Sustainable governance of aviation: changing tailwinds: from shareholding to stakeholders?

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ISBN: 978-90-836999-0-5
Printed by: Print Service Ede - The Netherlands

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Proefschrift

ter verkrijging van
de graad van doctor aan de Universiteit Leiden,
op gezag van rector magnificus prof.dr. S. de Rijcke,
volgens besluit van het college voor promoties
te verdedigen op woensdag 27 mei 2026
klokke 16:00 uur

door
Thomas Niall Buissing
geboren te Rotterdam, Nederland
in 1993

Promotor:	prof. dr. P.M.J. Mendes de Leon
Copromotor:	dr. R.W. Heinsch
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Acknowledgements

I first set out to write a PhD proposal in 2019, soon after joining the International Institute of Air and Space Law (IIASL) as academic coordinator for the Advanced LLM in Air and Space Law. However, when the COVID-19 pandemic hit, we entered unprecedented times. All my time and energy were devoted to ensuring that students who had travelled from around the world, and suddenly found themselves in a precarious situation, would continue to receive high-quality education. Looking back, I remain deeply proud of what my colleagues and I achieved during that time. Hearing, years later at the Institute's 40th anniversary celebration in August 2025, how thankful those very same students remain for the efforts we made, I have never regretted — not for one moment — putting my PhD trajectory on pause.

As the world slowly emerged from the crisis in 2021 and life gradually returned to a steadier course, I was eager to resume my writing. Yet new challenges presented themselves, both professionally and in my personal life, which made it impossible to find the peace of mind required to pursue doctoral research. It is in times like these that one discovers who truly stands by you. For that support, often quiet but unwavering, I am profoundly grateful.

But where one door closes, another opens. Setbacks, though unwelcome, have a way of strengthening resolve. Transitioning into consultancy work turned out to provide not only fresh professional challenges, but also the freedom and clarity of environment I needed to commit to my PhD. With the approval of my research plan in 2022, the momentum returned: my first article appeared later that year, followed by two articles in 2023 and three in 2024. These publications form the backbone of this dissertation. I am indebted to all who contributed directly or indirectly along the way — colleagues, friends, and the many industry practitioners who engaged in thoughtful discussions with me. These exchanges enriched my work, ensuring it remained both topical and of practical relevance.

I would also like to acknowledge the unique and warm aviation community I have been privileged to be part of during these years. From conferences and seminars to late-night debates and unexpected conversations, I have benefited immensely from the generosity of scholars and professionals who shared their perspectives, challenged assumptions, and offered encouragement. Research can be solitary, but scholarship never is, and this project is very much the product of collective inspiration.

I am especially grateful to my supervisor, Prof. Dr. Pablo Mendes de Leon, for his guidance, encouragement, and confidence in my research. His unwavering support over the years has not only shaped this dissertation but also enriched my personal, professional and academic development. I am thankful for the generous way in which he shared his time and insights.

Finally, and most importantly, I wish to thank one person above all others. On 1 July 2023, I was given the greatest gift when I could call Barry not only my partner but my husband. He has been my anchor and my companion through the most difficult period of my professional life, and it is only thanks to his encouragement, patience, and belief in me that I was able to persevere. With Sepp loyally by our side, we have weathered challenges and celebrated joys together, and I am grateful every day for the life we are building. I am equally proud of how we support one another, and I hope that I have been, and will continue to be, as steadfast in his own professional and academic pursuits as he has been in mine.

This dissertation is the result of many years of interrupted starts, unexpected detours, and hard-won progress. If it stands for anything, it is that perseverance, strengthened by the support of others, can overcome even the most unanticipated obstacles. For everyone who has accompanied me on this path — whether in ways big or small — I extend my heartfelt thanks.

Niall Buissing

List of Abbreviations

AFIR	Alternative Fuels Infrastructure Regulation
AM	Aircraft Movements
AoA	Articles of Association
AOC	Air Operator Certificate
ASA	Air Services Agreement
ATA	Air Transport Agreement
ATD	Airport Traffic Decree
BA	Balanced Approach (to Aircraft Noise Management)
BAR	Balanced Approach Regulation (EU No 598/2014)
CBAM	Carbon Border Adjustment Mechanism
CJEU	Court of Justice of the European Union
CORSIA	Carbon Offsetting and Reduction Scheme for International Aviation
DG COMP	Directorate-General for Competition (European Commission)
DOT	Department of Transportation (United States)
EAP	Environmental Action Programme
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEA	European Economic Area
EEC	European Economic Community
EIA	Environmental Impact Assessment
END	Environmental Noise Directive (2002/49/EC)
ESG	Environmental, Social and Governance
ETD	Energy Taxation Directive (2003/96/EC)
ETS	Emissions Trading System
EU	European Union
EU ETS	European Union Emissions Trading System
FDI	Foreign Direct Investment
FF55	"Fit for 55" legislative package
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GHG	Greenhouse Gas
IASTA	International Air Services Transit Agreement
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice

ILC	International Law Commission
ILT	Inspectorate for the Human Environment and Transport (*Inspectie Leefomgeving en Transport)*
I&W	(Dutch Ministry of) Infrastructure and Water Management
LLC	Low-Cost Carrier
LTAG	Long-Term Global Aspirational Goal
NGO	Non-Governmental Organization
NNHS	New Standards and Enforcement System (*Nieuw Normen- en Handhavingsstelsel*)
NOA	Noise Abatement Objective
O&C	Ownership and Control
PCA	Permanent Court of Arbitration
PPoB	Principal Place of Business
PSO	Public Service Obligation
RED	Renewable Energy Directive (EU 2023/2413)
SAF	Sustainable Aviation Fuel
SARPs	Standards and Recommended Practices
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
WTO	World Trade Organization

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Part A – Setting the Scene

1. Introduction

For most companies, nationality carries limited legal significance. Factors such as taxation, access to labour and infrastructure, or the availability of commercial and logistical networks typically determine an undertaking's connection with its 'home' State, that is, the State in which it maintains its Principal Place of Business (PPoB).[1] This explains why countries like Ireland, Switzerland, Luxembourg, and the Netherlands are attractive locations for corporate headquarters. In international law, the nationality of undertakings generally depends on domestic incorporation or the place of effective management, and rarely affects their legal capacity to conduct cross-border activities.

Civil aviation is a marked exception. Airlines must possess a specific nationality in order to exercise transit and traffic rights, which form an essential basis of their economic activity. Unlike, for instance, digital or manufacturing companies, they cannot freely choose the most convenient jurisdiction from which to operate. The allocation of nationality to an airline, traditionally through requirements of substantial ownership and effective control, creates a unique legal link between the airline and the State designating it to operate international air services. This special relationship continues to shape the governance and regulation of airlines today.[2]

The nationality link between airlines, as the operator of aircraft, and the home State from which they operate said aircraft, is established by international air law in conjunction with domestic law, including EU air law, of the State licensing and designating the airline for the operation of international air services. That link is as old as the Paris Convention relating to the Regulation of Aerial Navigation (hereafter the 'Paris Convention') of 1919.[3] The requirement that an airline must have the nationality of the State designating the carrier to operate international air services between States, and subsequent conditions that the carrier's 'substantial ownership' and 'effective control' resides with the designating State, its nationals or a combination thereof, dates back to the adoption of Agreements attached to, and Air Services Agreements

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1. Neither international law nor international air law provides a uniform definition of the PPoB; Its interpretation depends on domestic law, including European law, as further examined in Part B of this research, in particular in the articles "The Unique Link between an Airline and a State" (at section 3.3) and "Navigating Airline Nationality" (at section 2.2.5).
2. As to which, see also Part B, "The Unique Link between an Airline and a State" for a deeper analysis.
3. Convention Relating to the Regulation of Aerial Navigation (signed 13 October 1919, entered into force 11 July 1922) 11 L.N.T.S. 173. Article 7 of the Paris Convention: "A*ucune société ne pourra être enregistrée comme propriétaire d'un aéronef que si elle possède la nationalité de l'Etat dans lequel l'aéronef est immatriculé*" which translated to "No company may be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered." (translation provided by author).

(ASAs) established under Article 6 of the Convention on International Civil Aviation (the 'Chicago Convention').[4]

The nationality of an airline still determines whether it is allowed to operate cross-border services, but the attribution of nationality to an airline has become more complex in the past decades. The rapid growth of air transport through technological advancements, privatisation, increased competition, and liberalisation of air services has transformed the sector into a worldwide industry which is operated if not dominated by global airline alliances. Airlines have discovered new business models and sought to further reduce costs through collaboration and consolidation. Meanwhile, this global industry is limited by the above nationality restrictions and is often subject to national politics and governmental interference, and at times relying on, the State's support. Numerous authors have written on nationality requirements of airlines, as to which see, for instance, Van Fenema, Haanappel, Mendes de Leon,[5] and Leleur.[6] However, the topic maintains its relevance as new developments continue to test the notions of ownership and control (or 'O&C'); some directly, for instance where it concerns calls to allow more foreign investment in airlines, but also more indirectly, such as to exert influence on or impose sustainability objectives within business' Environment, Social and Governance (ESG) policy.

In this study, the concept of 'sustainability' occupies a central position. In its most common understanding, it refers to sustainability from an environmental perspective, as defined by the World Commission on Environment and Development (WCED) as development that "meets the needs of the present without compromising the ability of future generations to meet their own needs."[7]

Driven by scientific evidence and societal concern, environmental sustainability has become firmly embedded in international and European policy agendas, giving rise to an evolving body of legal norms interpreted by domestic, European,

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4. Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295, and attached agreements. The Chicago Convention has 193 State parties.
5. See, H.P van Fenema, *Substantial Ownership and Effective Control*, in: T.L. Masson-Zwaan, and P.M.J. Mendes de Leon (eds in chief), Air and Space Law: De Lege Ferenda: Essays in Honour of Henri A. Wassenbergh 27-42 (1992); P.P.C. Haanappel, *Airline Ownership and Control, and Some Relates Matters,* 26(2) Air & Space Law 90-103 (2001); P.M.J. Mendes de Leon, *The Future of Ownership and Control Clauses in Bilateral Air Transport Agreements: Current Proposals and Legal Obligations*, S. Hobe et al. (ed.), Consequences of air transport globalization 19-36 (2003).
6. I. Leleur, *Law and Policy of Substantial Ownership and Effective Control of Airlines* (2016).
7. Report of the WCED, *Our Common Future* (1987), at 51. See also, A,D. Basiago, *Methods of defining 'sustainability'*, 3 Sustainable Development, 109–119 (1995); D.A. Dam-de Jong & F. Amtenbrink, *A greener international law: international legal responses to the global environmental crisis*, in: D.A. Dam-de Jong & F. Amtenbrink (eds.), Netherlands Yearbook of International Law 3-17 (2021), published in 2023.

and international courts.[8] These developments have progressively shaped States' obligations to mitigate climate change.[9] In the well-known *Urgenda* judgment, for instance, the Dutch Supreme Court held that, under the Paris Agreement of 2015,[10]

> "Dutch policy must also be tightened in the short term to comply with the Paris Agreement … the State has insufficiently substantiated that it would fit within a responsible policy to prevent dangerous climate change to pursue a reduction in greenhouse gas emissions of less than 25% by 2020."[11]

This line of reasoning illustrates that the control of emissions causing environmental harm remains, in principle, a matter of *international State responsibility*. States fulfil this responsibility by imposing obligations on undertakings physically established on their territory and within their jurisdiction—an establishment which may, but need not, coincide with the undertaking's PPoB as referred to above. Through such an establishment, a State acquires regulatory competence and international responsibility for emissions produced on its territory. This territorial link, however, is largely absent in international civil aviation, where aircraft operate as mobile

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8. See *GabCikovo-Nagymaros Project* (HungarylSlovakia), Judgment, I.C.J. Reports 1997, at 140: "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of *sustainable development*." (*italics added*). See also European Court of Human Rights (ECHR), *Greenpeace Nordic and Nature and Youth v. Norway*, Judgment of 28 October 2025, ECHR 251, where the Court upheld most legal arguments concerning the requirement that any authorization of new fossil fuel projects must take into account the cumulative effects arising from the combustion of the extracted fuels.

9. This will be further reflected on in the Concluding Remarks (Part D) of this research.

10. Paris Agreement under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016), UNTS Vol. 3156, No. 54113.

11. See *Staat der Nederlanden v. Stichting Urgenda*, Supreme Court of the Netherlands (*Hoge Raad*), Judgment of 20 December 2019, ECLI:NL:HR:2019:2007, paras 7.4.4 and 7.5.1. In para. 7.4.4, the Court noted (in Dutch): "*Gelet op het Akkoord van Parijs, [is] een beleid noodzakelijk dat veel verder gaat dan het huidige beleid van de betrokken landen. Volgens het PBL … moet ook het Nederlandse beleid op korte termijn worden aangescherpt om in overeenstemming te komen met het Akkoord van Parijs*." In para. 7.5.1, it further held that "*de Staat onvoldoende heeft onderbouwd dat het in een verantwoord beleid ter voorkoming van een gevaarlijke klimaatverandering zou passen om voor 2020 minder reductie van de uitstoot van broeikasgassen na te streven dan in elk geval 25%*."

assets across borders. Consequently, international agreements are indispensable for coordinating and allocating responsibility for aviation emissions.[12]

The notion of "sustainability" in this research is used in a multifaceted sense. As signalled above, it primarily relates to environmental objectives, including not only emissions but also noise abatement. In addition, it also contemplates the economic resilience and competitiveness of the aviation sector as increasingly relevant to the effective and equitable implementation of such environmental measures, alongside the strategic considerations that have become more prominent in EU transport and industrial policy. These dimensions are shaped through the interaction of a variety of actors and stakeholders, including States, EU institutions, industry, and civil society. Taken together, they provide the contextual frame for what this study's title refers to as *sustainable governance*: the capacity of regulatory, corporate, and policy frameworks to reconcile environmental, economic, and political objectives.

As a starting point, three trends are significant for the changing O&C landscape: *firstly*, despite liberalisation efforts, the attribution of nationality to an airline is likely to remain, while the 'principal place of business' model, as explained in section 2.1.2, offers an alternative criterion to the traditional ownership and control requirements. *Secondly*, airline consolidation, cross-border investment opportunities and the diversification of shareholders have led to more complex company structures, complicating the determination of the nationality of airlines, and *thirdly*, the effect of the mechanisms governments and airlines have put in place, such as special rights, the use of golden shares or limitations on foreign ownership to safeguard the airlines' nationality from hostile takeover attempts or significant investments by foreign entities.

Since the second decade of the 21st century, airlines have been under public and political scrutiny to pursue sustainability objectives, including, in the first place, environmental goals mandated by policymakers through international and European agreements and regulations, while shareholders and management simultaneously acknowledge that airlines must remain 'sustainable' through Environmental, Social and Governance (ESG) policies aimed, in addition, at preserving market position, social legitimacy, and the *license to operate*. The imposition of environmental measures, mainly at the EU level, but increasingly so by national governments, affects and influences the management of airlines with an EU nationality and the level playing field as compared to their international competitors. In this context,

12. See the article titled "EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?" in part C below.

the link with the State is used as a tool to attempt, directly or indirectly, to exercise strategic or political leverage on the airline bearing its nationality. This link raises questions on the role of the State in the management of airlines and how to consider this exercise of influence within the context of effective control.

These trends and observations will form the cornerstones of this research because they all pertain to the study's central theme of who owns, what controls, and how airlines are ultimately governed. The overarching theme '*Who governs the airline?*' captures the ambiguity surrounding the governance concept and serves as a guiding lens rather than a single-dimensional inquiry. The Cambridge Academic Content Dictionary defines *govern* as having 'a direct effect *or* controlling influence on something'. Therefore, the question aims to reflect the layered reality of modern aviation governance, where direction, control and influence are exercised simultaneously by different stakeholders and attempts to explain under which circumstances ownership of, and influence on, an airline's management is or can be established.In this study, the term governance is used comprehensively: it denotes the structures and processes through which direction and control over airlines is exercised, shared, or contested. It encompasses both *power*—the formal ability to make binding decisions—and *influence*—the external constraints and expectations that shape their decisions, whether through regulatory oversight, environmental and climate litigation, or societal pressure. This understanding bridges the notions of corporate governance (internal decision-making), regulatory governance (oversight by States and institutions), and stakeholder governance (societal influence exerted through courts, NGOs, market mechanisms, or public accountability processes).[13]

The present work analyses whether the latter two forms of governance may be gaining greater significance in the contemporary aviation landscape, and in particular in Europe, as explained below, in light of broader societal and geopolitical developments, including the pursuit of sustainable development objectives and the reassertion of aviation as a strategic asset in a changing global and political context. By tracing a broader range of actors, from States and regulators to

13. See, *Our Global Neighborhood: The Report of the Commission on Global Governance* (Oxford University Press, 1995), which defines governance as "the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken." It includes "formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest."

investors, courts, and civil society,[14] that can affect the conditions under which airlines operate, the research explores how these new dynamics both influence and challenge traditional, state-centred and shareholder-based conceptions of corporate governance. Each of these governance dimensions has evolved over time, reflecting the trends outlined earlier. *Corporate governance* initially characterised the State ownership and national identity of flag carriers, gradually developed into more complex international corporate structures within modern airline groups; *regulatory governance* expanded through liberalisation, market oversight, and, most recently, environmental regulation; *stakeholder governance* appears to be gaining prominence amid sustainability debates, especially in the European Union—together suggesting a development that the subtitle of this research, "*From Shareholding to Stakeholders?*", invites to explore.

For the purpose of this research, the governance of airlines worldwide can roughly be divided into three historical periods, starting with *airlines 'of a State',* where flag carriers maintained a unique position at the heart of nations' diplomacy and foreign relations. In the 1950's in the Netherlands, air transport was an integral part of Dutch foreign policy. Government officials from the Ministry of Foreign Affairs, the Ministry of Transport and Waterworks and KLM Royal Dutch Airlines' (KLM, now part of the Air France-KLM Group) top management would routinely meet to discuss Dutch aviation relations, a cooperation so strong that it was called the 'Iron Triangle'.[15] The synonymity between the interests of the State and of the airline diluted when air transport deregulated and liberalised which prompted airlines to develop more into *airline undertakings* that are expected to operate and compete under market conditions. After the development of airlines 'of a State' into airline undertakings, in the next phase, a series of events between 2000 and 2020 have demonstrated that the airline industry is unlike other international undertakings that can stand on their own feet after privatisation, or without State aid, which is in principle forbidden by EU law, as demonstrated by the bankruptcies of the Belgian 'flag carrier' Sabena and the Swiss 'flag carrier' Swissair in 2001. Instead, airlines, especially those which are established outside the European Union, often more or less heavily rely on governmental support in the wake of pandemics like COVID, and large-scale disruptions, demonstrating their vulnerability to external shocks as well State's willingness to intervene.[16] The third period, starting around 2018, initially witnessed States returning to increase their governmental and

14. The stakeholder dimension, including actor typology is further elaborated on in section 2.3.2 of the Research Context.
15. Marc Dierikx and Jean Guillaume Petit, *Holding Patters*: *Air Transport and Foreign Policy in The Netherlands*, (2025), Preface, p. xv.
16. See section 2.2 below.

political capital on airlines to push for sustainability objectives. However, as the geopolitical landscape shifted, concerns about strategic autonomy emerged. This period reflects a renewed struggle to define the strategic role of airlines, with certain governments and stakeholders vying for and leveraging their influence to align the industry with policy goals pushing for environmental sustainability, while others prioritise economic resilience. This tension underscores the broader scope of sustainable governance as used in this study, encompassing not only environmental objectives but also political and economic dimensions essential to long-term sectoral resilience.

These three periods and their distinctive elements will be further discussed in the **Research Context** in the next section, which provides the legal and historical background, situating the evolution of airline governance within broader regulatory, economic, sustainability and societal developments. It thereby offers the empirical foundation upon which the consequent analysis builds.

Against this backdrop, and building on the historical narrative, the study situates its inquiry basically within the evolving European regulatory landscape, where aviation governance is shaped by the interaction of European institutions, national authorities, market actors, and societal stakeholders. The EU provides a particularly relevant framework for this analysis because it represents one of the most advanced examples of regional market integration in civil aviation, combining liberalised market access in conjunction with a dense set of environmental, competition, and sustainability, as well as safety and security, regulations that directly affect airline governance as defined in this study—that is, the structures and processes through which direction and control over airlines is exercised, shared, or contested. It also offers a multi-level governance setting in which both Union and Member-State competences interact, allowing for a nuanced examination of ownership, control, and stakeholder influence at different levels.

The study traces developments from the gradual liberalisation of air transport and privatisation of national carriers to contemporary debates on sustainability, strategic autonomy, as well as environmental and climate litigation. The research thus examines whether and how successive waves of market integration and environmental regulation have progressively altered the balance between ownership, control, and stakeholder influence in the governance of airlines. Accordingly, this dissertation's primary research question is as follows:

> "How is airline governance in the European Union evolving through the interplay between shareholder-based corporate structures and stakeholder influence, and how do sustainability objectives, environmental and climate litigation, and geopolitical developments collectively reshape the regulatory framework governing EU airlines?"

To structure this inquiry, this work is guided by two overarching sub-questions that correspond to the main analytical parts of the dissertation, as introduced in the **Methodology** section:

1. How do legal and institutional mechanisms within international and EU law, and national company laws, shape and constrain ownership and control in the context of corporate and regulatory governance of airlines in the European Union?
2. How are regulatory and stakeholder governance structures in the European airline sector being redefined through sustainability objectives, environmental and climate litigation, broader stakeholder influence and geopolitical dynamics?

In a consolidated fashion, these questions build on the contextual and conceptual framework established in this introduction and further developed in the following **Research Context**. The **Methodology** laid down in Section 3 explains how the sub-questions and article structure draw on the three analytical dimensions outlined throughout this introduction—sustainability, governance, and stakeholder influence—to address the central research question. Building on this foundation, the research integrates provisions and concepts of international air law, EU law, and national company law to examine how the traditional notions of substantial ownership and effective control operate within increasingly complex, multi-owner airline structures. Dissecting the multinational governance of airlines—through their parent companies, holding structures, and diversified shareholder bases—provides the analytical lens for addressing both the broader theme of who, or what, ultimately governs an airline and the research and sub-questions that flow from it. The research findings are synthesised in the concluding reflections.

2. Research Context

The context of the research will be illustrated through the three phases outlined above. Starting with the development phase from airlines 'of a State' into airline undertakings and followed by a phase of several events, this chapter will demonstrate that the airline industry is, in fact, different from other international undertakings and, at crucial times, relying still on national, or at best regional, links with the State or the European Union. In the third phase, we observe a resurgence of increased governmental interference, with airlines being subject to safeguarding the State's strategic autonomy and asserting influence in promoting sustainability objectives.

The basic legal concepts relevant to this study and the evolving trends in ownership and control of airlines will be woven into this periodical approach. The development of the more general concepts of the nationality of airlines and its function in the international framework of Air Services Agreements (ASAs), as well as changing perceptions of the O&C of airlines, play a key role in the first phase. The second phase describes and analyses how specific events and their aftermath have further shaped the perception of the governance of airlines and the involvement of States therein. The analysis of this in-between phase is more descriptive and based on observations. It functions as a bridge to the last phase relevant for this research. The final phase will, on the one hand, introduce the EU's concept of strategic autonomy, but more importantly, link ownership and control (O&C) to the persecution of sustainability objectives, including emissions and noise. To understand the legal regimes that cover these environmental concerns, this section will explain the legal force of Standards and Recommended Practices (SARPs), laid down by the International Civil Aviation Organization (ICAO) and attached to the Chicago Convention on International Civil Aviation of 1944 (the "Chicago Convention"),[17] the direct effect of EU law, and the relevance of environmental concerns for the management of airlines.

2.1 Nationality of Airlines: From 'Airline of a State' to Airline Undertakings

2.1.1 The link between an airline and a State

The necessity of establishing a link between an airline and a State is deeply rooted in the history of international civil aviation and continues to persist for its multifaceted use. The most profound one is linked to a State's security and its sovereignty over

17. Convention on International Civil Aviation, done at Chicago on 7 December 1944.

national airspace. That link has a military origin; both the Paris Convention relating to the Regulation of Aerial Navigation of 1919,[18] and its successor, the Chicago Conventionwere concluded in the wake of a World War, reaffirming the State's need to control and safeguard the airspace above its national territory, including control on who has access thereto. Both Conventions establish the principle of sovereignty over national airspace, meaning that the airspace above a State is, in principle, closed to foreign aircraft and foreign airlines' international operations of air services over or into the State's airspace, unless it is opened via an agreement between the concerned States (see below).[19]

On top of safety and security concerns in the aftermath of the World Wars, this constraint on access to a State's airspace, in conjunction with the distinction between national and foreign aircraft, also presents States with an economic opportunity. Following Article 6 of the Chicago Convention, the operation of air services over or into a State's territory requires "special permission" from that State. Signatories to the two agreements attached to the Chicago Convention, the *International Air Services Transit Agreement* (IASTA)[20] and the *International Air Transport Agreement*,[21] grant airlines of the other States such permission for specific "Freedoms of the Air", more commonly referred to as 'traffic rights'.[22] For instance, the first agreement grants, with respect to scheduled air services, the right to overfly a State without landing or to land for non-traffic purposes.[23] The 'special' permission to exercise the more commercially interesting traffic rights, i.e., transporting passengers and cargo to, from or via a State to another State, are traditionally bartered in Air Services Agreements (ASAs) between two or more States. States designating airlines based on nationality to exercise the traffic rights they exchange through ASAs remains a key practice. Traditionally, the designation of airlines has been restricted by nationality clauses. The Chicago Convention does not provide such criteria for nationality, but the IASTA stipulates that:

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18. *Convention portant réglementation de la Navigation Aérienne*, done at Paris on 13 October 1919.
19. Paris Convention, Art. I: 'The High Contracting Parties recognise that every power has complete and exclusive sovereignty over the air space above its territory', and Chicago Convention, Art. 1: 'The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.'; see, for instance, P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space: A Comparative Approach*, 15–23 (2003).
20. International Air Services Transit Agreement (adopted 7 December 1944, entered into force 30 January 1945) 84 UNTS 389. The IASTA has 135 State parties per 28 August 2023.
21. International Air Transport Agreement (adopted 7 December 1944, entered into force 30 January 1945) 171 UNTS 387. The International Air Transport Agreement only has 11 State parties.
22. P.M.J. Mendes de Leon, Introduction to Air Law, 11th Edition (2022), p. 78-79.
23. International Air Services Transit Agreement (1944), Section I(1).

> "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 nationals of a contracting State […]" (*emphasis added*).[24]

Similar provisions are found in most ASAs, pursuant to which nationality requirements remain a fundamental principle in international air transport. Ownership and control conditions are still the most widely used in the over 4,000 bilateral ASAs currently in existence.[25]

The continued relevance of these nationality requirements is illustrated in the trade in traffic rights between two or more States and jurisdictions such as the EU. If no nationality link exists between the State designating the airline and the designated airline, a) the State which is requested to accept the designation of the airline may, but does not have to refuse the designation, whereas b) a third-country or its airline could make use of a 'flag of convenience' to use the traffic rights exchanged between two other States. Hence, the airlines' designation *externally* balances the beneficiaries of the exchanged traffic rights. *Internally*, it is designed to control that the rights continue to be used by an airline of the State's nationality.[26] The link between an airline's nationality and a State is further locked by the so-called "double-boulted locking mechanism"[27] pursuant to which nationality requirements are not only used for designation clauses in ASAs but where similar nationality conditions apply in national laws and regulations, for instance, in national licensing procedures, for the performance of safety oversight and determining the State's authorities responsible for regulatory control. Such conditions require, more often than not, the airline's presence in a State and a 'genuine' or jurisdictional link with that State.

