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Foreign ownership and control restrictions in light of the
inability of airlines to do cross border M&A

Airline Economics Future Global Leaders Academy

15 January 2025

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Airline Foreign Ownership & Control

Archaic Restrictions with “Stickiness”

Historical reasons – shipping, mail control, subsidies, national defense (U.S. Civil Reserve Air Fleet – CRAF)

Cabotage – protect domestic market for own flag carriers

Two-Pronged Test –

Quantitative (Ownership) and Qualitative (Control)

U.S. - “Actual Control”

EU - “Effective Control”

Limits on cross-border investment have led to airline alliances, codesharing, and other cooperation

growth of commercial



Chicago Convention of 1944

Foreign Ownership and Control Restrictions

“The air has been used as an instrument of terrible aggression. It is now being made a highway of liberation. It is our opportunity hereafter to make it a servant of peoples.”

A.A. Berle,
U.S. Representative and Chair

- No “Open Skies,” bilateral negotiation of routes, rates, frequencies.
- Two Freedoms and Five Freedoms Agreements: “each contracting state reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another state in any case where it is not satisfied that substantial ownership and effective control are vested in the national of a contracting State.”



2007 EU-U.S. Open Skies Agreement

Historic Accord with Dispute Over Foreign Investment



- Removed restrictions on route rights and air fares, allowing any EU and U.S. airline to fly between any EU city and U.S. city.
- Annex 4, Article 1 – Foreign Ownership Numerical Rules:
 - U.S.: EU Member States can own up to 25% of voting equity, 49.9% of total equity
 - EU: airline must only be majority-owned by Member State
- Article 21: U.S. and EU were to address limited U.S. foreign ownership rules in second stage Open Skies negotiations or EU could suspend the 2007 agreement.
- 2010 Second Stage Agreement: U.S. foreign ownership rules unchanged, Article 21 suspension rights deleted.

U.S. Foreign Ownership Restrictions

Statutory Requirements and U.S. DOT Process/Precedent

- 25% of voting equity, 49.9% of total equity (if Open Skies)
- Numeric approach on officers and Board members
- Debt/Warrants
- Supermajority Provisions
- Trademark Licensing Agreements
- Business Relationships
- Standard Minority Investor Provisions



Actual Control - totality of circumstances: “The control standard is a *de facto* one – we seek to discover whether a foreign interest may be in a position to exercise actual control over the airline, i.e., whether it will have a substantial ability to influence the carrier's activities.”

- Part 121 certificated airlines: ongoing “fitness” reviews, DOT notification of “substantial changes”
- Part 135 operators: Part 298 certificate exemption and registration, self-certification as U.S. citizen
- Unpublished DOT decisions on ownership and “actual control”



U.S. DOT Actual Control Analysis

Standard Minority Investor Protections

DOT will not permit restrictive or specific control provisions (e.g., unanimous vote provisions) for foreign/minority investors that affect the everyday management or operation of an air carrier.

DOT often allows standard minority investor protections in the form of veto power over:

- Dissolution
- Bankruptcy
- Merger
- Amendment of agreements
- Stock splits, combinations, or reclassification
- Disproportional Board changes
- Fundamental change in business

Grey area: veto power on capital expenditures; can depend on relative size of an airline. Case-by-case basis review of limits that would lead to “actual control.”

Virgin America

Seminal Case

26 Dec. 2007:

- “The foreign interests are neither diffuse nor passive, due to the extensive involvement of, and financial interest held by, Sir Richard Branson and the Virgin Group.”
- Virgin America CEO Fred Reid appears to owe his appointment to Branson, the airline's largest foreign minority owner.
- “The licensing agreement Virgin America has with Virgin Group to use its brand name gives the Virgin Group too much control.” The US DOT identified several conditions "that significantly restrict Virgin America's commercial decision-making authority and essentially prevent Virgin America from acting as an independent air carrier.”
- “Debt agreements between Virgin America and the Virgin Group ‘show that Virgin America's survival is contingent upon the financing provided by the Virgin Group,’ and U.S. investors bear little or no risk.”
- Complete restructuring within 30 days, U.S. DOT reversed itself and granted VX its wings.





EU Foreign Ownership Restrictions

Regulation (EC) No. 1008/2008

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, amended in 2019

- Licensing of Community air carriers, Community air carrier intra-Community operating rights, and intra-Community air service pricing.
- EU ownership now required (vs. national ownership):
 - Article 4(f) provides that Member States or nationals of Member States must own more than 50 per cent of an EU air carrier and effectively control it, whether directly or indirectly, except as provided in an agreement with a third country to which the Community is a party.
- Article 8: notify authority in advance of any intended M&A and “within 14 days of any change in the 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.”



EU Foreign Ownership Restrictions

“Effective Control”

Regulation (EC) No. 1008/2008, Article 2 (Definitions):

“‘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;”

EU Ownership and “Effective Control” Analysis

Precedent, Guidance, and Case-by-Case Determinations

Focus on “effective control” over numerical ownership

2014 European Commission investigation into “Certain non-EU investments in European Airlines”

Unpublished decisions on ownership and “effective control”

1995 European Commission Swissair / Sabena Decision →

Guidance issued by European Commission, UK CAA, and Irish Aviation Authority

- Ownership: satisfied with 50% + 1 share of equity capital (case-by-case determination of “equity”)
- “Effective control”: case-by-case assessment of Member State shareholder’s decisive influence over management beyond third party shareholder influence
 - Management appointment, budget, business plan
 - Corporate governance
 - Minority investor / veto rights
 - Financial links to third country shareholder
 - Determining “nationality”



Future of Foreign Ownership Restrictions

Trump Administration and 119th Congress

Project 2025:

“Review foreign ownership and control limitations and, if necessary, work with Congress to change existing statutes.

Worldwide investors are providing access to capital to foreign airlines for innovations and new equipment purchases that U.S. airlines cannot match. The U.S. should use the Committee on Foreign Investment in the United States (CFIUS) process to keep out nefarious foreign actors while allowing investment from investors in designated like-minded countries so long as U.S.-based investors maintain plurality ownership.”



Thank you. Any questions

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