regulation which includes precise details of all proposed changes in relation to the ownership and control of the company.

Contacts

Any queries on the ownership and control requirements can be addressed directly to the **Airline Licensing Department**, Irish Aviation Authority, The Times Building, 11-12 D'Olier Street, Dublin 2, D02 T449, IRELAND. Tel: +3531 6031100 or to aclicensing@iaa.ie.

Irish Aviation Authority