In addition to the security, strategic and safety reasons referred to above, the protection of political and nationalistic interests is not to be underestimated. States have played a pivotal role in setting up the first national airlines. Most European legacy or flag carriers started as wholly or partially State-owned, as exemplified

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24. Ibid., Section I(5).
25. P.M.J. Mendes de Leon, Introduction to Air Law, (2022), p. 59. See also, ICAO Policy and Guidance Material on the Economic Regulation of International Air Transport (Doc 9587, 3rd edn, 2008), and Manual on the Regulation of International Air Transport (Doc 9626, 3rd ed, 2018), Part IV.
26. H.P. van Fenema, *Ownership Restrictions: Consequences and Steps to be Taken*, 23(2) Air & Space Law, 63-66 (1998);
27. World Economic Forum: A New Regulatory Model for Foreign Investment in Airlines, (2016).

by their names, such as *British* Airways, Air *France*, and Royal *Dutch* Airlines.[28] Nowadays, States may still be important stakeholders in airlines, airports, and the required infrastructural investments. In turn, the aviation industry provides strategic benefits, boosts the economy, and generates thousands of jobs.

The use of nationality restrictions ensures, on the one hand, that the home State, directly and indirectly, reaps the benefits from its investments and the traffic rights the State has bartered with other States. On the other hand, internal nationality restrictions are typically justified to ensure compliance with licensing and regulatory conditions, but they are also used as a measure to protect the national economy and address societal concerns, such as employment privileges, and increasingly to exert influence on environmental issues.[29]

2.1.2 Developments in "Ownership & Control" of Airlines

In the decades following the signing of the Chicago Convention in 1944, restrictive bilateral ASAs have been used to shield the somtetimes single-designated airline from competition between the airlines designated by the two States parties to the relevant ASA. States and their authorities stimulated cooperation between the airlines from each side to protect 'their' airline and ensure "equality of opportunity",[30] in other words, a ' level playing field', sometimes even to the extent of 'pool arrangements' where the airlines shared expenses and/or revenues and coordinated capacity, route planning and pricing.[31] The economic regulatory framework for international air transport that existed through this system of restrictive ASAs resulted in limited competition.

This pattern changed with the de-regulation in the United States in the 1980s, and the liberalisation in the European Union ("EU") in the 1990s.[32] Since then, the operation of air services has slowly but steadily moved away from a 'fair and equal opportunity to *operate*' (*italics added*) to a more economically 'fair and equal opportunity to *compete*' (*italics added*).[33] The policies of States geared to reduce their

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28. P. Dempsey, Competition in the air: European union regulation of commercial aviation, 66(3) J. Air L. & Com., 979-1154 (2001), 983.
29. See section 2.3 below.
30. Preamble Chicago Convention (1944): "THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established *on the basis of equality of opportunity* and operated soundly and economically." (*emphasis added*)
31. See also, S. Truxal, Competition and Regulation in the Airline Industry: Puppets in Chaos (2012).
32. See, for instance, B. Humphreys, The Regulation of Air Transport: From Protection to Liberalisation, and Back Again (2023).
33. P.M.J. Mendes de Leon, Introduction to Air Law (2022), p. 80.

stake in airlines and to enhance liberalisation by promoting competition through, for instance, Open Skies agreements or regional approaches, such as the EU internal market for air transport, and, to a somewhat lesser degree, the Association of Southeast Asian Nation ("ASEAN"), has led to opening markets. However, while these forms of liberalisation loosen the restrictions on the operation of the agreed international air services, the airline's nationality remains the decisive factor for determining the rights that are required for the operation of such services.

Over the years, States have given different interpretations to nationality conditions, either involving a test of 'substantial ownership', one of 'effective control', or a combination of the two.[34] The first test, ownership of shares of an airline or holding company,[35] is more easily quantifiable at first sight. For instance, the United States caps foreign ownership of *voting* shares in an airline at 25%.[36] However, 'effective control' is more ambiguous and leaves room for interpretation, an example being the *Daetwyler* case, where an airline, despite its shareholders satisfying the US ownership percentage, could not establish that actual control over the airline was in the hands of US citizens.[37] In this case, the American authorities climbed the 'corporate tree' and found that the 'ultimate decision maker' was a Swiss national. In *Virgin America,* the airline's application to launch air services from the US was initially denied because the actual control was found to be in the hands of the U.K.-based Virgin Group.[38]

The EU has added the 'community air carrier' to the nationality palette, whereby carriers must be *majority-owned,* rather than substantially owned*,* and effectively controlled by EU-nationals. They must also have their principal place of business in an EU State.[39] The change in the ownership requirement is significant because, as a result, the cumulative substantial or majority ownership of community carriers can now rest with a variety of EU nationalities. Third States have started to recognise this new development by accepting the EU nationality of airlines in their ASAs with the EU and its Member States.[40] Accordingly, in the *Norwegian* case, the US Department of Transport ('DOT') waived opponents' 'flags of convenience' argument on the basis that nationals of any EU State may own a community airline.[41] Nevertheless,

34. J. Walulik, At the core of airline foreign investment restrictions: A study of 121 countries, 49 Transport Policy, 234–251 (2014).
35. See Pablo Mendes de Leon*, A New Phase in Alliance Building: the Air France/KLM Venture as a Case Study*, 53 Zeitschrift für Luft- und Weltraumrecht 359-385 (2004).
36. Title 49 U.S.C. § 40102(a)(15)(C) as amended.
37. Willey Daetwyler, D.B.A. Interamerican Airfreight (CAB Docket 2214 (1971)).
38. Virgin America, Inc. (DOT Docket OST-2005-23307, Order 2006-12-23 (2006)).
39. Regulation (EC) No.1008/2008, Art. 2, 4(a) and (f).
40. Council Regulation. No. 847/2004.
41. Norwegian Air International Limited (Docket DOT-OST-2013-0204, Final Order 2016-11-12 (2016)).

this development is not without risk for the use of traffic rights, as illustrated by the decision of Wizz Air's largest stakeholder, a US private equity firm, to reduce its stake in the Budapest-based airline to comply with EU ownership rules following Brexit. With UK shareholders no longer counting as EU nationals, Wizz Air risked losing its EU nationality status, prompting a transfer of shares from US to EU nationals to retain access to EU traffic rights.[42]

In the analysis of majority-ownership and effective control in the *Swissair/Sabena* merger,[43] the EU Commission set out elements to assess compliance with both tests. The elements to be taken into account under the ownership concept, and under the definition of effective control as 'the power, direct or indirect, actual or legal, to exercise decisive influence on an airline'[44] form the starting point for determining control. These elements address the real questions of who, ultimately, has the decision-making power or final say in the daily management or key issues such as business planning or annual budgets. Other elements include but are not limited to the composition of the airline's management, the power to appoint or dismiss members of the Board of Directors and its Chair, special voting rights and the distribution of shares amongst shareholders.

The EU Commission's initiative to revise Regulation 1008/2008 identifies the ownership and control requirement as one of the issues to be evaluated.[45] In this regard, the additional requirement that an airline must have its principal place of business in an EU State, that is, the location of the head office or where the principal financial functions and operational control are vested,[46] could play a more prominent role in the attribution of nationality to airlines, or even be solely based on this principle.[47]

While the EU, the US and other jurisdictions apply more restrictive O&C requirements to various degrees, in contrast, States like Chile, Brazil, and Colombia relaxed ownership requirements for foreign entities based on reciprocity to attract greater

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42. Reuters, Wizz Air's top shareholder cuts stake to comply with ownership rules, 4 February 2020 https://www.reuters.com/article/us-wizz-air-hldgs-investors/wizz-airs-top-shareholder-cuts-stake-to-comply-with-ownership-rules-idUSKBN1ZY18G? (accessed: 8 July 2025).
43. 95/404/EC: Commission Decision of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena).
44. Ibid, Section XI.
45. Roadmap on the Evaluation of the Regulation (EC) No 1008/2008 on common rules for the operation of air services in the Community, p. 3.
46. Regulation (EC) No.1008/2008, Art. 2(26).
47. See also, T.N. Buissing, *124. Principal Place of Business*, in: A. Masutti and P.M.L. Mendes de Leon (*eds in chief*), Elgar Concise Encyclopedia of Aviation Law (2023).

foreign investment.[48] However, while in the case of US airlines, the airline's nationality is clear, the practices in Chile, other Latin American States, and the EU raise questions on attributing one nationality to an airline. This practice is particularly pertinent because States can deny traffic rights under ASA if the conditions of 'substantial ownership' and 'effective control' are not met. Virgin Nigeria, for instance, was initially denied operations to New York because it was substantially owned by Virgin Atlantic and, therefore, perceived to be a British airline.[49] States can also threaten to ban airlines' flights, such as when Russia questioned the nationality of Austrian Airlines after the Lufthansa Group had taken it over.[50] These cases exemplify that although airline O&C requirements are applied differently worldwide and are subject to interpretation, they remain fundamental to exercise traffic rights.

The above nationality questions will be further analysed in the articles which form part of this study. These will be contextualised with respect to policy, including environmental developments and the pursuit of strategic autonomy marking the 21st century.

2.1.3 Airline Undertakings: Changing Perceptions of Ownership

The term 'airline' has not yet been defined in legal documents. Hence, the question can be raised whether airlines should, at all, be treated as undertakings, for instance, in conformity with the regime that applies to companies within the EU internal market for the freedom of establishment and the provision of services, as well as the free movement of capital. To find out to what extent airlines can be treated as regular undertakings from an O&C perspective, this research first takes a step back to analyse the airline's transformation from airlines 'of a State' to airlines as undertakings, their competitive behaviour and the special regime applicable to the air transport services they provide.

A) Airline cooperation and consolidation

When air transport became more profitable and the commercialization of airlines set off, governments privatised their national carriers to various extents.[51] These and other developments mark the start of air transport liberalisation, in which regimes airlines compete in more open markets. The growth of air transport and the competition among airlines led to the rise of cross-border business

48. Decreto Ley 2,564, *Dicta Normas Sobre Aviacion Comercial*, Ministerio de Transporte y Telecomunicaciones de República de Chile (21 March 1979), Art. 1, para. 1.
49. Virgin Nigeria Airways Limited (Dockets DOT-OST-2005-23460/23461).
50. Financial Times, Russia threatens to ban Austrian flights, 28 February 2010 https://www.ft.com/content/e27168fa-24a2-11df-8be0-00144feab49a (last visited: 20 February 2024).
51. See, P.S. Morell, *Airline Finance: Vol. 4th ed*. (2013), 161-162.

opportunities for airlines, including investments into other airlines and eventually airline consolidation.

The first significant cross-border investment concerns the acquisition of up to 49% equity interest in the holding company of the former US's Northwest Airlines by KLM Royal Dutch Airlines (KLM) in the 1990s.[52] While this move initially served to gain access to the US domestic market, the collaboration between the airlines eventually evolved into extensive cross-border joint ventures.[53] Nowadays, airlines can cooperate in many forms, such as the integration of services through codeshare agreements and pooling resources in tactical and strategic alliances,[54] but some go far beyond mere cooperation. The last mentioned category is particularly relevant for this research and includes cross-investments and mergers.

In the highly competitive aviation industry, market access incentives remain prevalent, but economies of scale and the need for capital have also become significant drivers of the larger trends in airline consolidation and transnational investments. The present research will not delve further into the economic benefits for airlines or the consolidation process in general. Instead, the relevance of this trend is best illustrated by developments in the airline business:

- The mergers between the two national carriers Air France and KLM into the Air France - KLM Group (2003) and between British Airways and other airlines into IAG (2011);
- The setting up of subsidiaries in countries to gain access to those markets by AirAsia between 2004-2015;
- The interest in investments in Alitalia and Air Italy shown by Qatar Airways (2016-2017)
- The relaxation of ownership in Latin America for LATAM Airlines, in the search for foreign capital (2019-2020);
- The acquisition of foreign airlines to increase market share by the Lufthansa Group, including most recently the Italian carrier ITA, in 2024.

Each of these cases provides an example of an airline corporate structure with multinational or even transnational governance of the airline, the parent company, or the holding. Considering the diversification of shareholders with different nationalities and the transnational or multinational governance of the corporation,

52. P.P. Fitzgerald, A level playing field for "Open Skies" (2016), 76-77.

53. For a more detailed analysis, see Part B of this research, 'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance', Air & Space Law 49(6), 2024.

54. S. Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* (2013), 120-121.

the company's structure plays a pivotal role in determining whether the nationality conditions for O&C of airlines under ASA are met.

B) Airline shareholding and corporate structures

The corporate structure of airline businesses is not different from those of undertakings in other sectors. The requirements of 'substantial ownership' and 'effective control' are, however, intrinsically linked to company law concepts under international, national and EU law, and specifically, those that relate to shareholders, the different type of shares, (voting) rights, the substantial majority and the role of the parent company or the holding in the overall structure. Central to the determination of O&C of airlines are the various types of shares and shareholders, as well as their relationships and influence on the airline's corporate governance.

Shares come in various forms, as explained in more detail in Part B of this research.[55] A brief overview is provided in this research context. *Ordinary shares* typically give the holder of the share a right to a dividend, a right to vote and a right to a share of the assets in case of liquidation.[56] Companies can have more than one class of shares (i.e. 'A' or 'B') with different rights, which are described in the Articles of Association or Articles of Incorporation.[57] The different rights can relate to the entitlement to dividends, and the order thereof, for instance, the *(cumulative) preference shares* or *deferred ordinary shares,* to the order of entitlement to the capital after winding up, and, most importantly for this research, to voting rights.

In terms of establishing effective control, we must turn to the voting stock of a company, that is, the sum of the shares that carry voting rights, to determine whether a shareholder or a group of shareholders can exercise decisive influence and thereby effectively control the business. Shares may be allocated special rights, for instance, *priority shares* may confer the power to appoint or dismiss members of the Board and the right to veto or overturn decisions.[58] These voting rights can give shareholders with less than 50% of the shares a controlling interest if they possess

55. See Part B, 'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance', Air & Space Law 49(6), 2024.

56. See, LexisNexis Legal Glossary, available at: https://www.lexisnexis.co.uk/legal/glossary/ordinary-share (accessed: 8 July 2025).

57. See, for instance, Articles of Association for SAS AB (Reg. No. 556606-8499), Article 5, available at: https://www.sasgroup.net/files/documents/Corporate_governace/Articles_of_Association_SAS_AB_2022.pdf (accessed: 8 July 2025).

58. See, LexisNexis Legal Glossary, available at: https://www.lexisnexis.co.uk/legal/glossary/weighted-voting-rights (accessed: 8 July 2025).

a significant amount of the voting shares. This way, even small shareholders with enough support can influence decision-making at the shareholders' meeting.

Two other types of shares influence the control of a company. The first, albeit not classified as a different class of shares, concern the *loyalty share*. To encourage long-term ownership in France, shareholders receive double voting rights if they have held the shares uninterruptedly for at least two years.[59] This is particularly interesting when looking at the level of influence a shareholder has in the overall company, which was one of the reasons for the Dutch government to increase its stake in the Air France-KLM S.A.[60] The second one is commonly referred to as *golden shares* and is mostly used by governments to retain control over privatised companies, for instance, in the case of the Brazilian aircraft manufacturer, Embraer.[61] Golden shares can confer direct special rights to block strategic decisions such as changes in ownership, mergers, or the disposal of key assets. They may also include indirect rights, such as board appointments or veto powers, which allow continued influence over a company's direction, especially in sectors critical to national security or public interest, such as infrastructure.[62] In the EU, golden shares constitute a restriction on the free movement of capital, which may, however, be justified by overriding reasons in the public interest.[63] Golden shares are mostly issued by State actors, but a private company can also issue a share that controls at least 51% of the voting rights, giving it a similar level of control to golden shares.

The above differentiation in shares and the rights attached to them, as well as the role of national company laws, demonstrates that the corporate structure should be assessed on a case-by-case basis to determine the airline's ownership and control. Where shares can be traded on stock markets, such determination is time-dependent and can change from one day to the next.

C) Competition management & merger control

Building on the O&C conditions for airlines relating to their corporate shareholding structures, competition rules may apply to control who can own shares and control the business and how undertakings are allowed to behave to maintain a

59. Article L.225-123 of the French Code of Commerce.

60. See, https://www.airfranceklm.com/en/newsroom/air-france-klm-groups-position-following-share-acquisition-dutch-state (accessed: 8 July 2025).

61. See, https://www.ft.com/content/bf0e473e-1525-11e9-a581-4ff78404524e (accessed: 8 July 2025).

62. Oxera, 'Special Rights of Public Authorities in Privatised EU Companies: The Microeconomic Impact', report prepared for the European Commission (2005), 20.

63. I. Antonaki, *Keck in capital: Redefining restrictions in the golden shares case law*, 9(4) Erasmus Law Review 177-188 (2016), 181.

competitive environment. In open air transport markets, States, and supra-national organisations such as the EU, supervise competition amongst airlines; on the one hand through *ex ante* agreement in ASAs, on the other via direct application of *ex poste* competition rules as is the case in, for instance, the EU.[64] These rules aim to create a level-playing field between carriers on routes in an air transport market, i.e., air services between the States concerned performed by carriers so designated by these States. That market is defined pursuant to geographical and comparable service criteria. These criteria consider whether a service operates on a point-to-point basis, typically associated with low-cost carriers, or includes transfer options via a hub, which can influence the competitive dynamics by affecting pricing, scheduling, and passenger connectivity.

In the EU, the general rules of the EU Treaty on the Functioning of the European Union ('TFEU'), including competition rules, directly apply to air transport.[65] Article 101(1) TFEU, for instance, prohibits agreements between undertakings which "*may affect trade* between Member States and have as their object or effect the *prevention, restriction or distortion of competition* within the internal market (..)" (*emphasis added*).[66] Similarly, Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position, "in so far as it *may affect trade* between Member States" (*emphasis added*).[67] The same is true for the EU rules on State aid, which have been applied in the air transport sector.[68] The TFEU does not define an "undertaking", but the Court of Justice of the European Union ("CJEU") has established that it:

> "encompasses every entity engaged in an economic activity regardless of the legal status and the way it is financed."[83]

Airlines perform an economic activity by engaging into the operation of air services, and within this context, should be considered "undertakings". For EU airlines, this

64. P.M.J. Mendes de Leon, *Introduction to Air Law* (2022), 128. See also, S. Truxal, *Competition and Regulation in the Airline Industry: Puppets in Chaos* (2012).

65. See, Case No. 167/73, French Seamen, ECR 371 (1974). See, also, J. Milligan, *European Union Competition Law in the Airline Industry* (2017).

66. Article 101(1) TFEU. See, for instance, the investigation into the SkyTeam Alliance, in Decision of 12 May 2015, Case AT.39964, *Air France/KLM/Alitalia/Delta*, C(2015) 3125 final.

67. See also, Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (these articles now correspond to 101 and 102 TFEU), and the EU Commission's – Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009).

68. See, Art. 107 TFEU and following provisions, and the Swissair/Sabena cases referred to above.

engagement has been affirmed by EU Regulation 1008/2008 on common rules for the operation of air services in the Community.[69] In ASAs the designated entities to perform air services are airlines, but these typically do not refer to the airline as undertakings, leaving room for a different interpretation and the scope of rules and regulations applicable to them. When airlines enter into deeper forms of cooperation, for instance, by acquiring a stake in the corporate structure of another airline to jointly carry out activities and reach economies of scale, start joint ventures, or even merge their cooperate structures to various degrees, many jurisdictions subject these activities to merger control like any other business. From a competition law point of view, the concerned provisions are aimed at preventing undertakings, in this case, airlines, acquiring a dominant position within a certain relevant geographical market,[70] and by extent, ensure that a competitive environment remains.

In the EU, EU Regulation 139/2004 on the control of concentrations between undertakings, henceforth referred to as the EU Merger Regulation, applies to mergers with an EU dimension, that is, where there is an acquisition of control for companies with specific thresholds for worldwide and EU-wide turnover.[71] Airline mergers typically meet these conditions, which means that they must be notified in advance to the EU Commission for clearance. The Commission can approve the concentration, attach conditions or remedies thereto or prevent its implementation if, in the latter two cases, it would significantly reduce competition in the EU internal market, i.e., leading to or strengthening an airline's dominant position.[72] Since the adoption of the EU Merger Regulation, the EU Commission has reviewed over 30 airline mergers,[73] both intra-EU mergers between EU carriers, such as between *Swissair/Sabena* (1995), referred to in section 2.1.2 above, and the merger between Air France/KLM (2004),[74] but also between non-EU airlines or EU and non-EU airlines.[75] This latter category is of specific importance for this research, as

69. See, Art 2(1), EU Regulation 1008/2008.
70. See, Commission Notice on the definition of the relevant market. For air services, *interchangeability* is the determining factor: air services which are interchangeable fall within one services market.
71. EU Regulation 139/2004 on the control of concentrations between undertakings (the EU Merger Regulation), Art 1.
72. Ibid, Art. 8.
73. P.M.J. Mendes de Leon, Introduction to Air Law (2022), 139. See, for instance, *Lufthansa/Austrian Airlines* Case M.5440, decision of 28 August 2009; Case M. 5747; *British Airways* and *Iberia,* decision of 14 July 2010, and Case M.6796, *Aegean /Olympic II*, decision of 9 October 2013.
74. Case No. COMP/M.3280 – Air France/KLM, decision of 11 February 2004.
75. For example, United/USAir (Case M. 2041), Delta/Pan Am (Case M. 130). Singapore Airlines/ Virgin (Case M. 1855) and Swissair/South Africa (Case M. 1626), Alitalia/Etihad (Case M. 7333)

merger control in these cases is also highly relevant to the O&C of airlines through the attribution of nationality required to maintain traffic rights for performing air services under ASAs.[76]

While the two definitions do not duplicate each other, the definition of control under the EU Merger Regulation as "exercising *decisive influence* on an undertaking"[77] is practically identical to that of 'effective control' for the EU carrier designation under EU Regulation 1008/2008. While the latter concerns internal governance of an airline, 'control' under the Merger Regulation refers to the relationship between merging entities, aiming to safeguard competition in the EU internal market.[78] Furthermore, in the – 2014 – merger between Aliia/Etihad,[79] the EU Commission linked ownership of shares and the rights attached thereto to check 'control' and 'joint control' in the merged entity under the EU Merger Regulation.[80] The additional requirement to maintain, in this case, the EU carrier designation for the purpose of retaining traffic rights disqualifies airlines as just ordinary undertakings. This is even more pertinent considering additional requirements under Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, hereafter referred to as the Takeover Directive,[81] such as national mandatory bid rules when a bidder exceeding a certain threshold must make an offer on some or all outstanding shares of the targeted company.[82]

D) Trade in air services

While one may argue that there is a discernible trend to treat airlines as increasingly regular undertakings operating in an international competitive environment, this approach ignores that trade in air services is subject to a special regime. Trade in air services, with special reference to trade in traffic rights, falls basically outside the scope of the World Trade Organisation (WTO). The WTO's General Agreement on Trade in Services (GATS) does not apply 'to measures affecting: (a) traffic rights,

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76. See also, 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).
77. Merger Regulation, Art. 3(2).
78. See also Part B, 'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance', Air & Space Law 49(6), 2024.
79. Case No COMP/M.7333 – *Alitalia/Etihad*, decision of 14 November 2014.
80. Ibid, para. 153: "Alitalia will have the *absolute majority of the votes* at New Alitalia's shareholders' meeting and board of directors and will therefore be in a position *to block all initiatives* that are not in Alitalia's interest" (*emphasis added*).
81. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the "Takeover Directive").
82. J. Hoogerwerf, "Eigendom, zeggenschap en nationaliteit van geprivatiseerde luchtvaartmaatschappijen", International Institute of Air and Space Law, Leiden (1999).

however, granted; or (b) services directly related to the exercise of traffic rights',[83] i.e., the operation of air services, that is, the operation of flights. This rather explicit exclusion means that generally accepted WTO principles and commitments do not apply to trade in air services. Instead, trade in air services is regulated pursuant to the regime of bilateral air services agreements between States, as explained in section 2.1.1. Conditions and provisions applicable to trade in air services must be expressly agreed between the States to, from or via which the air transport services are operated.[84]

2.1.4 Government Ownership and Protective Mechanisms

A third and final element pertains to the situation pursuant to which the State is still involved with the airline, for instance, through the holding of, part of, the shares or through the exercise of control rights or a controlling interest. Even though national carriers have been privatised, their governments put in place mechanisms to ensure that the nationality of the national carrier is protected or can be preserved through the intervention of the State or its nationals, for instance, by exercising special rights or using golden shares in unforeseen events, such as hostile takeover attempts or significant foreign investments.

These measures come in all shapes and sizes. The golden share and the different forms in which it exists have been mentioned above. Another example is the issuance of two types of ordinary shares and limiting ownership by foreign nationals to one such type. In Thailand, New Zealand and Mexico, the largest airlines have 'A' and 'B' shares with ownership and transfer of the former being limited to their nationals.[85] A more sophisticated protection measure, but also less transparent, was agreed upon between the Dutch State and KLM in the late 1990s. Should the situation arise where another State imposes restrictions or onerous conditions on KLM's flight services because the majority of the capital is no longer held by Dutch nationals, such agreements provided the government with the option to gain the majority of the equity capital by the issuance of preferential 'B' shares.[86] The German *Luftverkehrsnachweissicherungsgesetz* provides the board of Lufthansa a similar option to buy shares or issue new shares if foreign ownership of shares exceeds 40%.[87]

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83. See General Agreement on Trade in Services, Annex on Air Transport Services, Art. 1.3.
84. See Art. 6 of the Chicago Convention.
85. P. Morrell, Airline Finance, Vol. 4th ed, Routledge (2013), 142.
86. Overeenkomst tussen de Staat der Nederlanden en Koninklijke Luchtvaart Maatschappij, 23-12-1996, Art. 6.
87. Luftverkehrsnachweissicherungsgesetz (1997), as amended in 2017, Art. 4.

In the EU, measures to safeguard the nationality of the carrier based on national company law, must also comply with EU company and competition rules, most notably the rules on mergers, (direct) foreign investment and the free movement of capital. However, this study will only focus on these rules insofar they have consequences for the ownership and control of businesses, like the Takeover Directive[88] and the mandatory bid rule.[89]

Last but not least, protective measures t ought to be addressed in the context of a changing geopolitical landscape.[90] In some instances, governments deem preserving national ownership desirable or sometimes even necessary, for instance, to protect strategic sectors, such as ICT, energy and infrastructure.[91] Within the context of pursuing strategic autonomy in the EU, this research will also explore whether policy factors or the public interest can be used to justify the measures safeguarding nationality,[92] and whether this means that airlines can be, or should be, regarded as 'undertakings' in a genuine business environment.

2.2 Demystification of Airlines as Regular International Undertakings

Turning from a phase in the latter half of the 20th century where airlines 'of a State' have developed into airline undertakings operating and competing in an international market, albeit being subject to a special regime,[93] developments in the first two decades of the 21st century have shown that aviation is often not treated as a regular industry. Between, around 1995 and 2020, a series of events, including State aid provided to EU airlines (Lufthansa, Air France, Alitalia) on a 'one time last time' basis, and bankruptcies of European 'flag carriers' (Sabena and Swissair), demonstrated that, unlike other international industries that thrive after privatization, the airline industry frequently remains heavily dependent on government support and intervention. This section will briefly touch upon that evolution.

88. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the Takeover Directive).
89. J. Hoogerwerf, Eigendom, zeggenschap en nationaliteit van geprivatiseerde luchtvaartmaatschappijen, International Institute of Air and Space Law, Leiden (1999).
90. C. Waymouth, Is 'Protectionism' a Useful Concept for Company Law and Foreign Investment Policy? An EU Perspective, in: Company Law and Economic Protectionism (2010).
91. For instance, the hostile takeover attempt of KPN by America Movíl or the blocking of Huawei.
92. See A. Jones & J. Davies, Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate, 10(3) Eur. Competition J. 453-497 (2014).
93. As explained in section 2.1.3(d) above.

A) Post-9/11 State Support

The terrorist attacks of September 11, 2001, resulted in an immediate and severe drop in passenger demand, as heightened security concerns and fear of further attacks caused travel confidence to plummet. Many airlines found themselves in a critical financial position, forced to ground fleets and downsize operations. To stave off widespread bankruptcies and maintain essential connectivity, the U.S. government enacted emergency legislation, such as the Air Transportation Safety and System Stabilization Act,[94] that provided direct financial aid, loan guarantees, and other forms of support. This swift intervention not only underscored the aviation industry's strategic importance to the economy and national security but also highlighted its ongoing reliance on government involvement when facing global crises.[95]

B) The Financial Turbulence of 2008

The 2008 global financial crisis had a profound impact on airline balance sheets, as surging fuel prices, plummeting passenger demand, and scarce credit severely strained carriers' operating margins. Numerous airlines, large and small, grappled with urgent liquidity needs and escalating debts, prompting governments worldwide to offer bailouts, guarantee loans, or even assume ownership stakes in struggling carriers. These interventions, although controversial at times, were deemed necessary to preserve vital infrastructure, secure employment, and mitigate the risk of losing key domestic and international air services. By highlighting the sector's vulnerability to global economic shocks, the 2008 crisis reinforced the notion that airlines often require extraordinary governmental backing to maintain stability and continuity.[96]

C) National Interest in Privatization: The Case of TAP Portugal

Governments sometimes prioritise broader strategic goals over strict market principles, as evidenced by Portugal's involvement in the national carrier, TAP. Despite earlier moves toward privatisation, successive Portuguese administrations opted for direct intervention and partial state ownership, aiming to secure vital air links between Portugal and its overseas territories. These decisions reflected concerns about preserving connectivity to regions with deep cultural and economic ties, safeguarding local jobs, and maintaining Lisbon's status as a hub.

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94. Public Law 107–42, Sept. 22, 2001.

95. See, for instance, Brian F. Havel & Michael G. Whitaker, "The Approach of Re-Regulation: The Airline Industry After September 11, 2001" in Issues in Aviation Law and Policy, Autumn 2001, 10,051.

96. See, for instance, "The Impact of the Economic Crisis on the EU Air Transport Sector", prepared for the European Parliament by the DG for Internal Policies, October 2008.

While these actions interfered with free-market dynamics, the protection of national interests, especially during economic downturns, continues to lead to government involvement.[97]

D) State Aid and COVID-19

The outbreak of COVID-19 in early 2020 led to border closures, widespread travel bans, and a sudden, dramatic collapse in passenger demand. Airlines worldwide faced an existential threat, with grounded fleets and severely reduced revenues. In response, governments across the globe deployed unprecedented financial rescue packages, including direct grants, loans, and equity injections. Notably, many of these aid measures came with new stipulations, such as requiring airlines to reduce carbon emissions or streamline their operations to meet sustainable targets. This conduct marked a shift in the industry's regulatory landscape: while State support was still essential to keep carriers afloat, policymakers increasingly leveraged these interventions to push for structural reforms and encourage greater environmental responsibility.[98]

E) Political and Environmental Airspace Closures

Airspace closures can stem from both geopolitical strife and natural disasters, with equally disruptive consequences for global aviation. High-profile incidents underscore this vulnerability: the downing of Malaysia Airlines Flight MH17 over eastern Ukraine in 2014 brought renewed scrutiny to overflight routes, while the Qatar blockade in 2017 forced Gulf carriers to reroute or suspend important regional connections.[99] More recently, the invasion of Ukraine in 2022 resulted in widespread sanctions and reciprocal bans that abruptly shifted flight paths, adding flight time and operational costs for multiple carriers. Additionally, natural events like the 2010 eruption of Iceland's Eyjafjallajökull volcano grounded flights across Europe for days, stranding millions of passengers and causing significant economic losses for airlines. Considered holistically, these events underscore the fragility of international air transport networks in the face of sudden, large-scale disruptions, whether geopolitical, economic, or environmental. The following section examines how sustainability objectives have re-emerged and appear to reinforce airline governance through both regulatory frameworks and stakeholder influence.

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97. See, Court of Justice of the EU, Case C-563/17, Associac¸ão Pec¸o a Palavra and Others v. Conselho de Ministros, decision of 27 February 2019.
98. See, for instance, Air and Space Law, Volume 54, Special Issue on COVID-19.
99. See, for instance, Luping Zhang, 'The Middle East Air Blockade: Revisiting the Jurisdictional Inquiry of the ICAO Council', (2021), 46, Air and Space Law, Issue 1, pp. 135-150.

2.3 Advancing Sustainability Objectives through Regulatory and Stakeholder Governance

Since around 2020, States have sought to re-engage with the governance of airlines, both to advance sustainability objectives and to safeguard elements of strategic importance. This renewed engagement has not amounted to a return to ownership-based control, but appears to indicate a gradual reassertion of public and societal influence within an otherwise liberalised market. In the context of this study, governance refers to the structures and processes through which direction and control over airlines is exercised, shared, or contested—whether by States, EU institutions, corporate actors, or civil society. Within this framework, both regulatory governance (based on formal rules, oversight, and enforcement) and stakeholder governance (arising from the influence of investors, courts, and societal actors) constitute complementary modes through which sustainability goals increasingly interact with the management and operation of airlines. Rather than replacing earlier forms of control in the context of corporate governance, these developments may suggest a growing interaction among public regulation, corporate autonomy, and external accountability. As environmental regulatory frameworks expand, as alluded to in the introduction, and stakeholder expectations seemingly intensify, as addressed below, questions arise as to who ultimately holds responsibility for balancing economic resilience, environmental ambition, and social expectations within this evolving governance architecture.

Against this background, the following analysis examines two main avenues through which sustainability objectives engage with airline governance in the context of this study. The first concerns the regulatory dimension, addressing how international and EU environmental measures shape the legal and operational conditions under which airlines operate. The second concerns the stakeholder dimension, focusing on the role of States, investors, and societal actors in influencing airline decision-making through financial, legal, and normative means. Together, these perspectives provide the foundation for understanding how sustainability objectives may be reshaping—not redefining—the interplay between regulatory governance, market dynamics, and stakeholder influence in contemporary aviation governance.

2.3.1 International regulation of environmental measures for aviation

The international regulation of aviation remains grounded in State sovereignty over airspace, as affirmed in Article 1 of the Chicago Convention (1944). Yet, through the International Civil Aviation Organization (ICAO), States have collectively transferred especially safety-related standard-setting functions to the international level, including in the environmental domain. In terms of the international regulation of

aviation, Annex 16 to the Chicago Convention (1944) on *Environmental Protection* establishes Standards and Recommended Practices (SARPs) to mitigate the environmental impact of international aviation. The four volumes of this Annex address aircraft *noise*, setting noise certification standards and frameworks to reduce noise disturbances near airports as well as aviation *emissions*, limiting pollutants such as nitrogen oxides (NO_x) and carbon monoxide (CO_2), monitoring and controlling outputs and introducing the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA), a global market-based measure aimed at reducing international aviation emissions.

The international Standards and Recommended Practices (SARPs) established by the International Civil Aviation Organization (ICAO) in the Annexes to the Chicago Convention (1944) do not have treaty status. This study will not detail the differentiation between standards and recommended practices or the debate on their legal force.[100] Although SARPS may not be directly legally binding, they carry significant legal and practical weight. SARPs serve as the baseline for international aviation standards, ensuring safety, efficiency, and environmental protection in global air transport. While ICAO member states are obligated to implement and comply with SARPs to the greatest extent practicable under Article 37 of the Chicago Convention (1944), States retain sovereignty over their airspace and may maintain deviations if necessary. Such deviations must be limited in time and reported to ICAO.[101] Nevertheless:

> "Reading all these provisions together [Art. 37 & 38], one cannot help but conclude that the primary focus of these provisions is the achievement of uniformity of international standards, and not the freedom of action of the contracting States to file differences."[102]

Implementing SARPs into national regulations and practices of States gives them legal force, albeit on the national level. States are expected to integrate SARPs into national legislation, aviation safety regulations and operational guidelines. While some States adopt SARPs directly, others adapt them to align with local legal and operational frameworks. Ultimately, all ICAO member States' integration and enforcement of SARPS nationally grant it its worldwide application as the minimum norm.

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100. See, M. Milde, *International Air Law and ICAO*, 71–73 (2016); same author: *International Civil Aviation Organization – An Introduction* (2007) and J. Huang, *Aviation Safety and ICAO*, 58–66 (PhD Leiden, 2009).
101. Art. 38 of the Chicago Convention (1944).
102. See, J. Huang, *Aviation Safety and ICAO*, (PhD Leiden) section 2.2.4 (2009), pp 59-60.

In the European Union, SARPs are also implemented via the European Aviation Safety Agency (EASA) in EU law. Following the 'direct effects' doctrine,[103] individuals and entities can invoke provisions of EU law before national courts to an extent based on the legal instrument used. Article 288 of the Treaty on the Functioning of the European Union (TFEU) defines the legal acts of the Union, stating that a *regulation* "shall be binding in its entirety and directly applicable in all Member States," while a *directive* "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." A *decision* is binding in its entirety, while *recommendations* and *opinions* have no binding force. EU Regulations need not be transposed into national law; they automatically become part of the national legal order. Individuals can directly rely on them before domestic courts if the provisions are sufficiently clear, precise, and unconditional.[104] Directives, in contrast, require transposition into national law by member States within a specified timeframe. Under certain conditions, provisions of a Directive may have direct effect. This occurs when the implementation deadline has passed or when the Directive has not been properly transposed. In such cases, individuals may invoke the Directive's provisions against the state or state-controlled bodies, which is referred to as vertical direct effect.[105] Directives, however, do not confer horizontal direct effect, meaning they cannot be directly invoked in disputes between private parties.[106] Unlike Directives, Regulations do confer horizontal direct effect.

Whether it is the transposition of international environmental SARPs into EU law or the implementation of new environmental measures by the EU, promoting sustainability objectives through environmental measures relies on the legal instrument employed and the binding commitments enshrined therein. The enforceability of these provisions in national courts, whether vis-à-vis States or other entities, such as airlines, is equally critical. From a governance perspective, this layered system illustrates how responsibility in aviation environmental policy and regulation is exercised through multiple levels, international standard-setting, EU regulatory transposition, and national implementation, each shaping, in different ways, the conditions under which airlines operate.

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103. See, Van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/62). See also, Briefing of the European Parliament: 60 years of Van Gend & Loos - Direct effect of EU law and a 'new legal order' of February 2023, by the European Parliamentary Research Service, PE 739.326.

104. Ibid. See also, *Defrenne v. Sabena* (Case 43/75) and *Francovich v. Italy* (Joined Cases C-6/90 and C-9/90).

105. See, Case 148/78, *Ratti* (1979) ECR 1629, rec. 23.

106. See, Case 152/84, *Marshall V South-West Hampshire Area Health Authority* (1986) ECR 723, rec. 48.

2.3.2 Considerations on corporate and stakeholder governance in aviation

For the purpose of this research, corporate governance is defined as the framework that directs and controls a company. It is a "set of institutional arrangements" such as mechanisms and processes "affecting corporate decision-making" that deals with "relationships among various participants in determining the direction and performance" of a company.[107] These 'participants' comprise *stakeholders* in the company and internally include various types of shareholders and, among others, executives and employees. Additionally, external parties that interact with the company—such as suppliers and customers—are also considered stakeholders.

In line with the broader understanding of governance adopted throughout this study—namely, the structures and processes through which direction and control over airlines is exercised, shared, or contested, either through power or influence—corporate governance represents one specific layer of this wider governance architecture. Alongside regulatory governance, which concerns the exercise of authority through law, oversight, and public regulation, stakeholder governance captures the influence exerted by actors whose interests or values intersect with the airline's operations but who do not necessarily hold formal decision-making powers. Together, these dimensions provide a framework to assess whether and how corporate practice, compliance, and accountability contribute to, or are aligned with, sustainability objectives in aviation. Within this framework, the concept of *stakeholder governance* serves as an analytical lens through which to examine how diverse actors—ranging from States and EU institutions to investors, financiers, and societal groups—affect the governance of airlines. The following sections distinguish between institutional, economic, and societal stakeholders, each of which can influence the airline's strategic and operational choices through legal, financial, or normative means.

In air transport, various categories of stakeholders can exert influence on the carrier's business, depending on the governance model and the degree to which ownership, management, and accountability are separated. Within this context, three forms of corporate governance can be distinguished analytically: managerial, entrepreneurial, and stakeholder governance.[108] Rather than discrete or competing models, these reflect a continuum through which direction, control and influence over or within airlines have evolved alongside broader regulatory

107. C. Giapponi & C. Scheraga, *Cross-Cultural Factors and the Corporate Governance Transparency in Global Airline Strategic Alliances*, Journal of the Transportation Research Forum, Vol. 46(2), (2007), pp. 103.

108. M. Carney & I. Dostaler, *Airline Ownership and Control: a Corporate Governance Perspective*, Journal of Air Transport Management, 12(2), (2006), p. 65.

and market developments. *Managerial Governance*, prevalent among established airlines, involves more distant shareholders who appoint managerial executives to run the business. This model relies on institutional investors or shareholders to concentrate voting power without necessarily concentrating ownership.[109] The resulting structure strengthens managerial autonomy and stability but can reduce direct accountability to individual shareholders. *Entrepreneurial Governance*, by contrast, observed in the early stages of airlines such as Ryanair and Virgin Atlantic, concentrates control in a few hands, permitting innovative and risky business models. However, it presents challenges in raising capital due to the insufficient oversight for external investors.[110] Both managerial and entrepreneurial governance structures facilitate the establishment of effective control in the corporate decision-making sense and align with the traditional shareholder-centric understanding of governance.

Over the last decades, airlines have seemingly increasingly operated under conditions that can be attributed to or labelled as *Stakeholder Governance*. Traditionally, said model reflects the participation of *internal* stakeholders, such as managers and employees, who have a stake in the company and are interested in its continued welfare or seek to exert influence to achieve specific objectives, such as salary increases.[111] However, in the 21st century, particularly in Europe, it appears that *external* stakeholders have come to exert a growing influence on corporate decision-making and on how an airline is managed. External stakeholders include, among others, financiers, suppliers, customers, and communities affected by the airline's activities, often organised in collective or activist forms, as well as the State, in the capacity of policymaker and regulator, balancing different policy or political interests. Stakeholders may, therefore, be "double-hatted": for instance, a State may hold equity in a national airline while simultaneously pursuing broader policy objectives related to sustainability, the national or regional economy and connectivity, as well as strategic considerations. Similarly, activist investors or climate-focused shareholder groups may acquire stakes in airlines to have a voice

109. S.R. Kole & K.M. Lehn, *Deregulation and the Adaption of Governance Structure: the case of the U.S. Airline Industry*, Journal of Financial Economics 52(1), (1999), p. 80.

110. See, A. Ramírez-Orellana et al, *The cost of capital for airlines: The effects of internal governance practices and the application of new leasing standards*, Journal of Air Transport Management, Vol. 124 (2025).

111. See, for instance, H. Spitzeck, E.G. Hansen, *Stakeholder governance: how stakeholders influence corporate decision making*, Corporate Governance: The international journal of business in society, Vol. 10(4) (2010).

at the shareholders' meeting and pressure the company's management or influence environmental or social strategies from within.[112]

In governance terms, this trend suggests a widening of the sphere of influence over corporate decision-making, where direction and control is no longer exercised solely through ownership or management but also through financial leverage, regulatory expectations, and societal accountability. This evolution corresponds with the broader argument of this study that the pursuit of sustainability objectives has become a salient vector through which both public and private stakeholders seek to shape, or at least influence, airline conduct and legitimacy. Within this broader understanding, three broad categories of stakeholders can be distinguished according to the source and nature of their influence:[113]

- ◊ *Institutional stakeholders* include States, EU institutions, and international organisations such as ICAO, which exercise authority through regulation, policy frameworks, and oversight mechanisms. Their influence represents the formal, public dimension of governance and often determines the conditions under which airlines operate.
- ◊ *Economic stakeholders*, including shareholders, investors, and financiers, affect governance through capital allocation, ownership structures, and financial conditions attached to funding or support. Their engagement increasingly incorporates environmental, social, and governance (ESG) criteria, linking financial participation to sustainability performance.
- ◊ *Societal stakeholders*, such as consumers, communities, non-governmental organisations, and judicial actors, shape governance more indirectly by exerting normative and reputational pressure or by invoking legal accountability through litigation and advocacy.

These categories are not mutually exclusive; their influence frequently overlaps and reinforces one another. Together, they illustrate how the pursuit of sustainability objectives is embedded in a multi-level governance framework,[114] where regulatory

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112. For activist shareholding in general, see for instance, D.P. Stowell & P. Stowell, *Chapter 13 - Shareholder Activism and Impact on Corporations*, in: Investment Banks, Hedge Funds, and Private Equity (Fourth Edition), Academic Press, 2024, pp. 309-326.

113. See, R.E. Freeman, *The Stakeholder Approach Revisited*, Zeitschrift für Wirtschafts- und Unternehmensethik, Vol. 5(3), 2004. Freeman reiterates the multi-level nature of stakeholder relationships (rational, process, transactional) and emphasises that firms engage simultaneously with institutional, economic, and societal constituencies, reflecting normative, instrumental, and descriptive dimensions of stakeholder influence.

114. See, for instance, B. Sjåfjell & C.M. Bruner, "Corporations and Sustainability", in The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (CUP, 2020).

frameworks, market incentives, and societal expectations interact to guide the behaviour and strategic orientation of businesses,[115] or in this case of airlines.

Although a comprehensive analysis of this development is outside the scope of this research context, several examples illustrate how different stakeholders attempt to influence airline governance, as framed in this study, within the sustainability domain. Economic stakeholders, such as financiers, whether private or in the capacity of the State, and investors, can attach environmental or social conditions to financial instruments. That influence was evident during the COVID-19 pandemic, when both private and public financiers imposed labour, environmental or organisational restructuring conditions to airline support packages.[116] Institutional stakeholders, particularly States, may steer or influence airline behaviour through policy interventions, as reflected in the discussion about reducing the number of flights at Schiphol Airport to balance connectivity with environmental and noise-reduction goals.[117] Societal stakeholders, including communities around airports and environmental action groups, seek to influence aviation practices through advocacy and litigation against the airport, airlines, or public authorities and the State.[118] The Netherlands again offers several illustration, ranging from proceedings concerning noise disturbance,[119] environmental permits for airports,[120] to cases on alleged greenwashing in airline sustainability communications.[121]

Viewed in combination, these examples illustrate how sustainability considerations enter airline governance not only through formal regulation but also through

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115. See, for instance, T. Kuntz, "Introduction," in Research Handbook on Environmental, Social and Corporate Governance (Edward Elgar 2024). Kuntz describes ESG as a transnational, multi-level governance framework shaped by public regulation, market dynamics, and social expectations, illustrating the interdependence of regulatory authority, financial incentives, and societal norms in contemporary corporate governance

116. Conditions on the support package for KLM included, among others, a reduction of flights at night, sustainability commitments to reduce CO_2 emissions and increase the use of Sustainable Aviation Fuel and salary cuts of personnel. See also, S. Truxal, *State Aid and Air Transport in the Shadow of COVID-19*, Air and Space Law, Special Issue, 2020.

117. See, Part C of this research, *Challenging the Balanced Approach to Aircraft Noise Management Principle: Will the Dutch Approach Stand or Will the Principle Prevail*?, Air and Space Law, 49(1), (2024).

118. See, Part C, *The Path Towards the Balanced Approach in the Netherlands: From Consensus to Litigation Over Schiphol Downsizing (translation)*, Tijdschrift Vervoer en Recht, 2023(6).

119. See, for instance, the court case by "Stichting Recht op Bescherming Vliegtuighinder" (Foundation for the Right to Protection from Aircraft Nuisance) against the Dutch State, ECLI:NL:RBDHA:2024:3734.

120. See, for instance, court cases by, amongst others, Mobilisation for the Environment to appeal against the environmental permits for, Eindhoven Airport, ECLI:NL:RBGEL:2024:2154, Amsterdam Schiphol Airport, ECLI:NL:RBGEL:2024:2155, and Rotterdam The Hague Airport, ECLI:NL:RBGEL:2024:2156).

121. See, court case by Fossielvrij (Fossil Free NL) against KLM, ECLI:NL:RBAMS:2024:1512.

the expectations and interventions of economic, institutional, and societal actors operating across different governance levels. In practice, sustainability objectives are pursued through a combination of regulatory oversight, financial conditionality, and societal engagement. In aviation, governance in this sense operates across multiple and overlapping levels, with international and EU regulation providing the overarching legal and policy framework, States and investors exercising targeted influence, and societal stakeholders seeking to steer conduct through legal and normative channels. Rather than signalling a structural transformation, these developments suggest a gradual broadening of accountability in airline governance, in which multiple stakeholders participate—directly or indirectly—in shaping and influencing airline behaviour. That eviolution aligns with the notion of stakeholder governance as used in this study: a mode of governance in which direction, control and influence are distributed among institutional, economic, and societal actors whose engagement affects corporate conduct beyond traditional shareholder control.

In this sense, the pursuit of sustainability objectives may be seen as both a driver and a reflection of multi-level governance, linking institutional and regulatory frameworks, market incentives, and societal expectations in shaping and influencing airline governance. The following methodological section builds on this contextual foundation by examining how these governance dynamics can be analysed across the subsequent parts of the dissertation.

3. Methodology and Structure

This study adopts a primarily doctrinal and comparative legal approach to examine how airline governance evolves under international and European law. Methodologically, it relies on interpretation, comparison, and synthesis of legal and policy materials rather than empirical data. The analysis draws on treaties, domestic legislation with special reference to EU regulations, directives and decision, case law, and policy instruments, complemented by academic literature and selected corporate and institutional sources. Comparative reference to other jurisdictions is used selectively to illuminate European developments or to test the generality of observed trends.

The research design combines doctrinal analysis, comparative contextualisation, and interpretive reasoning. As noted by *Van Hoecke (2011)*,[122] doctrinal legal reasoning involves identifying, systematising, and interpreting legal rules as a coherent normative system. This approach enables the study to clarify how ownership and control, sustainability obligations, and governance mechanisms are constructed in law, how they work in practice, and how they interact across different legal orders. The comparative dimension follows the understanding developed by *Cryer et al. (2011)*,[123] who emphasise that comparison in international and EU law serves both explanatory and evaluative purposes. In this context, comparative analysis highlights how similar legal notions—such as substantial ownership, effective control, principal place of business, or strategic considerations—are interpreted and applied in varying regulatory contexts, revealing the flexibility and limits of legal harmonisation in aviation. Interpretation follows recognised principles of treaty and EU-law analysis, including Articles 31–32 of the Vienna Convention on the Law of Treaties and the textual, contextual, and teleological methods applied by the Court of Justice of the European Union.[124] This ensures interpretive coherence between international and EU sources and allows the analysis to trace how governance norms are transposed and applied within national frameworks.

Finally, the article-based format allows each paper to apply these methods to a distinct facet of the overarching inquiry, while maintaining conceptual and

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122. M. van Hoecke, (editor). *Methodologies of Legal Research : Which Kind of Method for What Kind of Discipline?* 1st ed., Hart Publishing, 2011.
123. R. Cryer, et al. *Research Methodologies in EU and International Law*. Hart Publishing, 2011.
124. See, G. Beck. *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, 2012

methodological consistency across the dissertation. The following section discusses the analytical framework used to address the research and sub-questions.

3.1 Analytical Framework and Research Questions

The Research Context provides the legal and historical background, situating the evolution of airline governance within broader regulatory, economic, sustainability, and societal developments. It thereby offers the conceptual and empirical foundation upon which the later analysis builds. Three interrelated analytical pillars guide the subsequent analysis:

- **Sustainability** – examines how environmental, economic, and strategic objectives inform regulatory and policy choices, and provides the overarching conceptual frame.
- **Governance** – offers the analytical perspective to analyses how direction and control over airlines is exercised, shared, or contested, encompassing both *power*—the formal ability to make binding decisions—and *influence*—the external constraints and expectations that shape such decisions, across three interlinked domains:
  - o Corporate governance – the internal distribution of decision-making power within companies, an in this case airlines;
  - o Regulatory governance – the frameworks through which public authorities and institutions steer, supervise, and coordinate the sector; and
  - o Stakeholder governance – the societal influence exerted through courts, NGOs, investors, market mechanisms, and public accountability processes.
- **Stakeholder influence**, with reference to stakeholder governance above, explores the growing role of *institutional, economic, and societal actors* in shaping governance outcomes, linking back to the preceding two pillars and providing the explanatory mechanism through which sustainability and governance interact.

The combined effect of these perspectives form the analytical lense through which the dissertation addresses its central theme: Who governs the airline? This theme is translated into a central research question: "How is airline governance in the EU evolving through the interplay between shareholder-based corporate structures and expanding stakeholder influence, and how do sustainability objectives, environmental and climate litgation, and geopolitical developments collectively reshape the regulatory framework governing EU airlines?"

Two sub-questions structure the analysis and correspond to the two thematic parts of the dissertation, introduced below: *Firstly*, how do legal and institutional

mechanisms within international, EU, and national company law shape and constrain ownership, control, and governance in the European airline sector? *Secondly*, how are these governance structures being redefined under the influence of the pursuit of sustainability objectives, environmental and climate litigation, and broader stakeholder and geopolitical dynamics?

The next section outlines how the research is structured to address these questions.

3.2 Structure of the Research

The dissertation comprises six peer-reviewed articles, published in leading air law journals, which collectively explore how airline governance is evolving under the combined influence of regulatory change, stakeholder dynamics, and the pursuit of sustainability objectives. This article-based format allows the research to capture contemporary developments and to analyse them within a coherent legal and policy framework. The articles are divided into two thematic parts, each addressing one of the sub-questions derived from the central research question, to ensure a focused and cohesive exploration of the research theme. Together, these parts reflect the three dimensions of governance analysed throughout the dissertation — corporate, regulatory, and stakeholder — and how they intersect in shaping the governance of airlines.

Part B, "Ownership and Control of Airlines," examines the legal and institutional mechanisms through which direction and control over airlines is defined and exercised — from traditional nationality-based ownership requirements to the broader concerns of strategic autonomy and market access within the EU and international frameworks. Part C, "Pursuing Sustainability Objectives," shifts the focus to the re-emergence of public and societal influence, analysing how sustainability goals, environmental regulation and stakeholder pressures influence airline behaviour and corporate and regulatory decision-making within the sector. Both parts B and C, and the articles they comprise, are described in more detail below, including their respective contributions to the sub-questions and the overarching research question. The articles are structured to ensure coherence and logical progression and are arranged according to their relevance to the research objectives rather than the chronological order of their publication. Insights developed in Part B lay the foundation of the analysis in Part C, establishing how corporate governance frameworks interact with contemporary regulatory governance of sustainability-related legal frameworks, as well as evolving forms of stakeholder governance and their influence on airlines. The final section, Part D, synthesises findings from both parts, culminating in a comprehensive discussion

of governance within the aviation industry's current regulatory, corporate and stakeholder contexts.

Part B: Ownership and Control of Airlines

Part B addresses the first sub-question by examining "how [do] legal and institutional mechanisms within international and EU law, and national company laws, shape and constrain ownership and control in the context of the corporate and regulatory governance of airlines in the European Union?". It focuses on the interaction between corporate governance, the internal allocation of ownership and decision-making power within airlines, and regulatory governance, which defines who may own or exercise control over airlines to meet nationality conditions under international and EU law. By analysing historical and regulatory contexts and interpreting "substantial ownership" and "effective control" across various jurisdictions, the analysis shows how these concepts still underpin the allocation of traffic rights and market access amid increasingly complex corporate structures. Moving beyond the development of nationality-based requirements to more strategic concerns of economic sustainability, competitiveness and autonomy, Part B demonstrates how the governance of airlines remains closely tied to the broader economic and geopolitical interests of States and the EU.

The three following articles address part of the first sub-question through doctrinal and comparative analysis, linking an institutional analysis of corporate and regulatory governance with broader concerns of economic sustainability, competitiveness, and strategic autonomy within the EU aviation sector.

1. The Unique Link Between an Airline and a State'

Published in the *Aviation and Space Journal*, Issue 1(2023), pp. 4-16.

This article explores the historical and regulatory foundations of airline nationality, focusing on the origins of the relationship between airlines and their home States under the Chicago Convention. It analyses why nationality requirements remain critical in regulating air transport, contrasting this necessity with industries like digital services, where nationality plays a less significant role. The paper highlights that, despite liberalisation efforts, the nationality of airlines remains a cornerstone for operational traffic rights and regulatory oversight.

This contribution is primarily engaged with regulatory governance, addressing the first sub-question by tracing the origins of State responsibility and nationality in air transport law. It establishes the conceptual foundation for the later analysis of

ownership and control, illustrating how sovereignty and public oversight remain embedded in the legal definition of airline nationality despite market liberalisation.

2. 'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance'
Published in *Air & Space Law* 49, Issue 6 (2024), pp. 609-636.

This article examines the EU's ownership and control criteria under Regulation 1008/2008, highlighting how they govern market access, licensing, and traffic rights for EU carriers. Examining case studies such as KLM/Northwest Airlines and Swissair/Sabena highlights the complexities of compliance in a globalised aviation sector. The analysis reveals how multinational airline groups like Air France-KLM, the Lufthansa Group and IAG navigate these criteria using intricate shareholding and governance structures.

This publication connects corporate governance with regulatory governance and oversight, analysing how EU ownership and control rules under Regulation 1008/2008 operationalise the traditional link between nationality and market access. It applies a doctrinal-comparative method to show how airlines structure shareholdings and decision-making to comply with EU and bilateral requirements, thereby illustrating how legal and institutional mechanisms shape corporate control in practice.

3. 'Securing Strategic Autonomy for EU Airlines: An Assessment of Foreign Investment Exposure in the Air Transport Industry'
Published in the *Aviation and Space Journal*, Issue 3(2024), pp. 4-17.

Focusing on the EU's move to ensure strategic autonomy, this article assesses the role of ownership and control regulations in safeguarding EU airlines from foreign influence. It evaluates protective measures related to airline shareholding and regimes, such as the Foreign Direct Investment Regulation and the Critical Entities Resilience Directive, to ensure that control over EU airlines remains within the bloc. The article examines the balance between foreign investment and economic and strategic interests. It complements the other studies in Part B by addressing the intersection of regulatory frameworks and geopolitical considerations. It extends the analysis of regulatory governance to the EU's emerging strategic-autonomy agenda, and examines how instruments such as the FDI Screening Regulation and the Critical Entities Resilience Directive protect EU ownership and control, integrating the economic-sustainability and competitiveness dimensions of the

framework. The findings link corporate-law mechanisms to broader geopolitical concerns, providing the bridge to the sustainability-oriented analysis developed in Part C.

Part C: Pursuing Sustainability Objectives

Part C targets the second sub-question, analysing "How are regulatory and stakeholder governance structures in the European airline sector being redefined through sustainability objectives, environmental and climate litigation, broader stakeholder influence and geopolitical dynamics?". It discusses the apparent evolving interrelation between regulatory governance and stakeholder governance, focusing on how diverse actors—institutional (States, the EU, ICAO), economic (airlines, investors, market partcipants), and societal (NGOs, communities)—attempt to influence and shape decision-making and accountability in the pursuit of sustainability goals. The analysis explores how environmental and climate obligations, such as emissions reduction and noise management frameworks, are integrated into existing or new regulatory regimes and how these obligations affect the conduct and governance of airlines as used in the context of this study. In doing so, Part C demonstrates that the transition towards sustainable aviation is not only a matter of regulatory design but also of stakeholder influence, where societal and economic pressures increasingly complement or contest formal legal authority. It thus extends the focus from ownership and control to the broader distribution of authority, influence and responsibility within aviation's sustainability agenda.

The three following articles delve into distinct aspects of the second sub-question through doctrinal and comparative analysis, because it investigations how regulatory governance interacts with stakeholder governance and how sustainability objectives, climate litigation, and societal, economic, and institutional pressures collectively shape the evolving governance of airlines within the EU and international frameworks.

1. 'EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?'

Published in *Air & Space Law* 47, Issue 6 (2022), pp. 577-600.

This article explores the EU's ambitious Green Deal and the Fit for 55 legislative package as applied to air transport. It focuses on the potential for the Carbon Border Adjustment Mechanism (CBAM) to address competitive distortions and carbon leakage in the aviation sector. The paper maps the legal and political challenges of applying CBAM to air transport and evaluates its implications for global aviation

relations. By examining the intersection of economic and environmental policies, it contributes to understanding whether sustainability objectives can reshape industry practices.

This publications engages primarily with sustainability objectives and the regulatory governance of environmental policy within EU aviation. It addresses how market-based climate instruments such as the EU ETS and the proposed CBAM affects the competitive balance between EU and non-EU carriers. By examining the interaction between economic and environmental regulation, it situates the sustainability angle of the sub-question within the EU's broader pursuit of competitiveness and carbon-leakage prevention, thereby illustrating how environmental policy influences and constrains the conditions under which airlines operate.

2. 'The Path Towards the Balanced Approach in the Netherlands: From Consensus to Litigation Over Schiphol Downsizing'[125]
Published in *Tijdschrift Vervoer & Recht*, Issue 6 (2023), pp. 198-207.

This article examines the Dutch government's evolving noise policy at Schiphol Airport, which has shifted from a collaborative decision-making process to unilateral government action. The policy includes noise-related capacity restrictions designed to mitigate the noise impact of aviation. By analysing the legal and procedural controversies surrounding these measures, the article places them within the broader framework of the Balanced Approach as prescribed by international and EU regulations. It highlights the tension between local environmental priorities and compliance with international legal obligations, offering a nuanced perspective on the interplay between governance and sustainability.

Within the context of the second sub-question, this contribution focuses on environmental litigation through the stakeholder governance lens. Using the Schiphol case as a contextual case study, it examines how conflicting interests of government, industry, and communities translate into legal disputes over noise-related capacity restrictions. Schiphol was selected because it represents one of the most visible and legally complex test cases of the EU's Balanced Approach framework, where local environmental priorities directly confront international and EU obligations. The article demonstrates how judicial and societal actors can influence the boundaries of regulatory governance and discretion.

125. This article is published in Dutch; translation of the title is provided by the author.

3. 'Challenging the 'Balanced Approach to Aircraft Noise Management' Principle: Will the Dutch Approach Stand or Will the Principle Prevail?'
Published in *Air and Space Law* 49, Issue 1 (2024), pp. 1-33.

This article provides a comprehensive overview of the Dutch government's attempts to implement noise-related operating restrictions at Schiphol Airport under the Balanced Approach framework. It examines the international and EU legal foundations of the Balanced Approach and evaluates the Dutch measures against these standards. The article also considers the broader implications of noise-related restrictions for the EU internal air transport market and international obligations, contributing to a deeper understanding of how these environmental policies are operationalised within the aviation sector.

This article extends the analysis of stakeholder and regulatory governance by evaluating how international and EU standards on aircraft-noise management are interpreted and enforced through national decision-making and judicial review. It further analyses the geopolitical and market implications of the Dutch approach for the EU's internal air-transport market and for international partners. The Schiphol case shows how environmental measures at the national level can trigger multi-level governance and geopolitical tensions, illustrating the limits of unilateral environmental action within a highly integrated regulatory regime.

3.3 Analytical Coherence and Synthesis

The six articles unite provide a comprehensive study on the the evolution of airline governance under the combined influence of legal, economic and societal drivers. Part B analyses how ownership and control rules continue to structure the allocation of airline nationality in the aviation sector and their role in airlines' corporate governance, while Part C identifies how sustainability objectives and stakeholder influence are reshaping the governance framework through new regulatory and judicial dynamics. These articles are designed to consolidate both sub-questions while collectively illuminating the multi-level interplay between corporate, regulatory and stakeholder governance in European aviation. Part D will synthesise their insights to answer the overarching research question and reflect on how airline governance is being redefined within an increasingly complex and sustainability-driven legal environment.

3.4 Reflections and Limitations of the Research

This dissertation applies a qualitative, doctrinal and comparative legal approach to a field characterised by rapid regulatory and policy change. The chosen method and article-based style have allowed for a structured examination of legal norms and governance dynamics while remaining responsive to emerging developments in European and international aviation. At the same time, it is important to acknowledge the methodological boundaries and interpretive choices that frame the analysis as set out below.

The study is interpretive rather than empirical. It relies on the systematic reading and comparison of legal, policy and institutional materials, and does not attempt to quantify competitiveness effects, stakeholder impact or environmental performance. The analysis is confined primarily to the European Union and its Member States, with international and extra-EU frameworks examined insofar as they interact with the EU regime. Comparative references to other jurisdictions serve an illustrative rather than exhaustive purpose. The article-based design ensures topicality and depth but also entails certain limitations. Each contribution focuses on a specific question and applies a tailored analytical lens, which results in some variation in scope and emphasis. Because the articles are intended to be read as standalone publications, a degree of duplication is inevitable, both among the individual papers and with the Research Context of the dissertation, particularly in establishing the relevant legal framework. Publishing on timely topics, such as the evolving Schiphol case, further enhances academic and policy impact but carries the inherent risk that subsequent developments may alter the surrounding legal or political context. Managing this balance between relevance and durability has therefore required careful coordination of research and publication schedules. Collectively, however, the six articles provide complementary perspectives that together illuminate the multi-level dimensions of airline governance.

While Part C analyses environmental litigation and sustainability obligations, the dimension of climate litigation—explicitly mentioned in sub-question two—remains largely unexplored. This theme, environmental and climate litigation will be alluded to in the concluding reflections of Part D, which consider how judicial interpretation and climate-related responsibility and accountability further influence the regulatory and stakeholder governance of airlines.

Overall, the combination of doctrinal and comparative reasoning within a governance-oriented analytical framework enhances both the analytical rigour and the interdisciplinary relevance of the research. The division into Parts B and C

ensures a focused exploration of foundational legal principles and contemporary sustainability challenges, while Part D synthesises their findings to assess how airline governance is being redefined under sustainability pressures, increasing stakeholder influence and shifting geopolitical dynamics. Together, these methodological and structural choices are intended to provide a coherent basis for understanding the evolving governance of airlines in an integrated legal and policy environment, and to reflect on the research question in Part D.

Part B – Ownership & Control of Airlines

B1. "The Unique Link Between an Airline and a State"
Published in the Aviation and Space Journal, Issue 1(2023), pp 4-16.

B2. "Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance"
Published in Air & Space Law 49, Issue 6 (2024), pp 609-636.

B3. "Securing Strategic Autonomy for EU Airlines: An Assessment of Foreign Investment Exposure in the Air Transport Industry"
Published in the Aviation and Space Journal, Issue 3(2024), pp 4-17.

The Unique Link Between an Airline and a State

Published in the *Aviation and Space Journal*, Issue 1(2023), pp. 4-16.

Abstract

This article analyses the legal nature of the link between an airline and a State in international law. Building on general principles of nationality in the jurisprudence of the International Court of Justice, it examines how corporate nationality is attributed to juridical persons and assesses its relevance to airlines. It argues that, although the Chicago Convention does not expressly define airline nationality, a functional legal nexus is constructed through bilateral Air Services Agreements and domestic licensing regimes. This nexus is primarily articulated through the criteria of substantial ownership and effective control, complemented in practice by the notion of principal place of business for purposes of safety oversight and regulatory jurisdiction. At the same time, airlines remain independent undertakings under private international air law and competition law, bearing liability separate from the State. The article contends that this reflects a unique legal configuration, in which a special link between an airline and a State remains a decisive condition for market access, distinguishing aviation from broader developments in international economic law.

Keywords: corporate nationality, ownership & control, principal place of business, air services agreements, market access, safety oversight, regulatory control, licensing conditions

1. Introduction

In February 2023, the Organisation for Economic Cooperation and Development (OECD) released technical guidance to assist governments to implement a global minimum corporate tax rate of 15%.[1] In 2021, after years of preparations and negotiations, the G7 and G20, reached this breakthrough in the global effort to address tax challenges arising from globalisation and the digitalisation of the world economy. The landmark accord, backed by over 130 States, aims to put a hold on tax evasion by multinational companies by proposing a global minimum tax rate and creating a new taxing right for the largest multinational companies, where the nexus is no longer exclusively determined by reference to a *physical presence* in a country and regardless of where headquarters are located. This shift constitutes a monumental break with the historical 'race to the bottom' whereby governments attract multinational companies to establish in their country with favourable tax regimes or other enticements such as lower labour standards. In turn, multinational undertakings would orchestrate their company structure using tax havens, with parent companies and subsidiaries, by setting up headquarters and other physical establishments, or even just letterboxes, all with the objective to pay fewer taxes.

For certain companies, it is less relevant what place they run their business from, on paper or in real, or which corporate nationality or structure they must assume to make use of tax or other legal loopholes. Companies like Google, Facebook and Amazon are 'home' to the United States, but run their European operations from headquarters in tax friendly countries such as Ireland and Switzerland. Nationality is not always based on a so-called home country or whether a company has an anchor or genuine link with the country it is located in. Neither do we necessarily identify companies with their corporate nationality; even if a company is closely linked or associated with a nationality like IKEA is to Sweden, its headquarters may very well be located elsewhere, in this case in the Netherlands.

Air services, like digital services, in essence, do not require one fixed location to operate or offer services from; an aircraft can fly to and from a country regardless of the airline having an establishment there, and passengers can buy and 'consume' tickets from any airline and fly from any -or at least most- points in the world. However, that is where the analogy ends. Air transport does not fall under the

1. OECD (2023), Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two), OECD/G20 Inclusive Framework on BEPS, OECD, Paris. www.oecd.org/tax/beps/administrative-guidance-global-anti-base-erosion-rules-pillar- two.pdf. (last visited 20 March 2023).

regime of the World Trade Organization, nor are tax regimes so much a decisive factor for airlines' establishment. The new tax accord will not change the practice of airline nationality, as to which see section 5.

So why does airlines' nationality retain its relevance? This article will explore the origins of airlines 'of' a State from the Chicago Convention and will analyse the rationale and current status of this link with the State, and the subsequent allocation of nationality.

2. International Law on the Link between a State and its Nationals

Much has been written about the relationship between an airline and a State in practice;[2] from the economical need of State-funding that was - and turns out still is - necessary, to the policy involvement of the State when negotiating transit and traffic rights with other States, required by the airline to operate international services.[3] This section takes a step back for a different approach, by concentrating on the formal legal status of the link between a State and its nationals, that is legal entities, both natural and juridical, under international law.

2.1 Nationality under International Law

For natural persons, *citizenship* denotes the legal link between an individual and a political community, such as a city, State or territory, conferring both rights and obligations onto the citizen and the institutions.[4] Within the context of State citizenship, it is often used interchangeably with *nationality*, stemming from being a citizen of a nation. On the premise that this article focusses on the link with a State, nationality will be the leading concept.

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2. See H.P van Fenema, *Substantial Ownership and Effective Control*, in: T.L. Masson-Zwaan, and P.M.J. Mendes de Leon (ed.s in chief), *Air and Space Law:* De Lege Ferenda: Essays in Honour of Henri A. Wassenbergh 27-42 (1992); P.P.C. Haanappel, *Airline Ownership and Control, and Some Relates Matters*, 26(2) Air & Space Law 90-103 (2001); P.M.J. Mendes de Leon, The Future of Ownership and Control Clauses in Bilateral Air Transport Agreements: Current Proposals and Legal Obligations, S. Hobe et al. (ed.s), Consequences of air transport globalization 19-36 (2003).
3. Transit rights grant airlines the right to fly through the airspace of another State, without making a stop, unless for emergency reasons. Traffic rights concern rights of the designated carriers under an Air Services Agreement (ASA) to carry traffic between States on the points and terms agreed upon in the ASA, see also section 3.2.
4. See, for instance, P.J. Spiro. *The rights and obligations of citizenship*, 21(3) The William and Mary Bill of Rights Journal, p.899 (2013).

Nationality for individuals can be determined on the place of one's birth, through descent or inheritance from parents, on the basis of residency or via a process of naturalization. While it is within each State's jurisdiction to set criteria in its own laws on who are its nationals, international law and principles must be respected.[5] This practice was first codified in The Hague Convention on Nationality of 1930,[6] and further expanded into a right to a nationality by the Universal Declaration of Human Rights of 1948.[7] Issues regarding individual's nationality have been brought before the International Court of Justice (**ICJ** or **the Court**) under the doctrine of diplomatic protection. In the famous *Nottebohm* case of 1955, Mr Nottebohm, a German national living in Guatemala, had obtained the 'neutral' Liechtenstein nationality while on a trip to Europe, the Court ruled that:

> "According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a *genuine connection of existence*, interest and sentiments, together with the *existence of reciprocal rights and duties*."[8] *(italics added)*

States must thus recognise nationality awarded by another State to a natural person, only insofar there is a *genuine and effective link* between the State and that individual. This raises the question whether the same genuine and effective link with the State also extends to legal personality for juridical entities, such as companies. In the *Interhandel* case of 1959,[9] the subject of German control over Interhandel, a company registered in Basel holding the majority of shares of a company incorporated in the United States, was at the core of the issue in 1942. At the time of proceedings, however, neither of the parties questioned Interhandel's Swiss nationality or referred to this connection with the State. The Court ultimately dismissed the case and did not deal with the companies' nationality.[10]

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5. See PCIJ Advisory Opinion on *the Tunis and Morocco Nationality Decrees* of 1923.
6. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930, Art. 1: "*It is for each State to determine under its own law who are its nationals. […]*" 179 LNTS 89.
7. Universal Declaration of Human Rights of 1948, Art. 15.
8. *Nottebohm Case (Liechtenstein v. Guatemala); Second Phase*, ICJ, 6 April 1955.
9. *Interhandel Case (Switzerland v. United States of America)*, ICJ, 21 March 1959.
10. David Harris, "*The Protection of Companies in International Law in the Light of the Nottebohm Case*", The International and Comparative Law Quarterly Vol. 18(2), 1969, at p. 286.

2.2 Corporate Nationality

The differentiation between corporate nationality and the nationality of shareholders was at the heart of the case leading to the ICJ's *Barcelona Traction* judgement of 1970.[11] In short, Belgian shareholders predominantly owned Barcelona Traction, Light & Power Co., Ltd., a company incorporated in Canada, conducting all its activities in Spain. Following bankruptcy proceedings in Spain, Belgium brought a claim before the ICJ to protect the Belgium shareholders. Amongst other things, the case concerned whether Belgium had *jus standi* to bring a claim protecting a Canadian corporation. A small majority of the Court considered that the 'genuine connection' test for corporations could not be equated with the nationality of its shareholders and take precedence over that of the State of incorporation. The Court stated:

> "In allocating corporate entities to States for purposes of diplomatic protection, international law is based, but only to a limited extent, on an analogy with the rules governing the nationality of individuals. The traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments."[12]

Concurrently, the Court continuous to put forward that States adopt different practices, and some State require a company to have "its seat *(siège social)* or management or centre of control in their territory, or when a majority or a substantial proportion of the shares has been owned by nationals of the State concerned."[13] Indeed, States can apply two different concepts; the first, the Real Seat Doctrine (*siège réel*), referred to above, links the legal capacity to the company's main business location, i.e., where the majority of the tasks are performed or where the management and administration are located, whereas the Incorporation Theory determines the legal capacity of a company by the State in which it is incorporated; where it conducts or coordinates its business is irrelevant.[14] Variations between these two concepts are also possible. Via the latter, companies can 'choose' to

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11. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, ICJ, 5 February 1970
12. Barcelona Traction, para 43.
13. Ibid.
14. See, for instance, J. Wouters, *European Company Law: Quo Vadis*?, 37(2), Common Market Law Review, pp. 257-307 (2000), and J. Wouters, *Private International Law and Companies' Freedom of Establishment*." European Business Organization Law Review 2(1) pp. 101–39 (2001).

establish themselves in a country for its favorable corporate and tax law regimes or less stringent labour and environmental rules.[15]

In *Barcelona Traction*, the Court concluded that, for corporate entities, "no absolute test of the 'genuine connection' [with a State] has found general acceptance,"[16] seemingly referring to the *Nottebohm* case, but it then proceeded with an analysis of factors indicating a 'close and permanent connection' with the State of incorporation, in this case, the length of incorporation in Canada, the maintenance of its registered office and board meetings held there, and the listing in the records of local tax authorities.[17] Although the case dealt primarily with the question of which State could exercise diplomatic protection, it confirms corporate nationality based on the incorporation theory, thus leaving such requirements to national law. At the same time the ICJ acknowledges that in certain cases, the 'link' with a State requires a more 'close and permanent connection' than only bearing the State's corporate nationality. Obviously, this position of general international law can be further specified in Treaties or other special agreements, as is the case under international air law as further discussed in Section 3, below.[18]

Under international trade law, the General Agreement on Trade in Services (**GATS**) of the World Trade Organization, takes a broad view, considering juridical persons, or legal entities, 'duly constituted or otherwise organized under applicable law,' and 'engaged in substantive business operations' in the territory of that Member State, as well as having a 'commercial presence' in the State's territory, which includes 'any type of business or professional establishment.'[19] However, further analysis of these requirements is not relevant to this article, as the GATS does not apply to the operation of air services.[20]

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15. Mendes de Leon P.M.J. & Maarsen-Neumann E. (2009), Ausländische Luftfahrtunternehmen mit Hauptsitz in der EU/EWR. In: Hobe S., von Ruckteschell N. (Eds.) *Kölner Kompendium des Luftrechts. Bd.2: Luftverkehr.* Köln: Carl Heymanns Verlag. 708-740.
16. Barcelona Traction, para 43.
17. Ibid.
18. Rodley, Nigel S. "*Corporate Nationality and the Diplomatic Protection of Multinational Enterprises: The Barcelona Traction Case*," Indiana Law Journal: Vol. 47: Iss. 1 (1971).
19. General Agreement on Trade in Services, Art 1.2(c) and (d), jo. Art 28(d), (l) and (m).
20. See, General Agreement on Trade in Services, Annex on Air Transport Services, Art. 1.3.

3. The Link between an Airline and a State under International Air Law

International civil aviation is governed by the Convention on International Civil Aviation of 1944 (the **Chicago Convention** or **the Convention**). This convention primarily lays down the safety and security provisions for international air transport. Within this context, a State requires a link with an airline and its aircraft to perform safety oversight, as further explained in Section 3.2. However, the link, between a State and 'its' airline also serves an important purpose in the economic regulation of air transport. In that area, such a link is used to designate airlines as the economic beneficiaries of a State's transit and traffic rights under the Convention and international agreements, which the State concludes with other States.

3.1 Nationality of Airlines under International Aviation Conventions

The original text of the predecessor of the Chicago Convention, the *Convention Relating to the Regulation of Aerial Navigation* of 1919 (the **Paris Convention**), explicitly linked corporate ownership of an airline to nationality, that is, the same nationality of its aircraft:

> "No incorporated company can be registered as the owner of an aircraft *unless it possesses the nationality of the State in which the aircraft is registered*, unless the President or chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfills all other conditions which may be prescribed by the laws of the said State."[21] *(italics added)*

Thus, an airline company shall be considered a national of the State under the laws of which it is created. In addition, the text imposed what has come to be known as nationality requirements, here specifically aimed at the control of the company exercised by the chairman and its directors. The importance States at that time attached to the nationality of an airline, specifically concerned with accepting foreign airlines in their airspace, is apparent in the drafting discussions; the United States did not sign the Convention, insisting on more strict requirements, namely two-thirds of the company's stock to be owned by nationals of the State and all their directors to be nationals of such State.[22]

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21. Article 7 of the Paris Convention (before amendment).
22. John C. Cooper, *United States Participation in Drafting Paris Convention 1919*, 18 J. AIR L. & COM. 266 (1951), page 278.

The Chicago Convention is silent on the 'nationality' of an airline. In various instances, the Convention refers to "airline *of* a contracting State" or "the airline *of* any other State" *(italics added)*.[23] Hence, the authors of both Conventions proceeded from the point of view that there should be a link between an airline and the State, but the Chicago Convention leaves the establishment of such a link to its Member States.

3.2 Designation of Airlines under Air Services Agreements

Economic regulation of air transport, as such, is not drawn up in the Chicago Convention (1944). However, pursuant to Article 6, States must engage into agreements on the operation of international air services. Such Air Services Agreements (**ASA**s), form the exclusive basis for the operation of cross-border air services from one State to another. Each State designates an airline(s) for the operation of international air services under the Air Services Agreement. This procedure is a special, if not unique one in the world of economic activities. This designation *externally* serves to balance the beneficiaries of the exchanged traffic rights between the States and ensures that airlines of third countries cannot make use of said traffic rights. *Internally,* it is designed to ensure that the rights continue to be used by an airline of the States' nationality.[24]

In principle, the nationality of an airline is restricted. The requirements that the carrier's 'substantial ownership' and 'effective control' (O&C requirements) reside with the designating State, its nationals, or a combination thereof, are found in the Agreements attached to the Chicago Convention,[25] and the mentioned ASAs between States. The scope and meaning of these terms 'substantial ownership' and 'effective control' are usually discussed in policy discussions rather than legally defined or refined. Over the years, States have given different interpretations to nationality conditions, either involving a test of 'substantial ownership', one of 'effective control', or a combination of the two.[26] The first requirement, that of substantial, or sometimes even majority, ownership is tested through ownership of shares of an airline or holding company.[27] The United States caps foreign ownership

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23. See Art 7, 81 en 82, 89 of Chicago Convention (1944).
24. H.P. van Fenema, *Ownership Restrictions: Consequences and Steps to be Taken*, 23(2) Air & Space Law, 63-66 (1998).
25. See, for instance, Article I(5) of the International Air Services Transit Agreement (IASTA) and Article I(6) of the International Air Transport Agreement.
26. J. Walulik, *At the core of airline foreign investment restrictions: A study of 121 countries*, 49 Transport Policy, 234–251 (2014).
27. See Pablo Mendes de Leon*, A New Phase in Alliance Building: the Air France/KLM Venture as a Case Study*, 53 Zeitschrift für Luft- und Weltraumrecht 359-385 (2004).

of *voting* shares in an airline at 25%.[28] In the EU, "community air carriers" must be *majority-owned* by EU-nationals.[29] The 'effective control' test leaves more room for interpretation, an example being the *Daetwyler* case where an airline, despite satisfying the ownership percentage, could not establish actual control to reside with US nationals.[30] A successful example, is the acquisition of up to 49% equity interest, but only 20% of the voting stock in the holding company of Northwest, a US airline, by KLM Royal Dutch Airlines (KLM) in the 1990s.[31]

In the *Swissair/Sabena* merger,[32] the EU Commission set out elements to assess effective control, being "the power, direct or indirect, actual or legal, to exercise decisive influence on an airline."[33] This addresses the real questions of who, ultimately, has the decision-making power, final say in the daily management or on key issues such as business planning or annual budgets.

The ownership and control structure of an airline is an internal matter. Hence, this structure, including the requirements for complying with ownership and control conditions, is determined by provisions of national law, including corporate law, and the Articles of Association of the airline, including rights of shareholders and their influence on management decisions. Consequently, when determining nationality, one must look up the corporate tree and at the factual circumstances to assess who really owns the airline and can exercise effective control under the mentioned regulations. However, since this article focusses on the legal connection between an airline and a State, an analysis of airline's internal structures falls outside its scope.

3.3 Safety Oversight and Regulatory Control under the Chicago Convention (1944)

Regarding the connection between an airline and a State for safety oversight, specifically through the certification of the airworthiness of the aircraft and licensing of personnel operating said aircraft,[34] the Chicago Convention (1944) initially exclusively looked at the State *in which the aircraft is registered*. Accordingly, aircraft have the nationality of the State in which they are registered, and aircraft

28. Title 49 U.S.C. § 40102(a)(15)(C) as amended.
29. Regulation (EC) No.1008/2008, Art. 2, 4(a) and (f).
30. Willey Daetwyler, D.B.A. Interamerican Airfreight (CAB Docket 2214 (1971)).
31. P.P. Fitzgerald, *A level playing field for "Open Skies"* (2016), 76-77.
32. 95/404/EC: Commission Decision of 19 July 1995 on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena).
33. Ibid. section XI.
34. See Chicago Convention (1944), Articles 31 and 32, respectively.

can only be registered in one State.[35] As a corollary, the State of registry carries out 'functions and duties' as to the responsibility for safety oversight of the aircraft in its registry.

While in the early days of international civil aviation, aircraft were registered in the same State as the airline, by 1980, the sector's growth required more opportunities for airlines to finance aircraft and alternatives to owning such aircraft directly. To maintain a single State's responsibility for safety oversight, Article 83 bis, and the term 'principal place of business' therein, were introduced in the Chicago Convention to allow arrangements for the transfer of functions and duties of the State of registry of an aircraft to the State in which the operator of the aircraft, the airline, has its principal place of business or permanent residence:

> " [..] when an aircraft registered in a contracting State is operated pursuant to an agreement for the lease, charter or interchange of the aircraft or any similar arrangement by an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State, the State of registry may, by agreement with such other State, transfer to it all or part of its functions and duties as State of registry in respect of that aircraft […]"[36]

The term 'principal place of business' (**PPoB**) is not defined in the Chicago Convention (1944). However, it has been addressed extensively in guidance material of the International Civil Aviation Organization (**ICAO**) as an alternate and more liberal criterion for designation and authorization, as to which see the previous section.[37] In this context, it is used in conjunction with a requirement of 'effective regulatory control,' not to be confused with 'effective control' of the airline company pursuant to the O&C requirements. The requirement of 'effective regulatory control' for safety purposes establishes a 'genuine' link between the airline and the State responsible for the airline's safety oversight so that the competent authorities of the State concerned can exercise and maintain their control functions effectively. As concisely explained in section 3.3, regulatory control in safety management is manifested through certification, licensing and monitoring compliance with the conditions of the granted certification and licenses.

35. Ibid. Articles 17 and 18.
36. Ibid. Article 83 bis.
37. See, ICAO, *Policy and Guidance Material on the Economic Regulation of International Air Transport* (Doc 9587, 3rd edn, 2008), its Annex 5 ICAO Template Air Services Agreement, and *Manual on the Regulation of International Air Transport* (Doc 9626, 3rd edn, 2018), Part IV.

For authorities to exercise regulatory control effectively, there must be a permanent, stable, and effective link with the air carrier and the location of its core operational control and financial functions, i.e. the PPoB, so that these activities are visible, 'capable of physical inspection' and of being overseen and monitored by said authorities.[38] The EU Court of Justice recognized that the special provisions on safety management, through licensing, regulatory control and monitoring create "reciprocal regulatory obligations between airlines and these authorities and thus a specific, stable link between them."[39] While a distinction should be made between the nationality of an airline based on designation pursuant to ASAs, and that for safety oversight through licensing, the two are often intertwined in domestic licensing conditions; an airline can only be designated under an ASA when it has received an (operating) license from the designating State.

3.4 Licensing Conditions

The requirements that enable a State to exercise regulatory control, and *de facto* establish a jurisdictional link between an airline and the national authority or authorities of the State concerned, are laid down in domestic licensing conditions.

In the EU, the conditions for obtaining an operating license are found in Regulation 1008/2008 on common rules for the operation of air services in the Community. The conditions cover several financial-economical aspects but also require an 'Air Operator Certificate' (AOC) containing technical, safety and environmental standards, as well as ownership and control requirements. Indeed, national licensing conditions can, on the one hand, internalize the requirement for carriers to meet the requisite safety standards and for authorities to exercise control thereof, and on the other, include nationality requirements on ownership and control for the purpose of economic regulation of air transport. In other words, although States must agree on the designation criteria on both sides in an ASA, they are, in principle, free to establish their own criteria for airlines' designation as laid down in national licensing provisions or, in the case of the EU, in Community legislation, requiring, for instance, a principal place of business in the EU, on top of O&C requirements.[40]

In the EU's internal air transport market, the PPoB is defined as "[…] the head office or registered office of the undertaking within which the principal financial

38. UK Civil Aviation Authority CAP1539, UK CAA Interpretation of Principal Place of Business, March 2017. Available at: https://www.caa.co.uk/cap1539 (last visited 31 March 2023).

39. EU Court of Justice, Case T-259/20, Ryanair DAC v European Commission, judgement of 17 February 2021, para 39.

40. Reg. EU 1008/2008, *on common rules for the operation of air services in the Community, A*rt 4(a).

functions and operational control of the activities referred to in this Regulation are exercised."[41] This definition is closer to the Real Seat Doctrine than it is to that of the Incorporation Theory, as discussed in section 2.2. Such a distinction is understandable to determine whose authorities are to perform safety oversight. Corporate law, on the other hand, is not harmonized at the EU level, and an undertaking's connection with a State is based on national law. It is, therefore, questionable whether EU Regulation 1008/2008 should make reference to such a definition of PPoB, as to which see section 3.2.

For safety oversight, where the beforementioned definition is insufficient, the following factors can be used to identify an airline's PPoB and to prevent airlines from "authority shopping" in which they create firms and subsidiaries in different countries to set up a favorable supervision regime:[42]

- Where the carrier's headquarters is located;
- Where it is registered and pays corporate taxes;
- Where its main administrative and financial functions are performed;
- Where the principal operational control of its activities is located;
- Where its key personnel controls and coordinates daily operational activities;
- where it employs a significant number of nationals in managerial, technical and operational positions;
- Where records regarding the operational and financial decisions affecting the direction, control, planning and coordination of finances of its activities are kept;
- Where it has a substantial amount of its operations and capital investments in physical facilities and where its aircraft are registered and based.

This is not a complete list. International companies can be constituted in a variety of ways, and each organizational structure should be evaluated individually, taking into account the different factors to determine an airline's PPoB. This should guarantee that an airline's oversight and control be given to the competent national authority that is best suited for it. As remarked in Section 2.2 above, there are indeed variations between the 'real seat' and 'incorporation' concepts as tests for defining the PPoB.

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41. See, EU Regulation 1321/2014 *on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks*, Art. 2(m), and similar definition in EU Reg. 1008/2008 2(26).
42. See, EASA and EU Commission Information Letter on Principal Place of Business, published by Icelandic Transport Authority, FOI003, 06 October 2022.

Finally, the 'EU air carrier clause' laid down in EU Regulation 1008/2008 has been 'exported' to third States, and other regional organizations such as ASEAN[43] and WAEMU[44] in order to permit designation by the EU and its Member States of airlines under ASAs, including Horizontal and Vertical Air Transport Agreements with such third States and other regional organizations for the operation of the agreed international air services. Therefore, an EU airline may operate its air services from a point outside of its PPoB under such agreements. For instance, Air France is entitled to operate a service between Frankfort (Germany) and Boston (US) under the EU – US Agreement on air transport of 2007, as amended in 2010. However, relatively little use has been made of these opportunities.

4. Airlines are Undertakings under International Air Law

The previous sections have shown that a special link exists between an airline and the State; however, it is equally important to establish the boundaries of this connection with the State and to distinguish between the rights and obligations of each. This section will consider the airline as an undertaking under private international air law and competition law, and whether an airline can be considered a part of or an agent of the State.

4.1 Private International Air Law

The Chicago Convention (1944) and the 19 safety, security and environmental Annexes attached to it clearly distinguish between the rights and obligations of States, on the one hand, and the operating airlines, on the other hand. States are responsible for safety regulation and supervision, whereas airlines are liable when they cause an accident.

The Convention defines an airline as "any air transport *enterprise* offering or operating an international air service."[45] *(italics added).* Airlines, not States, must compensate the damages which they cause to passengers, their luggage and cargo they carry on their services. The liability conditions are laid down in the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929), as variously amended, and the Montreal Convention (1999), bearing a nearly identical title. Indeed, the Warsaw Convention of 1929 was drawn up because of the rather close link between States and 'their' airlines. At that time, these were

43. ASEAN refers to Association of Southeast Asian Nations.
44. WAEMU stands for West African Economic and Monetary Union.
45. See, Art. 96 (c) of the Chicago Convention (1944).

mandated to carry cargo, mail, and government officials to the colonies of European States. This convention was designed to de-link State and airline: airlines were not allowed to shield behind the diplomatic protection of governments to avoid liability for the compensation of damages pursuant to reliance on, for instance, the defence of 'sovereign immunity' from such claims. The Warsaw and Montreal Conventions attach liability to the "carrier" which is not defined, but the first article explicitly refers to carriage performed for reward by an air transport *undertaking*:

> "This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft *for reward*. It applies equally to gratuitous carriage by aircraft performed by an air transport *undertaking*."[46] *(italics added)*

The two Conventions clearly detach the State from any liability regarding the international carriage performed by carriers, whether they have their nationality or not; hence, airlines are sued in court. As to the courts competent to hear and decide on cases falling within their scope, a link between the carrier and a State is among the general principles for establishing jurisdiction.[47] In the Montreal Convention (1999), for instance, these include the court of the 'domicile' of the carrier, referring to the carrier's headquarters (see section 2.2) and the 'principal place of business' of the carrier (see section 3.2), which is normally where the carrier is incorporated.[48]

It is not within the scope of this article to fathom out the case law that exists on the interpretation of the court's jurisdiction, but it is undeniable that across different legislation, similar terms are used to describe the necessary link between an airline and the State; the Warsaw Convention (1929) identifies the courts competent where the carrier is 'ordinarily resident,'[49] which for companies seems to coincide with the PPoB. In the EU, Regulation 593/2008 on the law applicable to contractual obligations (the former Rome I Convention), under contracts of carriage, lists the courts of carrier's 'habitual residence' or 'place of central administration' competent.[50] Despite the different names, each implies that a *genuine connection* with a State must exist to prevent passengers from forum shopping.

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46. Article 1 — *Scope of Application* 1. Montreal Convention.
47. Article 28(1) Warsaw, Article 33(1) Montreal.
48. Article 33(1), Montreal Convention, as to which see Aikpitanhi v. Iberia, 553 F.Supp. 2d 872, 876 (E.D. Mich. 2008).
49. Article 28(1) Warsaw Convention.
50. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Article 5.2(a) and (b).

4.2 Air Transport Competition Law

Under EU Regulation 1008/2008, airlines are defined as "*an undertaking* with a valid operating licence or equivalent"[51] *(italics added)*. The qualification of "undertaking" means airlines, like any other business, are subject to EU competition law:

> "The following shall be prohibited as incompatible with the internal market: all agreements *between undertakings,* decisions by *associations of undertakings* and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"[52] *(italics added)*

This provision applies to the conduct of undertakings, excluding the State or State bodies from its scope, as to which see also the next section. Airlines are also liable for collusive actions and the abuse of dominant positions under US antitrust law,[53] and the competition laws of other jurisdictions.

The liability of airlines for engagement in collusive action in air transport has been manifested in a recent and important decision of the Court of Justice of the EU.[54] While airlines have attempted to argue that their collusive behaviour in these proceedings was governed by mandates of 'their' States as derived from Air Services Agreements, the Court of Justice of the EU concluded that these airlines act independently from their governments and cannot hide behind them. The concerned airlines were based in all parts of the world, but the EU and US antitrust/competition laws operate irrespective of the nationality of these airlines or of the special link they have with their State.

4.3 An Airline Undertaking as an Agent of the State

When an airline is considered an undertaking, but maintains close ties with its government, this can raise questions as to the relation between the State and the

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51. See, Art. 2(10) of EU Regulation 1008/2008.
52. Article 101 of the Treaty on the Functioning of the EU (TFEU).
53. See, for instance, Sherman Act, 15 U.S.C. §§ 1–7 (2018).
54. See EU Court of Justice of the European Union, Cases T-323/17 *Martinair Holland* v *Commission*, T-324/17, *SAS Cargo Group and Others* v *Commission*, T-325/17 *Koninklijke Luchtvaart Maatschappij* v *Commission*, T-326/17, *Air Canada* v *Commission*, T-334/17, *Cargolux Airlines* v *Commission*, T-337/17, *Air France-KLM* v *Commission*, T-338/17, *Air France* v *Commission*, T-340/17, *Japan Airlines* v *Commission*, T-341/17, *British Airways* v *Commission*, T-342/17, *Deutsche Lufthansa and Others* v *Commission*, T-343/17, *Cathay Pacific Airways* v *Commission*, T-344/17 *Latam Airlines Group and Lan Cargo* v *Commission*, T-350/17, *Singapore Airlines and Singapore Airlines Cargo* v *Commission*.

airline and the independence of the latter. This was the case in court proceedings in Canada, where Air India was accused of being an 'alter ego' of the Indian State.[55] The term 'alter ego' is unknown under international law. Either an entity is a State, or it is not. The Montevideo Convention (1933) is often used as a benchmark for the 'definition' of a State, which, as a person of international law, must possess: 1) a permanent population, 2) a defined territory, 3) a government, and 4) the capacity to enter into relations with other States.[56] Obviously, this is not the case for an airline. Alternatively, an airline could be considered as an *organ of the State* under Articles 4, 5 and 8 of the Articles of the International Law Commission (**ILC**) containing the applicable principles of attribution. These principles are quoted in the Arbitral Sentence of the Permanent Court of Arbitration (**PCA**) in the case of *Devas and other companies* v. *the State of India* of 2016 ('the Devas case').[57] The PCA found that:

> "The acts of such a company can only be attributed en bloc to the State when it is considered a governmental body *under domestic law*.[58] *(italics added)*

Furthermore, in a case decided by the International Court of Justice, the Court stated that: "In determining whether a company possesses independent and distinct legal personality, international law looks to *the rules of the relevant domestic law*."[59] In the Devas case, the PCA concluded that the Indian company in question (Antrix), acting in the described circumstances, was a "private company limited by shares" within the meaning of the Indian Companies Act,[60] and did not act as an organ of the State of India.[61] This case confirms that, under international law, States ultimately decide on who it considers its nationals, and that domestic law prevails when it comes to the determining criteria for corporate nationality. For airlines specifically, this practice is further amplified by the nationality conditions contained in ASA as explained in Section 3 above.

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55. Court of Appeal Québec, Canada, *Devas and other companies* v. *Air India Ltd.* of 2022.
56. See, the Montevideo *Convention on the Rights and Duties of States* (1933), Article 1.
57. PCA Case No. 2013-09, Award on Jurisdiction and Merits, Decision of 25 July, 2016, (PCA Decision (2016).
58. Ibid, Section 270.
59. See, Ahmadou Sadio Diallo (*Republic of Guinea* v. *Democratic Republic of the Congo*), Preliminary Objections, Judgment, I.C.J. Reports 2007, p. 582, para. 61. Statement of Defence, para. 147.
60. See, section 272 of the PCA Decision (2016), referring to the Indian Companies Act, Section 3(I)(iii) (Ex. R-105).
61. See, section 281 of the PCA Decision (2016).

5. Changing Nationality Conceptions

Now that it is clear than an airline must have a nationality link with the State in order to be entitled to operate the agreed air services, this last section touches upon the question if an airline could change its corporate nationality and seek a more advantageous 'link' with another State, which practice the new tax accord referred to in the introduction is attempting to change. We have seen such moves in other sectors, like in the Netherlands, where Unilever and Shell relocated their headquarters to London, to shake of their dual nationality, for various reasons, in the wake of Brexit. More often, these relocations take place within the context of mergers; where two foreign companies merge and choose one of the originating States as the residence State for the parent company. In the US, inversions, where the headquarters of the parent company is moved to the State of the smaller foreign company that it is merging with, often for tax evasive purposes, have been made more difficult in 2016.[62]

Again, aviation provides a stark contrast; even where airlines merge, are subjected to a takeover, or otherwise consolidate or enhance their cooperation, great attention is paid to maintaining the original nationality of the individual airline(s) through protective schemes; the Air France – KLM merger,[63] the AirAsia Joint Ventures and subsidiaries,[64] and the acquisition attempts of Air Berlin by Etihad and Alitalia by Qatar Airways, demonstrate that nationality, based on 'substantive ownership' and 'effective control' remains important to safeguard the exercise of traffic rights of the home State. Similarly, the relevance of maintaining the PPoB of an EU air carrier for the operation of traffic rights, was recognized by the EU Court of Justice; the Portuguese government was allowed to draw up measures preventing the relocation of the PPoB of TAP, following its privatisation, because it "follows from those bilateral agreements that TAP would *lose its traffic rights* on routes *to or from those third countries* if it were to transfer its principal place of business outside of Portugal."[65] (*italics added*)

The loss of nationality as a real threat for airlines, is also illustrated by other examples, such as when Virgin Nigeria was initially denied operations to New York

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62. See, James A. Doering, *New Temporary Regulations Restrain Inversions*, 42 INT'ITAX J. 5 (2016).
63. Pablo Mendes de Leon, *New Phase in Alliance Building: The Air France/KLM Venture as a Case Study, A / Die Allianz zwischen Air France und KLM / L'Alliance entre Air France et KLM*, 53 ZLW.
64. Michelle Dy, Jae Woon Lee, 'Mitigating 'Effective Control' Restriction on Joint Venture Airlines in Asia: Philippine AirAsia Case', (2015), 40, Air and Space Law, Issue 3, pp. 231-253.
65. See, Court of Justice of the EU, Case C-563/17, *Associação Peço a Palavra and Others* v *Conselho de Ministros*, decision of 27 February 2019.

because it was substantially owned by Virgin Atlantic and perceived as a British airline.[66] States have also threatened to ban airlines' flights over this issue, for instance, when Russia questioned the nationality of Austrian Airlines after the take-over by the Lufthansa Group.[67] It even has a preemptive effect when a US private equity firm, being its largest stakeholder, reduced its stake in the Wizz Air to comply with EU ownership rules after Brexit.[68]

6. Concluding remarks

Although the Chicago Convention (1944) does not explicitly mention the link between an airline and a State, it is clear from the text and general practice that a link must be established between the airline and ("of") a State. In regulating international air transport, this link between an airline and a State has a twofold purpose; first, to determine the State responsible for safety oversight, and second, to designate an airline a nationality for economic considerations. The link is established per agreement between States, referred to as Air Services Agreements (ASAs). For the purpose of economic regulation, licensed airlines are designated pursuant to nationality requirements such as 'substantial ownership' and 'effective control' and occasionally the requirement of a 'principal place of business' agreed upon in ASAs. In the context of safety management, the jurisdictional link between an airline and the national authorities of the State mandated to conduct of safety oversight, a stable and permanent link is often determined on the basis of the airline's PPoB.

In other industries, the legal capacity of a company, for instance for tax purposes or the application of domestic laws, is based on this principal place of business, either assessed pursuant to its corporate domicile, or based on the State in which it is incorporated. Air transport is one of the few industries, if not the only industry, where the nationality of the undertaking is relevant, if not essential, for the performance of its operations, and where such nationality is predominantly based on nationality criteria of ownership and control.

66. See Virgin Nigeria Airways Limited, Dockets DOT-OST-2005-23460/23461.
67. Financial Times, Russia threatens to ban Austrian flights, 28 February 2010 https://www.ft.com/content/e27168fa-24a2-11df-8be0-00144feab49a (last visited: 31 March 2023).
68. Reuters, Wizz Air's top shareholder cuts stake to comply with ownership rules, 4 February 2020 https://www.reuters.com/article/us-wizz-air-hldgs-investors/wizz-airs-top-shareholder-cuts-stake-to-comply-with-ownership-rules-idUSKBN1ZY18G (last visited: 31 March 2023).

Art. 83 bis of the Chicago Convention (1944) determines that an airline, as the operator of an aircraft, ought to have a 'principal place of busines' which is a is a fixed location. However, PPoB is not defined as such in international law. In practice, using the PPoB to establish the link with a State for safety oversight is more broadly accepted. For more economical and market-oriented regulation, its definition depends on a jurisdiction's policy. The concept of PPoB is increasingly presented as an alternative or additional nationality requirement covering both designation and safety oversight. However, even the most free-trade nations with an open-market oriented approach towards air transport, like the EU countries, US, and Canada, require that the designated airlines are substantially owned and effectively controlled by their nationals.[69]

Trade in air services, including traffic rights, is governed by a web of over 3,000, mostly bilateral (State to State) ASAs. These ASAs continue to establish the nationality of airlines through O&C requirements, and exceptionally, or as an extra requirement as to which see the EU air carrier clause, the PPoB of the operating airline, confirming the 'genuine link' between a State and/or its nationals on the one hand and an airline on the other.

While there exists both in law and in practice a very special link between an airline, in particular, the air carrier on the one hand, and the State that licenses and designates it to operate the agreed international air services on the other hand, international air law, including public air law (the Chicago Convention (1944)) and private air law (the Montreal Convention (1999)), as well as US and EU antitrust/competition law, identify airlines as undertakings which are liable for the implications of their conduct, independent of their governments. From that perspective, airlines are no different than other economic actors, that is, undertakings, in the marketplace.

Still, where in other industries it may be interesting for companies to move their principal place of business or headquarter to a different country, so as to enjoy more advantageous tax, social or environmental conditions, this is not the case for airlines. The very nature of the air transport business, through the exercise of traffic rights, of which the airlines is dependent on the State and its connection with it, make it unique one in the world of economic activities. The regime of trade in air services, including traffic rights between States is unlikely to change drastically any time soon.

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69. See, for instance, Agreement on Air Transport between Canada and the European Community and its Member States, Annex 2, section 1.

Navigating Airline Nationality

European Perspectives on Airline Shareholding and Corporate Governance

Published in *Air & Space Law* 49, Issue 6 (2024), pp 609-636.

Abstract

This article explores the complex and evolving landscape of airline nationality requirements in the European Union (EU). Despite liberalisation efforts since the early 1990s, nationality requirements remain essential for regulating market access, licensing, and the exercise of traffic rights by airlines. The article analyses the EU's ownership and control criteria, specifically under Regulation 1008/2008, which mandates that EU carriers must be majority-owned and effectively controlled by EU nationals, and places these requirements in the context of shareholding and corporate governance. The paper examines landmark cases, such as KLM/Northwest Airlines and Swissair/Sabena, to illustrate how different jurisdictions interpret and apply nationality requirements. Furthermore, it investigates how multinational network carrier groups like Air France-KLM, International Airlines Group (IAG), and Lufthansa navigate these regulations using complex shareholding and governance structures to maintain compliance with the nationality conditions. The study underscores that, despite the increasing complexity of airline corporate structures due to consolidation and cross-border investments, the fundamental criteria for ownership and control continue to adapt effectively to the shifting landscape of global aviation. The findings suggest that the interplay between ownership and control will remain critical in determining airline nationality in the foreseeable future.

Keywords: nationality requirements, licensing conditions, designation, substantial ownership, effective control, principal place of business, airline shareholding, corporate governance

1. Introduction

Establishing a link between an airline and a State is deeply embedded in the history of international civil aviation, and due to the link's multifaceted nature, it continues to hold significant importance. Despite efforts since the early 1990s to liberalise or even eliminate airline nationality requirements, these are still a reality today. This paper confirms that there are no significant signs that we are entering an era in which the nationality of airlines as regulated by international, EU and national air law will disappear.

First and foremost, the 'unique' link between an airline and a State, which was the focus of one of this author's previous publications,[1] is characterised by, among other things, an airline's need for a license to access a domestic or international air transport market and to operate air services, and the relation with the relevant authorities charged with oversight. Licensing requirements are a matter of national law of the licensing State and, in the case of the EU of EU law, as enforced by its Member States. Such licensing conditions include nationality criteria that enable the licensing authority to exercise 'effective regulatory control' of the airline under its authority and establish a *de facto* jurisdictional link between the airline and the national authority concerned.

Subsequently, States designate airlines based on nationality requirements for exercising traffic rights exchanged through Air Services Agreements (ASAs). Designation is conditioned to ownership and control, which prevail in most existing ASAs and whose fulfilment is the primary focus of this article. States apply different wording for designation clauses, utilising either a test of 'substantial' or 'majority ownership,' one of 'effective control,' or a combination of both tests to attribute a nationality to an airline. In the current 21st century, the use of the 'Principal Place of Business' (PPoB) for the purpose of (re-)defining the nationality of a designated airline has gained traction in international aviation.

Over the years, the assessment of the nationality requirements has evolved and become more complicated. While the US fast-forwarded liberalisation by tabling 'Open Skies' agreements in the 1990s, the EU followed suit and went even further with the introduction of the 'Community air carrier' clause,[2] which enabled airlines to be majority-owned and effectively controlled by a mix of EU nationals. In the same period,

1. See, T.N. Buissing, *The Unique Link between an Airline and a State*, Aviation and Space Journal, 2023(1).
2. See, section 2.2.3, below.

the EU included the PPoB in its licensing conditions for EU airlines while keeping the nationality requirements vis-a-vis third countries. While these developments have added new layers to nationality requirements, the ownership and control tests have become even more complex with the consolidation of airlines into groups with multinational ownership, using sophisticated shareholding and governance structures.

This article seeks to provide an overview and analysis of airline nationality requirements in the EU (section 2) and the link with other regulatory regimes and company law concepts under EU and national laws, including shareholding (section 3), as applied in the aviation sector (section 4).

2. The regime on airline nationality in the EU

Ownership and control requirements have a long history. The link between the two requirements to determine airliner nationality became apparent in the context of the liberalisation of air transport and the rise of airline cross-investments. Before delving into the EU regime on airline nationality, a brief examination of two landmark cases in two different jurisdictions provides the background against which airline nationality should be analysed.

2.1 The transatlantic background of liberalisation of air services

As has been more often the case in aviation law, US policy has influenced the EU's approach to managing air transport markets. The US initiated and progressed its deregulation process of the airline industry with remarkable speed. The *Airline Deregulation Act* of 1978 focused on deregulating the domestic market, and *the International Air Transportation Competition Act* of 1979 was, among other things, designed to ensure fair competition between domestic and foreign carriers.[3]

At that time, in the – then - European Economic Community (EEC), it was left open whether air transport was subject to the general rules of the EEC Treaty, including those on competition.[4] The US deregulation policy prompted a shift towards a more market-oriented approach to air transport in the Community,[5] which was boosted by

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3. See, B. Humphreys, *The Regulation of Air Transport: From Protection to Liberalisation, and Back Again* (2023).
4. Treaty establishing the European Economic Community (EEC Treaty), Article 84, "2. The Council, acting by means of a unanimous vote, may decide whether, to what extent. and by what procedure appropriate provisions might be adopted for sea and air transport."
5. See, for instance, the Commission's proposal "Progress towards the development of a Community air transport policy." Civil aviation memorandum No. 2. COM (84) 72 final, 15 March 1984.

the European Court of Justice (ECJ) in the *Nouvelles Frontières* case, confirming that the Treaty's competition rules applied to air transport.[6] European air transport was gradually liberalised via three Aviation Liberalisation Packages in 1984, 1989 and 1992.[7] Since 2008, the three packages and underlying regulations have been replaced by EU Regulation 1008/2008. A similar trend can be observed in the regulation of airline nationality, which the next subsection will illustrate by comparing the first major cross-investment cases of airlines in both jurisdictions.

2.1.1 US: KLM/Northwest Airlines (1989 – 1992)

In 1989, KLM Royal Dutch Airlines (KLM) acquired around 57% non-voting shares and less than 5% voting interest in the financially troubled US-based Northwest Airlines (NW). Additionally, KLM had the right to nominate one of the twelve NW board members and advise on financial matters through a special committee. As a result, the legal requirements for NW to be considered a US subject were satisfied since KLM owned or controlled less than 25% of NW's voting interest and held fewer than one-third of the board seats.[8]

However, the US Department of Transportation (DOT) was concerned that KLM's influence over NW was more substantial than the formal structure suggested due to the extensive institutional ties between the two airlines. The parties involved agreed on measures to address DOT's concerns,[9] which included that the airline's foreign equity could not exceed 4% and that voting interest could not exceed 25%.[10] KLM reduced its share in NW and turned it into a loan.[11] Applying a control test, which required that the airline remain under the authority of US citizens, DOT found that:

> "In view of this finding that Northwest is *firmly controlled* by US citizens, we see no potential for the foreign interest represented by KLM to exert control, given the structure of these corporate mechanisms and the remaining restrictions retained in this order" (emphasis added).[12]

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6. Cases 209 to 213/84, Air Tariff (Nouvelles Frontières) [1986], ECLI:EU:C:1986:188, paras. 39-42.
7. See, for instance, J.M. Balfour, *European Community Air Law* (1995), and B. Humphreys, *The Regulation of Air Transport: From Protection to Liberalisation, and Back Again* (2023)
8. Title 49 U.S.C. § 40102(a)(15)(C) as amended.
9. DOT Order 89-9-51 of 29 September 1989; see also Final Order of the US Department of Transportation in the matter of defining 'Open Skies', Order 92-8-13, Docket 48130, of August 5, 1992, and Brian Havel, *In Search of Open Skies* (1997) at 191.
10. Id. at paragraphs 21-22
11. See also, Pablo Mendes de Leon, *'Before and After the Tenth Anniversary of the Open Skies Agreement Netherlands-US of 1992'*, (2002), 27, Air and Space Law, Issue 4, pp. 280-314.
12. DOT Order 89-9-51 of 29 September 1989, at paragraph 18

The US and Dutch aviation authorities resolved the potential antitrust aspects of the joint ventures between KLM and NW by granting anti-trust immunity to the KLM/NW cooperation under the Open Skies agreement between the two States, which has been concluded in 1992.[13]

2.1.2 EU: Swissair/Sabena (1995)

In 1995, a few years after the US DOT decision in KLM/NW, the – then - EC Commission (hereafter: (EU) Commission) faced a similar situation involving the investment that Swissair, Switzerland's national airline at the time, planned to make in the financially struggling Belgian flag carrier, Sabena. Since Switzerland was not a member of the meanwhile renamed European Community (EC), Swissair was interested in gaining access to the EC's market to expand its global network.

In short, with the envisaged transaction, Swissair acquired 49.5% of Sabena's voting shares, which satisfied the prevailing ownership requirement that EU nationals held 50% plus one share.[14] To assess whether EU nationals also possess 'effective control',[15] the Commission found that all legal and actual circumstances should be considered cumulatively to determine who has the ultimate decision-making power in managing the carrier concerned.[16] Despite Swissair's powers to appoint half of Sabena's board members and to elect the Chairman in case of even votes, the Commission found that Belgian nationals held 'effective control' of Sabena, meeting the control requirement. The Commission approved the transaction.[17]

2.1.3 Similarities and differences between the two cases

In some respects, the US DOT and the EU Commission adopted similar criteria: both decisions investigated majority ownership and effective control, but their assessments of these criteria expose the two jurisdictions' different approaches.

The US authorities differentiated between voting and non-voting shares and restricted institutional arrangements to prevent foreigners from exerting control over US airlines. The US DOT clearly wished to protect the US domestic market

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13. *Memorandum of Consultations concerning the US-NL Open Skies Agreement* (1992), available via https://1997-2001.state.gov/issues/economic/tra/opskies_us_netherlands.html
14. At the time, Article 4 of Regulation (EEC) No 2407/92. Section 2.2 below will provide a more detailed analysis of the 'ownership' and 'control' tests in the Sabena Decision (1995).
15. Which test will be further alluded to in subsection 2.2.2
16. See, section X of 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*), hereafter the Swissair/Sabena Decision (1995).
17. Ibid.

from foreign influence, even if that investment comes from a much smaller and friendly 'Open Skies' partner, and despite the view of "the liberalized aviation relationship that prevails between the United States and KLM's homeland."[18] Other than this name suggests, liberalisation under the US Open Skies policy excluded, for instance, national ownership and control clauses for designated air carriers and 'cabotage', that is, the right of an airline to carry traffic between two points located in the territory of, in this case, the Open Skies partner.

The EU Commission, appeared more pragmatic when assessing compliance with the control test and was perhaps more prone to political considerations. Again, the transaction concerned a friendly nation, Switzerland, in the heart of Europe, placing the transaction in a broader perspective of granting Swissair access to the EC internal market and possibly reeling them into the EU.

In the three decades following these first two cases, the EU air transport sector has undergone a tremendous transformation with the rise of the Low Cost Carrier (LCC) model and increased collaboration, consolidation, and cross-border investment opportunities between national airlines. This has led to the shaping of several large airline groups with complex corporate structures so as to meet nationality conditions. The underlying regime for ownership and control requirements has sustained these developments and will likely continue to prove adept for the foreseeable future.

2.2 Licensing conditions of EU Regulation 1008/2008 on nationality of EU air carriers

In terms of nationality of Community air carriers, henceforth also referred to as EU air carriers, EU Regulation 1008/2008, hereafter also referred to as 'the Regulation', requires that the EU Member States or their nationals *own more than 50% of an airline* and *effectively control* it in order for that carrier to qualify as a 'Community air carrier'. In addition, the carrier must obtain an operating licence in the Member State where its *Principal Place of Business* (PPoB) is located.[19] The latter definition has been subject to interpretation by the Court of Justice of the EU (CJEU).[20] The next subsections deal with the assessment of these nationality criteria and other elements linked to them.

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18. DOT Order 89-9-51 of 29 September 1989 at paragraph 18.
19. 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* (EU Regulation 1008/2008), Art. 4(a) and (f).
20. An analysis of the Court's interpretation will be discussed in subsection 2.2.5.

2.2.1 Ownership of shares

Although the term 'own' means ownership of shares, this is not defined in the regulation, nor does it explain the term 'share'. However, the Annex of the Regulation stipulates that EU carriers must disclose detailed information regarding "*shareholders*, including *nationality and type of share*s to be held" (*emphasis added*) and the Articles of Association.[21]

Regarding shareholding, in the *Swissair/Sabena* decision of 1995,[22] the European Commission (EC) considered the concept of ownership based on shareholding in the airline's *equity capital*. The EC contemplates holders of equity to have typically *voting/control rights*, being "the right to participate in decisions affecting the management of the undertaking" and an *economic right* "to share in the residual profits or, in the event of liquidation, in the residual assets of the undertaking." However, if "capital does not confer upon its holders any of the two abovementioned rights to an appreciable extent, it must generally be disregarded in determining the ownership situation of an undertaking."[23] Such was the case of the 'special participation certificates' held by Swissair, which were not considered equity capital and consequently "must not be added to the voting shares of Sabena when assessing the company's ownership." [24] Furthermore:

> "The conditions for exercising those rights may, of course, vary according to the agreement of the participating parties. Therefore, the question whether a particular type of capital qualifies as equity capital [..] can be answered only on a case-by-case basis in the light of all relevant circumstances, including any possible consequences for compliance with the effective control requirement."[25]

This quote indicates that the intrinsic link between ownership and control requirements requires an analysis of an airline's shareholding structure and corporate governance on a case-by-case basis to understand the decision-making process, who influences it, and to what extent. This legal analysis of shareholding and corporate governance structures forms the cornerstone of this article.

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21. See, Section 1.6 of Annex 1 of EU Regulation 1008/2008, which applies to first-time applicants of an operating license to assess their financial fitness.
22. As also discussed in subsection 2.1.2., above, in a transatlantic context. See, also Swissair/Sabena Decision (1995), and Interpretative Guidelines, Art. 5.29(a) and (b) referred to in fn 26.
23. See Swissair/Sabena Decision (1995), Section X. Such was the case of the 'special participation certificates' held by Swissair, which were not considered equity capital.
24. Ibid.
25. Ibid.

In 2017, the EC issued "Interpretative Guidelines" on assessing the rules regarding ownership and control of EU air carriers (the Guidelines of 2017),[26] using its *Swissair/Sabena* decision as a benchmark for its approach. Regarding ownership of shares, the Guidelines elaborate on corporate structures where companies hold a percentage of shares in an EU air carrier and scrutinise scenarios involving third-country nationals or shareholders, who may possess shares and exert control through intermediary companies. EU air carriers are mandated to "provide evidence to the licensing authority on the rights attached to different classes of shares as well as on the *final* beneficial owners of the shares."[27] The emphasis on the word 'final' is crucial, highlighting the importance of the 'piercing the corporate veil' doctrine to reveal the actual beneficiaries behind corporate facades. This doctrine also establishes the concept of 'genuine nationality' of the shareholders and managers, analysed below in subsection 2.2.4, to determine who exercises the ultimate decision-making power in the carrier's management.

2.2.2 Effective control

In conjunction with the ownership condition of Regulation 1008/2008, EU nationals/shareholders must exercise 'effective control' of the airline, which pertains to rights exerting "decisive influence" on the composition, voting or decision-making process of the governing bodies of the airline or otherwise significantly influence running the business. [28]

In the *Swissair/Sabena* decision, effective control is defined as "the power, direct or indirect, actual or legal, to exercise *decisive influence* on an airline" (*emphasis added*).[29] The decision assesses compliance with the *de facto* condition of 'effective control' and how it is essential to consider all legal and practical circumstances cumulatively. Critical factors include, among other elements, the composition of the airline's management,

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26. 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).
27. See, section 42 of the Notice/Interpretative Guidelines.
28. See, Art. 2(9) of EU Regulation 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.

    The 'effective control' test under the EU Merger Regulation 139/2004 is dealt with in section 2.3, below.
29. Swissair/Sabena Decision (1995), Section XI.

the legal and actual authority to appoint Board members and the Chief Executive and the impact of these elements on the airline's daily operations.

Under EU Regulation 1008/2008, 'effective control' is construed as control exercised by the (governing) 'bodies' of the undertaking, which can be divided into executive management and non-executive management or Boards, depending on the applicable national law.[30] The influence shareholders exert on this control can vary based on the type and quality of shares they hold, mainly where voting rights are concerned. Depending on the corporate structure and type of shares, which will be addressed in section 3, shareholders may or may not yield actual or decisive control of the company's decision-making processes and overall governance.

In the Guidelines of 2017, the EC emphasised the critical role of EU States or their nationals in this decision-making process of EU air carriers, focusing particularly on shareholder rights concerning the 'control' of the airline. The EC examined various transactions that might influence the EU nationality of the air carrier due to potential involvement from third-country companies. [31] Such transactions include the right to veto share transfers, 'pre-emption rights', the ability of a third-country shareholder to sell shares, the option to acquire additional shares, conditions for investments by third-country shareholders, and other financial relationships between the EU air carrier and the third-country shareholder. Particular focus should be given to veto rights or positions held by third-country shareholders who own 30% or more of the shares of an EU air carrier. [32] Additionally, commercial cooperation agreements, like code-sharing and joint ventures with non-EU air carriers, could also affect the decision-making process of the EU air carrier.

2.2.3 Community air carrier

The EU has introduced the concept of a "Community air carrier" in its airline nationality regime, requiring that such carriers be majority-owned, rather than simply substantially owned, and effectively controlled by EU nationals. [33] This shift is significant, as it allows the cumulative majority ownership of community carriers to be distributed among various EU nationalities. Hence, whereas a community carrier may be considered as such, it is possible that it may no longer fulfil the nationality criteria of a single EU Member State.

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30. See section 3.
31. Interpretative Guidelines (2017), chapter 6.2.
32. See, Interpretative Guidelines (2017), Sections 65 and 72.
33. Regulation (EC) No.1008/2008, Art. 2, 4(a) and (f).

Meanwhile, an increasing number of third countries have recognised this new development by accepting the EU nationality of airlines in their ASAs with the EU and its Member States.[34] This has either been done through vertical or comprehensive aviation agreements with the US (2007/2010), Canada (2009), Qatar (2019), Oman (2019, not yet signed) and ASEAN (2023),[35] through horizontal agreements that replace the designation criteria with that of the community air carrier clause,[36] and in the context of the aviation relationship with Switzerland, (1999, as amended), the European Common Aviation Area (ECAA) and the UK following Brexit.[37]

2.2.4 Nationality of persons and undertakings

For the purposes of this research, to establish who owns and controls an airline, it is relevant to define the nationality of shareholders, that is, of both persons and legal entities. The *nationality of persons* is determined by national law. A State may refer to the International Court of Justice (ICJ) ruling in the *Nottebohm* case, where the Court stated that a person must have a "genuine connection" with a State to be considered its national, a link defined by the State's own regulations.[38] This criterion is also relevant in the 'golden passports' issue,[39] or in the context of the aviation business, the purchasing nationality under the 'flag of convenience' concept.[40]

Determining the corporate *nationality of undertakings*, whose shares may be traded on a stock exchange,[41] or who may also own shares of another airline, either directly in a daughter company, indirectly through subsidiaries, cross-investments between airlines or otherwise, is more complex.

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34. See, Council Regulation. No. 847/2004 *on the negotiation and implementation of air service agreements between Member States and third countries.*
35. Vertical agreements are comprehensive aviation agreements with the EU's key aviation partners that encompass all aspects of air transport, including competition, labour, and environmental and consumer protection and are designed to achieve regulatory convergence.
36. A horizontal agreement is an international agreement negotiated by the European Commission on behalf of EU Member States, to bring all existing bilateral ASA between EU Member States and a given third country in line with EU law.
37. For an early analysis of the EU and its external competence to conduct aviation relations with other States, see, for instance, B. Havel, *Beyond Open Skies: A New Regime for International Aviation* (2009), pp 422-433.
38. ICJ, *Nottebohm* Case (second phase), *Liechtenstein* v. *Guatemala,* Judgment of 6 April 1955: ICJ Reports 1955, at 23.
39. See, for instance, CJEU, Case C-135/08, Rottmann, 2 March 2010, paras. 39, 45 and 48.
40. See, for instance, Norwegian Air International Limited (Docket DOT-OST-2013-0204, Final Order 2016-11-12 (2016), and Evgeny Minchev, "*Flags of Convenience in Aviation - Myth or Reality?*", 19 Issues Aviation L. & Pol'y 149 (2020)
41. See section 2.3.

States apply different criteria to identify a company's nationality. Under the *corporate domicile doctrine*, States look at the location where directors and members of the company perform the majority of their tasks, the place where the company's management and administration are located, and the location of the company's headquarters. Under the *incorporation concept*, a company's legal capacity is based on the law of the State where it is incorporated.[42] This concept implies a looser connection between the undertaking and the State in which it is established.[43]

2.2.5 Principal Place of Business

EU Regulation 1008/2008 defines the term 'principal place of business' (PPoB) as follows:

> " '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."[44]

EU Member States can apply different criteria for defining an airline's PPoB as EU company law has not yet been harmonised in this regard. However, the wording of EU Regulation 1008/2008 seems to lean more towards the corporate domicile doctrine, as it links main operational functions with criteria such as obtaining an operating license, financial viability checks and safety oversight with the authorities of the State where the carrier has its PPoB.

In 2019, the CJEU (the Court) highlighted the connection between an EU airline's PPoB and the maintenance of its traffic rights. Invoking the Freedom of Establishment, claimants contended that the Portuguese government should permit the transfer of TAP Air Portugal's PPoB to a location outside of Portugal. However, the Court argued that:

> "bilateral agreements have been entered into between the Portuguese Republic and certain third countries, […] which subject TAP's traffic rights for air routes with those countries to maintaining TAP's principal place of business in Portugal. […] it thus follows from those bilateral agreements that TAP would *lose its traffic rights* on

42. Prof. Jan Wouters, *Private International Law and Companies' Freedom of Establishment*, European Business Organization Law Review 2001, p. 101.
43. See also, T.N. Buissing, *The Unique Link between an Airline and a State*, Aviation and Space Journal, 2023(1).
44. See, Regulation 1008/2008, Art. 2(26).

> routes *to or from those third countries* if it were to transfer its principal place of business outside of Portugal."[45] (*italics added*)

It follows that, as an 'overriding reason of public interest' for operating air services to and from other Portuguese-speaking countries, Portugal is entitled to implement measures securing these traffic rights by mandating that TAP's PPoB remains in Portugal. Relocating its PPoB outside of Portugal, even within the EU, would result in the loss of its operating license granted by the Portuguese government under the provisions of EU Regulation 1008/2008.[46]

2.3 Link with 'control' in the context of mergers

As stated above,[47] the concept of 'control' also arises in merger decisions under EU Regulation 139/2004 (the Merger Regulation).[48] The Merger Regulation aims to regulate the market power of consolidating entities within relevant geographical and service markets, to prevent mergers and acquisitions that would significantly impede effective competition in the EU's internal market. The CJEU confirmed "That effective control forms part of the general objective of Regulation No 139/2004, which is reflected in recital 5 thereof, consisting in preventing a process of reorganisation from resulting in lasting damage to competition in the internal market or in a substantial part of it."[49]

The *Swissair/Sabena* venture was among the first mergers to be reviewed under the Merger Regulation, but has been the sole instance so far where a decision was issued to check the nationality requirements of ownership and control under Regulation 1008/2008. In the field of mergers, however, the EC has built a wealth of experience in reviewing 'control' in about thirty airline mergers under the Merger Regulation.[50] The definition of 'control' under the Merger Regulation, which powers "either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising *decisive influence* on an

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45. CJEU, Case C-563/17, *Associação Peço a Palavra and Others v Conselho de Ministros*, decision of 27 February 2019, paras 75-76.
46. Ibid. For further discussion of this concept (PPoB) see also, T.N. Buissing, *The Unique Link between an Airline and a State*, Aviation and Space Journal, 2023(1).
47. See, section 2.2.2 above.
48. Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the Merger Regulation), repealing Regulations 4064/89 and 1310/97*.
49. See Case C-376/20 P, *European Commission v CK Telecoms UK Investments Ltd.*, judgment of 13 July 2023, at rec. 109.
50. See, for instance, *Lufthansa/Austrian Airlines* Case M.5440, decision of 28 August 2009; Case M. 5747; *British Airways* and *Iberia,* decision of 14 July 2010, and Case M.6796, *Aegean /Olympic II*, decision of 9 October 2013.

undertaking" (emphasis added),[51] shares characteristics to that under EU Regulation 1008/2008. However, whereas 'effective control' under Regulation 1008/2008 relates to the governance within an airline undertaking, 'control' within the meaning of the Merger Regulation sees to control between the two merging entities with a view to protecting effective competition in the EU's internal market. [52] In its assessment of the merger between Alitalia and Etihad in 2014,[53] the EC's relevant service, the Directorate-General for Competition (DG COMP), reiterated that the 'control test' under the Merger Regulation does not duplicate the 'effective control' test under EU Regulation 1008/2008:

> "the concept of *control* under the Merger Regulation *may be different from that applied in specific areas* of Community and national legislation concerning, for example, prudential rules, taxation, *air transport* or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation."[54] (*italics added*)

The DG COMP assessed the 'control' criterion in the context of this joint venture under the Merger Regulation and decided that the two airlines exercised 'joint control' in the new entity. At the same time, it also established a link between the shareholding and implied degree of control, observing that because of Alitalia's "absolute majority in the shareholders meeting" [in the new entity], it can control or 'block all initiatives that are not in its interest."[55] Alitalia's dominance in the decision-making process significantly contributed to the transaction's approval.

A similar reading follows from the EC's Notice of 2017, where it is stated that the "effective control" (in Regulation 1008/2008) and "joint control" (in the Merger Regulation) "present certain similarities" but "are not mutually exclusive."[56] Hence, 'joint control' does not necessarily mean the same as 'effective control', but

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51. Merger Regulation, Art. 3(2).
52. See, supra note 49, at rec. 106 "As is apparent from recitals 6 and 24 of Regulation No 139/2004, that regulation seeks to establish effective control of all concentrations in terms of their effect on the structure of competition in the European Union, in particular, to ensure effective and undistorted competition in the internal market and to ensure a policy conducted in accordance with the principle of an open market economy with free competition."
53. Case No COMP/M.7333 – *Alitalia/Etihad*, decision of 14 November 2014.
54. Ibid, see, par. 5, in conjunction with par. 23 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
55. See, *Alitalia/Etihad* decision, par. 153.
56. See, Interpretative Guidelines (2017), sections 54-55.

rather confirms that "effective control" must be assessed on a case-by-case basis considering the corporate structure of the concerned EU air carrier.

2.4 Concluding remarks on nationality conditions

As stated in the Introduction, nationality is particularly significant, if not essential, in the aviation sector due to the licensing requirements and conditions for the designation of airlines laid down in Air Services Agreements (ASAs), which link nationality to the operation of traffic rights. This unique combination makes aviation different from other sectors.[57] Furthermore, because designation based on nationality is prevalent in most existing ASAs, other than the EU Carrier concept, this international practice will not likely change for the foreseeable future.

As mentioned in the preceding section, an airline's nationality is determined by ownership and control requirements, sometimes in conjunction with its principal place of business. While certain authors point out that these requirements restrict access to foreign investment and prevent airlines from "becoming the kinds of strong multinational corporations that have developed in virtually all other transnational industries,"[58] the conditions may arguably also serve as a tool to protect from hostile takeovers. While most EU network carriers are not even near the foreign ownership threshold, EU Low-Cost Carriers often advocate for access to foreign investment. Since most LLC's operate only within the EU internal market or to neighboring countries, the risk of losing traffic rights under ASAs with third States is almost non-existent.[59] Attempts to waive airline ownership and control limitations through an international *Draft Convention on Foreign Investment in Airlines*,[60] at the level of ICAO remain in vain, fearing potential misuse of a flag of convenience and 'bad actors' with illegitimate intentions gaining backdoor access to a State's air transport market.

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57. See, T.N. Buissing, *The Unique Link between an Airline and a State*, Aviation and Space Journal, 2023(1).

58. Brian Havel, *A New Approach to Foreign Ownership of National Airlines,* Issues Aviation L. & Pol'y 13201 (2001-2004); see also, CAPA, *Airline ownership and control rules*: *at once both irrelevant and enduring*, at: https://centreforaviation.com/analysis/reports/airline-ownership-and-control-rules-at-once-both-irrelevant-and-enduring-345816 and, Barry Humphreys, *The Regulation of Air Transport: From Protection to Liberalisation, and Back A*gain (2023),who labels in Chapter 8 these nationality requirements as an 'anachronism in in a world of deregulation/liberalisation, but unfortunately one with little immediate prospect of substantial reform.

59. Wizz air is one of the few LCC's operating air services outside the EU internal market. An analysis of that airline is, however, outside the scope of this article.

60. ATRP/15-WP3, Draft Multilateral Convention on Foreign Investment of Airlines, 28-02-2019, see also A37 WP/190, *Facilitating Airline Access to International Capital Markets* (2010).

The similar definitions of control under the Merger Control Regulation 139/2004, and EU Regulation 1008/2008, i.e. to exercise "decisive influence" on an undertaking, could prompt a discussion as to why two different tests are applied to answer the same control question. However, while both tests use similar wording, they are applied in a different context and by different Commission services, i.e. DG COMP and DG MOVE, which is the department for Mobility and Transport, respectively. To determine whether airlines comply with the nationality requirements of ownership of shares, effective control, and, to a lesser extent, the airline's principal place of business, as specified in Regulation 1008/2008, these elements must be placed in the context of the complex regime of shareholding in order to pierce the so-called *corporate veil*.

3. Interplay between EU and national company law

The EU plays a significant role in harmonising certain aspects of company law, which concern the formation, operation and insolvency of companies or corporations, to ensure the functioning of the internal market.[61] However, many areas of company law remain under the jurisdiction of individual Member States, who each maintain their national company laws.

An undertaking's corporate structure and governance are unique to each company and laid down in its by-laws, more formally known as Articles of Association (hereafter: AoA) or Articles of Incorporation. Depending on the applicable national company law regime,[62] the AoA will typically set out, among other things, provisions regarding a company's share structure (which may comprise various classes of shares), rights attached to shares and various classes of shares, if any, and board and shareholder decision-making powers.

Understanding how an airline's governance structures is construed is necessary to assess whether airlines comply with nationality conditions. To this end, the next section will first look at national company laws before dissecting the two elements that comprise shareholding, i.e. shares (section 3.2) and the holders of shares (section 3.3) and that together determine and uncover who, ultimately, owns and exercises control of an airline.

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61. Directive (EU) 2017/1132 of 14 June 2017 *relating to certain aspects of company law*.
62. For instance, the Dutch "*Burgerlijk Wetboek Boek 2*", the French "*Code de Commerce*" and the "*Aktiengesetz*" in Germany.

3.1 National company laws

National company laws specify, among other things, the different forms of companies or corporations that can be set up in their jurisdiction, such as public and private limited liability companies, and, if applicable, the shareholders' positions within these corporations. National company laws may distinguish various classes of shares that provide the relevant shareholders or class of shareholders with certain distinct rights, whether in terms of decision-making, dividend distribution or otherwise. Shares may be in so-called 'bearer' form, which typically implies that the company will not know a shareholder's identity, or in 'registered' form, where the relevant shareholder's name and, importantly, nationality may be recorded.

National company regulations may also establish conditions for shareholders to notify designated public bodies when they possess fixed percentages of shares, including any changes in these holdings, similar to what is required under Regulation 1008/2008.[63] Under EU law, where shareholders acquire or dispose of shares to which a voting right, consequent upon which that acquisition or disposal exceeds or falls below a certain threshold, the shareholder must notify the issuer of the shares.[64]

This article is not designed to provide an in-depth analysis of EU company law. Still, there are EU rules related to corporate governance that affect relationships between a company's management, board, shareholders and other stakeholders and their effect on the management and control of the company. These include, among others, shareholder rights and requirements regarding shareholder identification,[65] and transparency and shareholders' protection in takeovers or changes of control.[66] The proposal for a *Corporate Sustainability Due Diligence Directive* (CS3D)[67] is currently being negotiated, and the trend to focus more on sustainability aspects may also be of interest in terms of stakeholder management and their influence on airlines, but this is outside this article's scope.

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63. As discussed in section 2.3
64. See, for instance, Directive 2004/109/EC of 15 December 2004 *on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market,* Article 9.
65. See, Directive 2007/36/EC of 11 July 2007 *on the exercise of certain rights of shareholders in listed companie*s, amended by Directive, 2017/828 of 17 May 2017 *as regards the encouragement of long-term shareholder engagemen*t, see also Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018.
66. Directive 2004/25/EC of 21 April 2004 *on takeover bids* (Takeover Directive)
67. See, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final).

3.2 Classes of shares in airlines' shareholding

Shares in a company can be classified into various categories, each with specific rights and characteristics and often accompanied by additional measures. The most relevant for determining ownership and control of airlines are outlined below.

3.2.1 Ordinary and preferential shares

Ordinary or equity shares typically confer upon the holder a right to receive dividends and a right to a share of the company's assets in case of liquidation. In many jurisdictions, companies may be able to issue multiple classes of shares (i.e. shares 'A' and 'B') with different rights attached to them. These can vary significantly, particularly regarding entitlements to dividends and their distribution order: (cumulative) *preference* shares, for instance, are paid out before common stock dividends are disbursed. *Deferred* shares are only paid out on a specific date or event or after all the ordinary shares have received their dividends.

Other financial instruments, such as warrants and options, can affect an undertaking's total equity capital in the future. In short, these are contracts that give the right but not the obligation to buy stock at a set price over a specified period of time. With regards to Swissair's warrants in the Swissair/Sabena transaction, the exercise of that right was limited so as to ensure that Sabena would continue to meet the ownership criteria:

> "… the agreement of 4 May 1995 explicitly provides that, unless the regulatory environment has been changed so as to allow Swissair to acquire the majority ownership and effective control of Sabena, Swissair *cannot exercise the warrants to increase its participation in Sabena* above the initially envisaged level of 49,5 %. […] Consequently, the warrants cannot affect the ownership situation of Sabena to the extent that it is possible to make such an assessment within the framework of the present procedure." [68] (*emphasis added*)

Many other examples of measures and instruments determine the relationship between ownership and control in companies under EU law,[69] including the relationship between capital and control.[70] The next sections delve into voting and other rights that can be attached to shares.

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68. See, Swissair/Sabena Decision (1995), Section X.
69. See, for instance, Shearman & Sterling LLP, *Proportionality between Ownership and Control in EU Listed Companies* (2007), at pp. 4-5
70. EU Commission study on *proportionality between capital and control in EU listed companies* (2007), at: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_07_751/IP_07_751_EN.pdf

3.2.2 Voting stock and equity capital

As stated before, not all shares have voting rights. In short, whereas the total *equity capital* of an undertaking is used to assess the ownership criteria under Regulation 1008/2008, the control test requires a closer examination of, among other things, the shares *with voting rights.* Considering a company's voting stock, that is, the sum of the shares that carry a voting right, means that a smaller shareholder or shareholders can have more influence than a larger equity shareholder, depending on the sum of the voting stock they possess. Whether such a shareholder can have substantial or decisive influence also depends on other factors, as to which see the next section. Non-voting shares, or 'economic ownership', can be used as a tool to meet the stringent nationality requirements in the aviation sector: a parent company can own another airline economically, while control remains with nationals of the originating State. Such is arguably the case of KLM in the AF-KL Group, whose corporate structure will be fully analysed in section 4.1.

3.2.3 Priority and special shares or arrangements

Holders of priority shares are typically entitled to the execution of special privileges, which may include the power to appoint or dismiss board members or the right to veto or overturn Board decisions or shareholder resolutions. Other arrangements may also confer more power to a specific shareholder, for example, veto or approval powers on certain important decisions, such as the appointment of the CEO. Consequently, even a small shareholder or a smaller group of shareholders with significant voting rights or other privileges may have substantial or even decisive influence at the shareholders' meeting, influencing the company's decision-making process and thus exert 'control' on the business within the meaning of EU Regulation 1008/2008.

Some States also recognise other special shares, such as the concept of loyalty shares. For instance, in France, shareholders are rewarded with double voting rights if they have held their shares continuously for at least two years.[71] This policy is designed to encourage long-term share ownership and is particularly noteworthy when considering the increased influence such a shareholder can exert at the shareholder's meeting. The use of 'golden shares' is not discussed here.

3.3 Shareholders

The final component of shareholdership pertains to the position and identification of *shareholders*. A study observed that "Companies have very different ownership and governance requirements depending on the activities in which they are

71. Article L.225-123 of the French Code of Commerce

engaged, the markets in which they operate, and the social and political conditions that they confront." The same study concluded that "In principle, dominant shareholders can provide the stability that dispersed shareholders cannot."[72] The next section distinguishes the principal types of shareholders, with specific attention paid to foreign shareholders.

3.3.1 Types of shareholders

EU Member States still hold substantial, sometimes majority or even full, shares in 'their' national airlines. Governments have been described as "patient shareholders" who do not necessarily expect dividends and are often willing to underwrite new equity injections to restore balance sheets. [73] When managing their State's investments in airlines or other undertakings, governments will likely want to balance and potentially trade off purely financial considerations and policy or even political objectives, such as safeguarding employment, ensuring the safety and sustainability of operations, etc. This dual role has been recognised by the CJEU, which acknowledges that EU States constitute a unique class of shareholders. They influence the company not only in their capacity as shareholders but also as stakeholders through their broader policy objectives. [74]

Institutional investors, including nominees and foundations, typically have longer-term objectives for their investments, whereas *hedge funds* or private shareholders that focus on short-term profits, may have little interest in participating in the airline's decision-making processes.

3.3.2 Third-country shareholders

As compared to EU shareholders, rights granted to third-country shareholders can vary, especially when considering their financial contributions relative to their shareholding. As observed in the Swissair/Sabena case (1995), specific internal arrangements may grant privileges to third-country shareholders as long as pecuniary rights lie with the EU shareholders "to an appreciable extent."[75] These internal arrangements can create dependencies where third-country shareholders gain concessions in strategic areas, even if the EU shareholder retains the right to refuse such concessions. For example, if a third-country shareholder engages in commercial cooperation with an EU airline, such as code-sharing, joint ventures, or transactions involving goods and services, the EU airline might find itself dependent

72. See, Julian Franks and Colin Mayer, *Evolution of Ownership and Control Around the World: The Changing Face of Capitalism*, Finance Working Paper N° 503/2017, April 2017, at p. 44.
73. See, Erwin von den Steinen, *National Interest and International Aviation* 66 (2006)
74. See, for instance, *EU Commission* v. *Germany*, Case C-112/05 on Germany's Volkswagen Act.
75. *Swissair/Sabena* Decision, Section X.

on the third-country shareholder. This dependency can provide third-country shareholders with significant influence over the airline. Such situations require careful examination by all parties involved to ensure compliance and balance of control.

3.4 Procedural enforcement of nationality criteria

Upon application for an operating license, the licensing authority of the EU State in which the carrier has its PPoB must issue a decision confirming compliance with, inter alia, the nationality requirements of ownership and control.[76] From then on, EU carriers are required to notify the competent licensing authority of any changes that could affect the carrier's legal situation or compliance status, which includes intended mergers or acquisitions and "any change in the ownership of any single shareholding which represents 10 % or more of the total shareholding of the Community air carrier or its parent or ultimate holding company."[77]

For any publicly listed undertaking, when shares are traded via stock markets, identifying the final beneficial owner can be difficult. Publicly traded shares may change ownership daily, and multiple layers of ownership can obscure the true owner, complicating the identification process. This is also the case for airline companies listed on the stock exchange, where shares are almost never held directly but almost always through a so-called "custodian" and/or a "nominee" account.

Identifying the beneficial owner of shares and ensuring continued compliance with ownership requirements can be challenging, if not nearly impossible, due to the volatile nature of the stock exchange and the often opaque structures involved, as previously discussed. This lack of transparency is problematic for determining and verifying shareholders' (EU) nationality, especially for airlines, who carry the burden of proof for meeting the EU nationality requirements. To this end, some airlines maintain shareholder registries to monitor their shareholder's nationalities; see also some examples in section 4.1, which may even be required by national law. However, if an airline's shares are traded daily, especially where nominee accounts are involved, this constitutes a practical complication upon which one can wonder how accurate such registries are.

3.5 Concluding remarks on shareholding structures

The elements of the shareholding structures' design, namely shares and shareholders, and to a lesser extent the principal place of business, are essential for regulating corporate governance and should ensure that the ownership and control

76. See, Art. 4, in conjunction with Art. 10 of EU Regulation 1008/2008.

77. See, Art. 8(5), (6) and (7) in conjunction with Art. 10 of EU Regulation 1008/2008, see also Interpretative Guidelines (2017) at paras 43-44.

of airlines remain compliant with the nationality mandates. The interpretation and application of these elements still vary from one EU State to another and between different fields of law. While being cross-border entities, airlines still rely heavily on the legal and regulatory frameworks of their 'home' State. Apart from these divergent approaches, corporate structures may obscure the 'genuine nationality' of the undertaking in question.

Corporate structures may yield diffusion when going up the corporate tree to 'pierce the corporate veil' and find the ultimate beneficiaries. Another question pertains to the question of who can exert a 'decisive influence' on or can effectively control the airline's business. The intrinsic link between the ownership and control requirements requires a case-by-case analysis of an airline's shareholding structure and corporate governance to understand the decision-making process, who has influence therein and to what extent. Developments in the 21st century, whereby different *stakeholders* increasingly influence and affect how an airline is managed, are outside this article's scope.

In the current landscape, airlines carry the burden of proof for compliance with the EU nationality requirements. For instance, the undertaking must consistently demonstrate that the majority of its shares are owned by EU shareholders, which can be challenging when shares are actively traded on stock markets. Airlines have found different ways and means and established control-enhancing mechanisms to maintain their nationality, which the next section (4) will allude to.

4. Protection of Airline Nationality in the EU

In the changing and rapidly consolidating EU aviation market, certain EU air carriers have become attractive targets for acquisitions, including by non-EU carriers, as evidenced by cases such as Air Italy/Qatar, [78] and Etihad's investments in Alitalia,[79] and in Air Berlin and Air Serbia.[80] While these cases, assessed under the Merger

78. See Case No COMP/M.8361 – *Qatar Airways/Alisarda/Meridiana*.

79. See Case No COMP/M.7333 – *Alitalia/Etihad*, decision of 14 November 2014.; see also section 2.3.

80. See, Financial Times (FT), *Etihad becomes biggest single shareholder in airberlin and benefits from additional connections*, 19 December 2011, at: https://www.timesaerospace.aero/news/air-transport/etihad-becomes-biggest-single-shareholder-in-airberlin-and-benefits-from;
And Arabian Business, Etihad buys 49% of Serbia's JAT Airways for $200m, deal; rebranding JAT Airways as Air Serbia, at: https://www.arabianbusiness.com/industries/transport/etihad-buys-49-of-serbia-s-jat-airways-for-200m-512117. Meanwhile, Alitalia and Air Berlin have gone bankrupt or restructured, whereas Etihad Airways has ended its stake in Air Serbia, reducing its ownership over the years and having no influence over the airline's management or strategy.

Regulation, warrant a separate analysis as to how nationality conditions were complied with in those transactions, this section will be limited to analyses of the schemes designed to protect air carriers' nationality in the three largest network carrier groups.

4.1 Nationality protection schemes of selected EU airlines

a) Air France – KLM Group

Upon their consolidation in 2004, Air France and KLM set up a holding company called Air France-KLM S.A. (*société anonyme*), hereafter AF-KL, absorbing the two operating carriers as daughter companies. AF-KL's principal place of business (PPoB) is Paris, France. On 31 December 2023, the French State is the largest shareholder of AF-KL (28%), followed by the Dutch State (9.1%), the transport company CMA CGM (8.8%), China Eastern Airlines (4.6%), Delta Air Lines (2.8%) and a few smaller shareholders.[81] Registered and bearer shares, totalling 42.6% of AF-KL shares, are traded on the stock market.

To monitor the shareholder's nationality for, *inter alia*, the requirements under international and European nationality requirements, a notification duty applies to any individual or legal entity acting individually or in concert and obtaining, directly or indirectly, 0.5% or more of the share capital or voting rights in AF-KL.[82] Furthermore, AF-KL is required to publish and distribute information to the public if over 45% of the share capital or voting rights are held by non-EU nationals. Upon reaching this threshold, AF-KL is authorised to initiate procedures mandating the sale of shares to protect its EU nationality status.[83] AF-KL's *Conseil d'Administration*, consist of 19 board members, with a majority of French nationals (11).[84]

As for its subsidiaries, AF-KL holds all Air France S.A. shares and voting rights, which places Air France S.A. under French control. A different shareholding structure had to be harnessed for KLM to maintain its Dutch nationality.[85] A solution was found by differentiating between shares with an *economic interest* in KLM's equity and those relating to *legal ownership* of KLM. In short, by holding different common and priority shares, as well as so-called depositary receipts of shares, AF-KL maintains a 100%

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81. See: www.airfranceklm.com/en/finance/air-france-klm-capital/shareholding-structure (last visited: 11 July 2024).
82. Air France KLM Group, Articles of Incorporation, as updated on July 1, 2022, Art. 13.
83. Ibid, Articles 15 and 16.
84. Seem www.airfranceklm.com/en/group/governance (last visited 22 July 2024).
85. See also, Pablo Mendes de Leon, "*New Phase in Alliance Building: The Air France/KLM Venture as a Case Study*" ,53 ZLW 359 (2004).

economic interest in KLM, formally KLM N.V. (*naamloze vennootschap*),[86] meaning it is entitled to all its dividends. The shares owned by AF-KL also represent 49% of the voting rights in KLM. [87] To ensure that the Dutch's legal ownership of KLM's shares remains majority-owned, two Dutch shareholding foundations were set up: *Stichting Adminstratiekantoor I* and *II* (SAK I and SAK II). On December 31, 2023, SAK I was the legal owner of 33.59% of shares with voting rights, whereas SAK II accounted for 11.25% of the voting rights. Together with the 5.92% direct participation of the Dutch State in KLM's shareholding, the three Dutch parties legally own 50.76% of the voting rights in KLM, ensuring that the legal ownership of KLM remains in the hands of Dutch nationals. Private shareholders own the remaining, less than 1%, of shares with voting rights.[88]

Regarding exercising control, KLM has a two-tier board structure consisting of a Board of Managing Directors and a Supervisory Board. On 31 December 2023, the date of the last available year report, the former consists of five members, all Dutch nationals, including the President & CEO.[89] The Supervisory Board supervises and advises the Board of Managing Directors; it oversees strategy and policies, and for certain major resolutions by the Board of Managing Directors, approval of the Supervisory Board is required. On 31 December 2023, the Supervisory Board encompasses nine members,[90] of which five are appointed based on the recommendation of the AF-KL holding company. Although the tasks and composition of the Supervisory Board muddle the question of which nationality, Dutch or French, has the final say on certain matters in KLM, the decision-making process regarding the airline's daily operations, fleet, and finances is clearly and effectively controlled by the Dutch nationals in the Board of Managing Directors.

KLM shareholding and board structure have been established to secure the exercise of KLM's traffic rights under bilateral ASAs with States that have not, or not yet, accepted the EU carrier concept.[91] For this purpose, the Dutch State continues to designate KLM as a Dutch carrier; to licence KLM as a Dutch carrier under EU Regulation 1008/2008; to grant an Air Operator's Certificate (AOC); to host the PPoB of KLM in Amstelveen, and to tax KLM as a Dutch company. While foreign States have, on certain occasions, questioned KLM's nationality claim, for instance, for

86. Koninklijke Luchtvaart Maatschappij N.V. is a public, limited liability company incorporated under Dutch law.
87. See KLM Annual Report 2023, p. 76.
88. Ibid.
89. Ibid.
90. Ibid., p. 77.
91. See also, section 2.2.3. Important exceptions are the Russian Federation, Nigeria and South Africa.

exercising traffic and transit rights, it has not lost those rights after explaining its shareholding structure.

In 2023, AF-KL announced taking a 19,9% non-controlling stake in the share capital of the Scandinavian airline SAS, with the option to become a controlling shareholder after a minimum of two years, subject to regulatory conditions and financial performance.[92]

b) International Airlines Group

The International Consolidated Airlines Group SA (IAG) emerged from the merger between the Spanish national airline Iberia (IB) and British Airways (BA) in 2010-2011. A full analysis of the merger is outside the scope of this article, and so is an analysis of the implications caused by Brexit. However, the brief overview below provides context to the IAG's dual composition.

Following Brexit, determining a single State's ownership and control of IAG is less clear-cut. IAG is a British-Spanish multinational incorporated and domiciled in Spain, including for tax purposes. However, IAG's main stock is primarily listed on the London Stock Exchange, which is also the location of IAG's operational headquarters, controlling the management of its British and Spanish subsidiaries. IAG also has various secondary stock listings in Spain, including in Madrid.[93]

As of 31 December 2023, significant shareholders in the equity capital of IAG include Qatar Airways (25,14%) and the US-based Capital Research (5%).[94] To comply with the EU nationality requirements, IAG shareholders must demonstrate their nationality, which is recorded in four dedicated registers: one each for Spanish nationals, UK nationals, EU nationals, and non-EU nationals.[95] The Board of Directors has the authority to set a ceiling on non-EU shareholders, suspend their voting and policy rights, and compel them to sell their IAG shares if necessary. [96]

In terms of exercising control of IAG, its Board of Directors meetings are held in Madrid. Since Brexit, the majority of the board members have EU nationality to comply with EU ownership and control rules. As of 31 December 2023, out of the eleven Board members, four are from Spain and the UK, and one is from

92. See, for instance, the announcement here, https://www.airfranceklm.com/en/newsroom/air-france-klm-team-sas-ab-through-equity-and-commercial-cooperation (last visited: 26 July 2024)
93. See, www.iairgroup.com/investors-and-shareholders/the-iag-share/ (last visited 17 July 2024).
94. IAG Annual Report 2023, p. 154.
95. See, Corporate Bylaws of International Consolidated Airlines Group, Art. 6.4.
96. Ibid,. art. 11.

Ireland, Sweden and Luxembourg.[97] The IAG Board has delegated the day-to-day management of the IAG to a Management Committee. Still, it retains the authority on, among other things, the IAG's strategy and investment and financing policy. A full review of the IAG's decision-making process is outside the scope of this article.[98]

As for ownership and control of IAG's subsidiaries, on 31 December 2023, IAG directly holds 90,02% and 86,45% of the economic rights in British Airways and Iberia, respectively. Through the cross-holding investments between the two airlines, IAG also indirectly holds the remaining economic interest in both airlines.[99] Similar schemes have been set up to maintain the nationality of its subsidiaries by issuing different classes of shares, carrying voting rights but no economic interests, complying with international and European nationality requirements, and protecting traffic rights under ASAs. Regarding the voting stock of Iberia, IAG holds 43.1% of the voting stock in IB Opco Holding S.L., whereas British Airways indirectly holds 6.8%. The remaining voting rights, representing 50.1%, belong to Garanair, S.L., a Spanish company incorporated to secure Iberia's Spanish nationality. As for the voting stock in British Airways, IAG, including through Iberia's shareholding, holds 49.9% of voting rights. The remaining 50.1% of voting rights correspond to a UK-based trust established to implement the BA's nationality structure.[100]

In addition to Iberia and British Airways, IAG includes Vueling, Aer Lingus, and Level. Again, to implement the nationality structure of, for instance, Aer Lingues, IAG holds 49.75% of the total number of voting rights and the majority of the economic rights in Aer Lingus Group DAC. An Irish-based trust holds the remaining 50.25% of voting rights.[101]

c) Lufthansa Group

Deutsche Lufthansa AG (hereafter Lufthansa AG) is the parent company of the Lufthansa Group; its shares are publicly traded on the Frankfurt Stock Exchange. Each share has one vote; Lufthansa AG has no shares that confer special controlling rights.[102] Lufthansa AG may only restrict the transferability of shares if it endangers the operation of traffic rights. To ensure that the majority of Lufthansa AG's issued capital remains with German or European shareholders, Lufthansa AG is granted

97. See Company Bylaws, IAG Annual Report 2023, p. 145 and note from the corporate secretary, "IAG Brexit Plans" Madrid, 31st December 2020.
98. IAG Annual Report 2023, p. 150.
99. Auditor's Report on International Consolidated Airlines Group, S.A. 2023, p. 17.
100. See, IAG Annual Report 2023, p. 297, British Airways Annual Report 2023, p. 118, and Auditor's Report on International Consolidated Airlines Group, S.A. (2023), p. 17.
101. IAG Annual Report 2023, p. 297.
102. Lufthansa Group, Annual Report 2023, p. 152.

special permission to buy back its treasury shares if the proportion of foreign shareholders reaches 40%. If this level reaches 45%, Lufthansa AG is authorised to increase issued capital by up to 10% by issuing new shares. If foreign shareholders reach the 50% threshold, Lufthansa AG can prevent them from acquiring new shares, require the most recently registered shareholders to sell their shares, limit their shareholders' (voting) rights, and ultimately even forfeit the shares concerned.[103] On 31 December 2023, foreign, non-German shareholders held 26.6% of the shares.[104]

Regarding control, Lufthansa AG has a dual board structure with an Executive and Supervisory Board. The positions on both boards are held by European nationals. At the end of 2023, the Executive Board comprised six members; three were German and one Belgian, Swiss, and Dutch national.[105] The Supervisory Board consists of 20 members.[106] The Group strategy is defined, and its implementation is managed through the Executive Board and the Group Executive Committee, which consists of, amongst others, the Executive Board and the CEOs of the main subsidiaries.[107]

In addition to operating flights under the Lufthansa brand, as part of the multi-hub, multi-airline and multi-brand system, Lufthansa AG maintains full ownership, both in terms of equity stake and voting share, of its major subsidiary network airlines offering international services to destinations outside of Europe: SWISS International Air Lines AG, Austrian Airlines AG, and Brussels Airlines SA/NV.[108] Lufthansa AG manages control of its subsidiary airlines through a blend of centralised strategic oversight and decentralised operations. Each subsidiary airline has its own management structure with a CEO, a Board of Directors or Executive Board and a Management Board or team responsible for the day-to-day operations, including, but not limited team, flight operations, customer service and brand and marketing positioning.[109]

In terms of the subsidiary airlines' nationality, these carriers are established in their respective States, in accordance with local law, have their PPoB there, receive

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103. See, Sections 4(1-3) and 5(2) of the *Luftverkehrsnachweissicherungsgesetz*, (LuftNaSiG, the German Aviation Compliance Documentation Act), Section 71.1(1) of the German Stock Corporation Act (AktG), and Sections 4(3) and 5(1) of the *Deutsche Lufthansa Aktiengesellschaft* (Articles of Association) of October 2023.
104. Lufthansa Group, Annual Report 2023, p. 15.
105. Ibid., pp. 5-6.
106. Lufthansa Articles of Association, Section 8(1).
107. Lufthansa Group, Annual Report 2023, p. 77.
108. Ibid. p. 259.
109. See, for instance, Lufthansa Group Annual Report 2023, p. 21.

the operating license and AOC from the local licensing and safety authorities and are supervised by these authorities. Although the Lufthansa Group holds both ownership and effective control through the voting stock, the subsidiary airlines have been able to continue operating their State's traffic rights. This is possible because other non-EU States have either accepted the designation of these carriers in their ASAs, for instance, based on the PPoB of the designated carriers, through *ad hoc* waivers of nationality requirements or via accepting the EU-carrier clause in Horizontal ASAs, although this does not apply to Swissair as Switzerland is not part of the EU's external relations agenda. Nevertheless, this scheme is very different from the ones of IAG and Air France-KLM and provides less certainty. States can and have threatened to ban airlines' flights, such as when Russia questioned the nationality of Austrian Airlines.[110]

On 3 July 2024, the European Commission approved Lufthansa AG's acquisition of a 41% stake in the Italian carrier ITA Airways. Lufthansa AG intends to acquire the remaining shares from 2025 onwards and fully integrate ITA Airways as the fifth network airline into the Lufthansa Group.[111]

4.2 Concluding remarks on nationality protection schemes

The protection of nationality in the EU's air transport sector is a multifaceted issue involving various regulatory regimes at the EU and national level. The above section has delved into the shareholding structures and corporate governance measures of the three largest network carrier groups in the EU. It has been demonstrated that airline undertakings employ various tools to maintain and protect the nationality of their daughter companies or subsidiary airlines, including, but not limited to, strategic shareholding schemes using holding companies or foundations created for that purpose, the issuance of priority shares, the limitation of shares with voting rights, and various arrangements concerning the Board(s) structure and composition.

Each airline group thus maintains its own methods to construe its corporate set-up, in which ownership and control considerations play their part but also take into account commercial and other policy interests, such as is particularly relevant in the case of IAG and their part-UK nationality. While Ryanair, Wizz air and easyJet

110. See, for instance, Financial Times, "Russia threatens to ban Austrian flights" of 28 February 2010, https://www.ft.com/content/e27168fa-24a2-11df-8be0-00144feab49a (last visited: 25 July 2024).

111. For more information, see announcement at, https://newsroom.lufthansagroup.com/en/eu-commission-gives-green-light-for-lufthansa-groups-participation-in-ita-airways/ (last visited: 25 July 2024).

also had to adapt their shareholder composition upon Brexit to qualify as an EU carrier,[112] an assessment of those cases is outside this article's scope.

Since a change of control that would alter the airline's nationality may affect an airline's continued compliance with Regulation 1008/2008, investors with the airline's best interest at heart would, therefore, think twice before making an investment that could jeopardise the airline's nationality. Having said that, even for the nationality of airlines in the Lufthansa Group, who are fully compliant with EU law and the EU-Swiss Air Transport Agreement allowing such cross-border investments, compliance with ownership and control requirements in an external, international context is, in my view and in certain cases, weakest. Subsidiaries have -so far- been able to maintain traffic rights under Air Services Agreements through regulatory governance and establishment in their 'home' State, and non-EU States accepting Swiss/EU carrier's designation or waiving nationality requirements in their ASAs.

5. Concluding remarks

Airline nationality has never lost its significance because of the interlock between domestic airline licensing and the State's designation in Air Services Agreements (ASAs), which airlines require to access traffic rights that States have exchanged in such ASAs. State's use of the restriction to access their air transport markets to pursue political, strategic and commercial objectives has endured and will continue to endure for at least the foreseeable future. The current state of global trade, which is moving away from globalisation, and a more complicated geopolitical landscape, has tightened the 'strain' of the web of ASA, "where one country must rely on the concurrence of another."[113]

This cornerstone of designation and traffic rights upon which airline operations are built makes aviation so different from other industries and is why, as a leading authority in this field, compellingly wrote, "Paradoxically, cross-border aviation is legally much more entrenched in national structures than other industries."[114] To

112. Reuters, Wizz Air's top shareholder cuts stake to comply with ownership rules, 4 February 2020 https://www.reuters.com/article/us-wizz-air-hldgs-investors/wizz-airs-top-shareholder-cuts-stake-to-comply-with-ownership-rules-idUSKBN1ZY18G? (last visited: 8 September 2024).

113. Peter P.C. Haanappel, 'Airline Ownership and Control, and Some Related Matters', 26(2), Air and Space Law (2001).

114. Translation provided by author, orginal text: "Paradoxerweise ist die grenzüberschreitende Luftfahrt rechtlich weit mehr in nationalen Strukturen verhaftet als andere Industrien" from Regula Dettling-Ott, in Rechtliche Fesseln bei den Allianzen mit SWISS. Kein Ende der Nationalitätenklausel in Sicht, NZZ 28. Aug. 2003.

this day, this entrenchment remains in effect, not the least by the US, which keeps the door firmly shut to relaxing airline nationality requirements. As a US delegate once unequivocally warned:

> " [..] the United States would advise other States who would be interested in entering into such a Convention [on Foreign Investment in Airlines] that doing so could potentially place their air carriers at risk *of not having their designation accepted by the United States* under the applicable designation criteria."[115] *(italics added)*

Building on this and other observations in this article's analysis, which highlights the significant transformation in the EU air transport industry through increased collaboration, consolidation, and cross-investments among airlines, as characterised by increasingly complex corporate structures, nationality conditions have hardly changed. One can argue that changing perceptions and practices of ownership and control may have led to "an increasing number of deviations and exceptions to the ownership and control principle," but in my view, this does not necessarily "reflect the progressive removal of this rule."[116] Instead, the criteria for ownership and control appear well-suited to adapt to changes in the aviation landscape and relationships. Given the resilience of these nationality requirements over the past decades, it is my belief that they will remain significant while being broad enough to effectively adapt to future developments in the sector.

Compliance with airline nationality requirements involves a complex interplay of the intrinsic link between share ownership and establishing effective control and, to a lesser extent, the principal place of business. Interpretations of these requirements under corporate governance vary across EU States and the differentiation between the predominant legal ownership providing control versus economic interest in determining airline nationality creates a challenging landscape for navigating airlines' corporate structures. A toolset of control-enhancing mechanisms, including, among other things, priority shares, voting rights, and holding companies, may obscure the genuine nationality of an undertaking and necessitate a thorough case-by-case examination of the shareholding structure and corporate governance to determine who holds decisive influence over the airline. An analysis of the three largest airline groups in the EU has demonstrated that they have each found a way to comply with nationality conditions in their EU multi-ownership structures using the toolset mentioned before.

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115. ATRP/15-WP3, Appendix C.

116. Isabelle Lelieur, *Law and Policy of Substantial Ownership and Effective Control of Airlines: Prospects for Change*. Routledge; 2016.

In the airline business, corporate governance extends beyond the control exercised by shareholders and has been and is increasingly scrutinised by external *stakeholders*, including interest groups, residents, and the State, when not acting in the capacity of a shareholder. This development in the 21st century, most notably in the field of "environment, social & governance" (ESG), provides an additional layer of complexity to corporate governance and the question of who influences and affects how an airline is managed. The challenges and opportunities this poses will be addressed in a future publication.

Securing Strategic Autonomy for EU Airlines

An Assessment of Foreign Investment Exposure in the Air Transport Industry

Published in the *Aviation and Space Journal*, Issue 3(2024), pp 4-17.

Abstract

This article examines the EU's pursuit of strategic autonomy as applied to the EU aviation sector and the regional and national interests it serves. It focuses on ownership and control regulations as tools to protect EU airlines from foreign influence. Initially, the strategic autonomy concept was driven by security and defence concerns, but global developments have broadened this scope to include economic resilience through enhancing competitiveness. EU Regulation 1008/2008 mandates that EU airlines remain majority-owned and effectively controlled by EU nationals, ensuring their access to key operational rights and preserving EU economic and strategic interests.

Although foreign investment offers growth opportunities, it also carries risks of shifting control outside the EU, potentially compromising essential services and weakening EU resilience in times of geopolitical or economic instability. To address these risks, the article evaluates whether the EU's protective regimes, such as the Foreign Direct Investment (FDI) Regulation, the Critical Entities Resilience (CER) Directive, and airline's strategic shareholding schemes maintain the EU's leadership in aviation by securing that control stays with its airlines and preventing undue dependencies on or exposure to third-country airlines. This layered regulatory approach not only supports EU competitiveness but also reinforces the autonomy of the EU's aviation sector amid evolving global dynamics.

Keywords: Strategic autonomy, foreign investment, ownership and control, nationality requirements, national interests, safeguarding competition, connectivity

1. Introduction

This article discusses Europe's transition towards 'strategic autonomy' as it is developing in the current era. It places this position in the context of providing air transport services and links it with pursuing other interests, such as connectivity and environmental objectives.

Since the European Green Deal was approved in 2020, the EU has made significant strides towards environmental sustainability, prioritising policies aimed at reducing greenhouse gas emissions and promoting clean energy transitions. While there is a large consensus that the air transport industry must play its part, since the adoption of sectoral environmental measures applicable to air transport,[1] concerns have existed that the additional costs for EU airlines lead to competitive distortion globally.[2] While the balance previously tipped in favour of green policies, by 2024, the world has changed and these competition concerns have become more widespread, shifting the EU's focus toward enhancing Europe's global competitiveness.

In the presentation of his report on the future of European competitiveness, Mr. Draghi paints a grim picture:

> "Europe is facing a world undergoing dramatic change. World trade is slowing, geopolitics is fracturing and technological change is accelerating. It is a world where long-established business models are being challenged and where some key economic dependencies are suddenly turning into geopolitical vulnerabilities. Of all the major economies, Europe is the most exposed to these shifts"[3]

Mr. Draghi's report reflects the growing recognition of the need to balance environmental ambitions with economic resilience, especially considering geopolitical challenges, potential supply chain disruptions, and technological competition from global powers such as the US and China. As a result, the EU's agenda is centering on fostering innovation, securing strategic autonomy, and maintaining its leadership

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1. I.e. the "Fit for 55" legislative package, including for air transport, among others, "ReFuelEU Aviation" to boost the use of Sustainable Aviation Fuels (SAF) and adapting the EU Emissions Trading System (ETS).
2. See, for instance, Niall Buissing, '*EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?*'. Air & Space Law 47, no. 6 (2022): 1–24.
3. Address by Mr. Draghi – Presentation of the report on the Future of European competitiveness, 17 September 2024, available at: https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#share (accessed: 29 Oct. 2024).

in key industries while continuing to support sustainability goals through advanced technologies and efficient infrastructure.[4]

Applying this mantra to the provision of air services raises the question of whether the EU has the tools to maintain a certain level of strategic autonomy in the EU's air transport industry, more specifically, whether it can protect and maintain ownership and control of airlines within the EU and to exert influence on EU airlines. This question will be central to this article's analysis.

In the in-depth analysis and recommendations (Part B), Mr. Draghi underscores that "transport is a clear example of a European public good providing essential services to EU citizens and businesses fostering the EU's global economic competitiveness and productivity",[5] for which an extensive body of regulations already exists in this sector. Moving forward, he recommends:

> *To retain a leading position in [the] face of growing global competition, EU policies must:*
> – *Ensure infrastructure development and the harmonisation of rules to achieve an integrated and intermodal market across the EU.*
> – *Secure the resilience of infrastructure and routes, services and the industry.*
> – *Lead decarbonisation and the adoption of digital and automated solutions.*
> – *Secure a leading manufacturing industry and a level playing [field] internationally for the EU's industrial operators.*[6]

In the responses following the report's publication, for air transport, most attention has gone to the calls for action to harmonise rules to achieve an integrated market across the EU, i.e., the implementation of the Single European Sky 2 Plus package,[7] accelerate air traffic management technologies, and lead decarbonisation through the production of alternative fuels and fuel efficient and zero-emission aircraft.[8] Many of these proposals are nothing new, and while that does not make them less important, they just reflect the industry's development over the past decade

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4. See, "The future of European competitiveness, Part A | A competitiveness strategy for Europe" (hereafter: Draghi Report, 2024), Foreword.
5. Draghi Report, 2024, Part B | In-depth analysis and recommendations, p. 218.
6. Ibid.
7. See, Position of the Council at first reading with a view to the adoption of a Regulation on the implementation of the Single European Sky (recast), adopted by the Council on 26 September 2024, at: https://data.consilium.europa.eu/doc/document/ST-8311-2024-REV-1/en/pdf (accessed 29 Oct. 2024).
8. Ibid, pp. 220-2021, see proposals 3-5.

or mirror the sector's lobby for more harmonisation. However, this article will focus on the call to secure resilient networks and services in the air transport industry, particularly the proposal on levelling the playing field through, among other means, foreign direct investment screening and the assessment of foreign investment exposure in air transport generally.[9]

More specifically, this article seeks to bring together the trends to pursue strategic autonomy for the EU and its application to the provision of air transport services (section 2) and the development in aviation moving away from the wave of liberalisation of the last couple of decades towards increased attention to aviation's potential role in preserving and promoting EU and national interests and why airline's nationality retains its importance therein (section 3). The last part assesses airlines' foreign investment exposure by analysing whether the EU's regulatory frameworks offer sufficient protection against undue foreign investments in airlines (section 4).

2. Strategic autonomy of the EU

Strategic autonomy has been defined as the ability of a State or a jurisdiction to pursue and protect its national interests and adopt its preferred foreign policies without heavy dependence on external entities.[10] The concept of strategic autonomy in the EU encompasses the capacity of the EU to act independently in strategically important sectors from other market powers, most notably, the US and China.

2.1 The evolution of strategic autonomy in the EU

Although pursuing European strategic autonomy has gained momentum over the last few years (2017 – 2024), the idea has slumbered since the start of the 21st century and widened in scope in several waves.[11] At first, strategic autonomy primarily focused on security and defence matters, reflecting concerns over the EU's ability to protect itself and its member states.

As of 2017, this focus broadened to include defending European interests in a shifting geopolitical landscape marked by significant events such as Brexit, the Trump presidency, and China's growing assertiveness. The onset of the COVID-19

9. Ibid, p. 222.
10. B. Lippert, N. v. Ondarza, & V. Perthes, (Eds.), *European strategic autonomy: actors, issues, conflicts of interests* (SWP Research Paper, 4/2019), at p. 5.
11. N. Helwig & V. Sinkkonen, '*Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term*', European Foreign Affairs Review 27, Special Issue (2022).

pandemic in 2020 further shifted the debate towards reducing economic dependencies on foreign supply chains, emphasising the need for economic resilience.[12] Since 2021, the concept of EU strategic autonomy has expanded to cover virtually all EU policy areas, including infrastructure and transport.[13]

The increasingly entrenched geopolitical environment, with the economic and technological rivalry between China and the US, the Russian aggression in Ukraine, and tensions rising in the Middle East, underscores the need for and importance of the EU's strategic autonomy. Countries increasingly use economic influence as geopolitical leverage, prompting the EU to adopt a more interest-based approach directed towards increasing its economic autonomy and fine-tuning its mantra of 'an open market economy with free competition' laid down in the TFEU.[14]

On March 28, 2023, Josep Borrell, the EU High Representative for Foreign Affairs and Security Policy, emphasised the need for a "paradigm shift". While the EU has traditionally fostered open trade, "the weakening of the WTO and the increasing weaponisation of trade" has forced the EU "to re-establish a 'level playing field' and to reduce excessive dependencies which could be weaponised."[15] The Draghi report alluded to in the introduction has amplified this call.

2.2 Strategic autonomy and EU air transport

Aviation serves strategic EU and national interests, such as maintaining connectivity and high EU standards in safety, security, the environment, social issues and passenger rights,[16] but the relevance of an autonomous EU air transport sector has not often been raised in the context of the strategic autonomy debate. For some time, the EU and the US have been committed to combating unfair practices that undermine the competitiveness of their carriers. However, as the next section demonstrates,

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12. European Parliament Briefing, EU Strategic Autonomy Monitor, *EU strategic autonomy 2013-2023: From concept to capacity,* July 2022.
13. Ibid., Annex 1, The 360° strategic autonomy wheel.
14. See, Art. 119 TFEU "the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of *an open market economy with free competition*." (*italics added*).
15. Address Josep Borrell on March 28, 2023, *Geopolitics of the green transition and improving EU's economic security*, at: www.eeas.europa.eu/eeas/geopolitics-green-transition-and-improving-eu%E2%80%99s-economic-security_en (accessed: 29 Oct. 2024).
16. See, for instance, the Commission's "An Aviation Strategy for Europe" of 7 December 2015, (COM(2015) 598 final, and Ulrich Schulte-Strathaus, *'Is the European Commission Fulfilling Its Ambitious Aviation Strategy?'*, 42(6), Air and Space Law (2017).

the necessity for safeguarding EU and national strategic interests through aviation extends beyond merely ensuring fair competition for EU air carriers.

In the context of this paper, the concept of strategic autonomy in aviation revolves around the ability to offer protection against dependency on non-EU countries and their carriers, not only for the more commonly referred to critical transport infrastructure and technology but even more so for the provision of air services, while maintaining competitive global trade relationships. The next sections will delve into the EU's and national strategic interests in air transport and the essential services it provides, emphasising the importance of reducing dependencies and the relevance of securing and maintaining control over the EU's aviation infrastructure and air transport services.

3. Preservation of interests and autonomy of aviation

In an era marked by globalisation, contrary to what the name suggests, national interests have become more, not less, important. As one author convincingly put back in 2006:

> "The question of national interest arises in situations and actions related to other countries that affect the home country's well being. One might argue, for example, that eliminating dependence on Middle-Eastern oil is in the national interest of democratic states. National interest, therefore, is *defined* by international relationships or challenges"[17] (*emphasis added)*

The same still holds true, perhaps even more so in the changing world of 2024, in which international relations are under increasing pressure, geopolitics is fracturing and economic dependencies can become geopolitical vulnerabilities.[18] While the *Realpolitik* observation "that States are rational actors and should behave in their own best interests as they engage with other States in the international aviation system" is very applicable to this international canvas, the continuation that "paradoxically, those interests are best pursued by ensuring the success of a cooperative international system"[19] is, in this author's view, *gratuit*. In an entrenched

17. Erwin von den Steinen, National Interest and International Aviation (2006), at p. 21.
18. As described in the Introduction.
19. See, Brian F. Havel, *'Book Review: Erwin von den Steinen, National Interest and International Aviation'*, 32(1), Air and Space Law (2007).

geopolitical landscape with diverging relationships and priorities, successfully pursuing a cooperative international system is ever more distant.

This section concerns the strategic EU and national interests that aviation serves, emphasising the importance of preserving the EU aviation sector, its control, and the strategic implications of airline ownership and control generally. The nationality of airlines plays an important role in this context, as it fosters the link between the EU and a State to the airline, enabling the exercise of control over access to air transport markets and the attainment of political, safety, and strategic objectives.

3.1 The interest in keeping control of airlines in an international context

In negotiating Air Services Agreements (ASAs), the requirement for a State, or a combination of States as is the case in the EU, or its nationals to 'own and control' an airline remains prevalent in most designation practices. These practices serve various purposes: they enhance safety, support political and strategic objectives, such as using access to a State's airspace as a trade or political bargaining tool, and protect commercial interests. By controlling airline ownership, States can regulate access to their air transport market and determine which airlines benefit from the State's traffic rights, which have been exchanged with third countries in such ASAs. These ASAs ensure that the strategic and economic interests of the State are safeguarded while maintaining oversight of airlines operating within its borders.[20]

The importance which States keep attaching to ownership and, more importantly, control of airlines is exemplified in the discussions around a proposal for a *Draft Convention on Foreign Investment in Airlines*,[21] first initiated at the 37th Session of the ICAO Assembly in 2010,[22] but still relevant to this day. The proposal's objective is for each party to generally waive limitations on airline ownership and control in the designation clauses of ASAs with other parties to the Draft Convention.[23] However, persistent discussions revolve around the potential misuse of a flag of convenience by 'free riders' and 'bad actors' with illegitimate intentions gaining backdoor access to a State's air transport market. At the root of the problem lies the 'hardcore' interlock between nationality designation and access to traffic rights.[24] While States party to the Draft Convention may agree to relax nationality requirements between them, the determination of ownership and control, and consequently a change in

20. ICAO Doc 9626 Manual on the Regulation of Air Transport, 3rd edition (2018).
21. Henceforth also referred to as the Draft Convention.
22. A37 WP/190, *Facilitating Airline Access to International Capital Markets* (2010).
23. ATRP/15-WP3, Draft Multilateral Convention on Foreign Investment of Airlines, 28-02-2019.
24. Also called the 'double-boulted locking mechanism', see World Economic Forum, A New Regulatory Model for Foreign Investment in Airlines, (2016).

the nationality of a carrier, can lead to significant repercussions and exposure to third States' acceptance of the designation. A US delegate unequivocally declared:

> " [..] the United States would advise other States who would be interested in entering into such a Convention that doing so could potentially place their air carriers at risk *of not having their designation accepted by the United States* under the applicable designation criteria."[25] *(italics added)*

It is this author's view that the above example underscores the complexities and potential risks of altering traditional airline ownership and control frameworks. Nevertheless, developments towards the liberalisation of nationality requirements have taken place and are taking place, of which the EU carrier concept and negotiations to accept the EU carrier clause in ASAs is a unique and remarkable achievement, but that trend or its limitations is not the focus of this article.[26]

3.2 Promotion of EU interests and strategic autonomy of aviation

The next sections support this author's opinion that the promotion of EU interests in aviation aligns with broader objectives of strategic autonomy, particularly in the face of rising competition from non-EU carriers and the debate on foreign investment versus the need to safeguard the provision of specific services, such as air transport connectivity and reduce dependencies thereof from non-EU States. It will also become apparent why the nationality of an airline, that is, both the EU nationality and the nationality of an EU State, is important in this context.

The next subsections are designed to demonstrate the importance of maintaining a certain level of strategic autonomy of the EU air transport sector through a number of measures that have been adopted by the EU to underpin its autonomous and continued operation. Relevant areas in which the EU has adopted this policy pertain to competition between EU and non-EU airlines, the preservation of connectivity within the EU, including via the instrument of Public Services Obligations (PSOs), and support of the aviation sector, and other industries, at times of crises and other exceptional circumstances.

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25. ATRP/15-WP3, Appendix C.

26. See, for instance, P.P.C. Haanappel, '*Airline Ownership and Control, and Some Related Matters*', 26(2) Air and Space Law (2001), I. Leleur, Law and Policy of Substantial Ownership and Effective Control of Airlines (2016), and B. Humphreys, The Regulation of Air Transport: From Protection to Liberalisation, and Back Again (2023).

3.2.1 The EU as a regulatory hub to even the level-playing field

The EU serves not only as an operational and logistical hub, but also as a global regulatory and policy leader in upholding certain democratic and trade values.[27] In aviation, the EU spearheads the promotion of economic and transport-related policies with a strong focus on consumer rights, safety and security, labour conditions, environmental protection, and a level playing field, both within the EU's internal air transport market and vis-à-vis third States when it adopts air transport agreements.[28] The 'genuine' EU home-based airlines, both network carriers and low-cost carriers (LCCs), are well-acquainted with these policies, actively participate in their development, and are adept at managing their implementation. Whether non-EU airlines can and want to adapt to these comprehensive conditions, reflecting a holistic approach to operating air services in alignment with the "European way", is, in the author's view, questionable.

While the EU States support European undertakings to compete internationally, they seek to protect them from anti-competitive practices or arrangements, abuse of dominance, Stata aid and subsidies.[29] In international air transport, this move is exemplified by, among others, the enactment of EU Regulation 2019/712 on *safeguarding competition in air transport*,[30] dealing with foreign government subsidies.[31] Such practices are deemed to distort the level playing field as agreed upon in ASAs,[32] which distortion of competition between EU and non-EU airlines could affect the competitive position of EU carriers and, subsequently, make the EU more dependent on carriers from outside the EU for, inter alia, its connectivity, as to which see also the next section.

Like its predecessors, EU Regulation 2019/712 has not been applied, at least not yet. This author questions whether the enforcement measures enshrined in the Regulation sufficiently empower the Commission to apply the Regulation extra-

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27. See, for instance, I. Hadjiyianni, '*The European Union as a Global Regulatory Power*', 41(1) Oxford Journal of Legal Studies (2021).
28. See "An Aviation Strategy for Europe" of 7 December 2015, (COM(2015) 598 final.
29. See, for instance, Scott Schneider, *'An EU Perspective of 'Fair Competition' in Global Air Transport*', 45(4), Air and Space Law (2020).
30. Regulation (EU) 2019/712 of 17 April 2019 *on safeguarding competition in air transport,* and repealing Regulation (EC) No 868/2004.
31. See, Art. 44(7) of EU Regulation 2022/2560 *on foreign subsidies distorting the internal market,* the Foreign Subsidies Regulation (FSR): "This Regulation is without prejudice to the application of Regulation (EU) 2019/712. Concentrations [..] involving air carriers shall be subject to the provisions of Chapter 3 of this Regulation."
32. See, for instance, the EU-Qatar Air Transport Agreement (2021), Article 7.

territorially versus third States and how such a third State would react to that.[33] Whether or not this Regulation can meaningfully contribute to maintaining a competitive EU air transport sector and indirectly safeguard EU interests, as referred to above, will depend on a successful demonstration. However, if such a show of force is without repercussions, the Regulation and fair competition clauses in ASAs appear toothless.

The level playing field is not only affected by external threats, such as foreign subsidies to airlines; EU Member State's and the EU's additional taxation measures and supplementary regulations burden its carriers from within, for example, in terms of safety and environmental requirements compared to airlines from third countries with less stringent regulations in these areas.[34]

3.2.2 Connectivity and Public Service Obligations

The autonomy of the EU is also exemplified by its measures to ensure connectivity within the EU. A notable instrument in this regard is the provisions on PSOs in EU Regulation 1008/2008. Applying EU Regulation 1008/2008, the CJEU acknowledges, rightfully so, national airlines' significant role in a State's economy and trade but also highlights their role in providing connectivity, including to regions with whom they have historical and cultural ties, as highlighted in the TAP Air Portugal case. Similarly, it is understandable from the same historical and cultural perspectives that States like Portugal, the Netherlands, France, and the UK would be reluctant to depend on third-country airlines to provide connectivity between them and their overseas territories.

In terms of connectivity to remote regions, the 'open market' conditions outlined in EU Regulation 1008/2008 are significantly influenced by the instrument of Public Service Obligations (PSOs). PSOs are designed to ensure connectivity to remote EU regions by financially supporting routes that might not be commercially viable under standard competitive conditions.[35] A detailed regime ensures non-discriminatory access to these routes for EU air carriers, however:

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33. See also, Magdalena Kucko, *'The EU-Qatar Air Transport Agreement: Bound to Succeed?'*, 45(3), Air and Space Law (2020).
34. For instance, measures concerning aviation emissions and noise-related restrictions; see also section 3.3. below.
35. See, "Study on the practice of Public Service Obligations in Europe", European Regional Airliens Association (ERA), available at: https://cloud.3dissue.net/9237/9242/9271/113009/index.html?26309 (last visited: 26 July 2024).

> "…. the number of PSOs and their restrictive nature had also increased significantly. Subsidy levels for PSOs had also been increasing, with significant country variations as to the average subsidy level per passenger. There was thus growing concern over an excessive or non-harmonised recourse to PSOs by some Member States. At the same time, the PSOs rules did not always attract a sufficient number of competitors in the tender procedure, for example because the concession period was too short to write off route-specific equipment."[36]

The PSO scheme could become more complex if EU carriers with 'mixed nationality,' backed by significant foreign interests and resources, were allowed to access these routes and compete in tender procedures. In addition, the continued interest of third-country undertakings and their nationals in maintaining PSO routes may be questioned as they often lack a cultural, historical or national tie or sense of responsibility to the remote regions these routes serve.

Further research is needed to understand the potential impacts of such a relaxation on the effectiveness and fairness of the PSO mechanism. However, it is this author's view that it is in the EU's and national long-term and strategic interest to provide connectivity to remote regions that such PSO routes are served by EU airlines instead of depending on non-EU actors for these services.

3.2.3 Support in times of crises

During the COVID-19 pandemic, the CJEU reaffirmed the importance of a 'genuine link' between State support and the airline's Principal Place of Business (PPoB) in the granting State. At the time, aid granted by, for instance, France to airlines having their PPoB in France was deemed justified due to the "stable" and "permanent link tying the airlines to the French economy."[37] Similarly, in a Swedish case, the CJEU determined that the 'genuine link' was established through the need to maintain continuous connectivity within Sweden, necessitating that beneficiary airlines have a 'stable presence' in the granting State.[38]

Although States have, at times of such unprecedented crisis, good reasons to limit the recipients of financial support and wish to favour airlines that have the most significant contributions to that State's economy or working population, limiting

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36. See, EC and Ricardo, Ex-post evaluation of Regulation 1008/2008 on common rules for the operation of air services in the Community (2018), at 2.3.2.2, point 4.
37. See, par. 40 of Case T-259/20, *Ryanair* v. *EU Commission* (2021).
38. See, par. 40 and 45 of Case T-238/20, *Ryanair* v. *EU Commission* (2021).

the qualification, for instance, to "identify airlines that have a link with Sweden and play a role in securing the connectivity of Sweden …"[39] to only those with their PPoB on your territory is a very narrow interpretation and disregards, for instance, the LCC business model. Hence, it was no surprise that in 2023-2024, the General Court overturned several decisions of the EU Commission's approving State aid measures to flag or other 'national' carriers during the Covid pandemic for being selective and discriminatory towards other EU airlines providing connectivity.[40]

Nevertheless, the willingness of States to support their airlines and the recognition of the relationship between the PPoB of an EU air carrier and the connectivity it provides underscores the 'public service' nature of international air transport, particularly in times of crisis and highlights the strategic importance of international and regional air connectivity to national economies. The Covid crisis has also demonstrated States' reluctance to provide financial support to airlines that do not bear its nationality, which would likely be even more problematic if such support to non-EU airlines were necessary to maintain connectivity.

3.2.4 Increased vulnerability at times of natural disasters, war or political unrest

Due to the articulated cross-border nature of international aviation, the air transport industry exhibits unique dynamics that distinguish it from most other sectors. Consequently, airlines are particularly susceptible to external events. These events include geopolitical crises such as the Russian invasion of Ukraine, health crises like the COVID-19 and SARS pandemics, political unrest in the Middle East (e.g., the Qatar diplomatic crisis) and military conflicts in this region, which render overflights hazardous, and environmental disruptions such as the 2010 eruption of the Icelandic volcano. The Russian invasion provides perhaps the most illustrative example; had the EU permitted Russian investors to acquire a significant share of an EU airline in 2017, under the then-supposed relaxed ownership and control conditions, the current sanctions would have prevented the Russian/EU airline from operating.[41]

Hence, this author argues that it is in the strategic interest of States and the EU to maintain limitations on who controls national or EU carriers to ensure continuity of operations and allow for a more rapid response to crises. A similar reasoning applies to the execution of repatriation flights where national carriers have often

39. Ibid. par. 3.

40. See, for instance, the Judgments of the General Court in Cases T-146/22, Ryanair v Commission (KLM II; COVID-19) and T-268/21, Ryanair v. Commission (Italy - aid scheme - COVID-19).

41. See, EU Council Regulation 2022/334, amending EU Council Regulation 833/2014, and EU Council Decision (CFSP) 2022/335, which amends again Decision 2014/512/CFSP, in particular banning any Russian air carriers from flying into, over or out of the territories of the EU States.

supported their home state to retrieve its nationals from precarious situations abroad, such as at the start of the COVID-19 pandemic or when large numbers of nationals are stranded due to a sudden bankruptcy of an airline.[42]

3.3 Considerations of other interests

In addition to the more strategic interest of the previous section (3.2), the ability to exert influence on EU or national airlines through EU or national policies and regulations can also drive other interests, including higher labour standards and the adoption of sustainable practices, such as reducing emissions and promoting the production and use of Sustainable Aviation Fuel (SAF).[43] Third-country carriers are not always covered by the same rules or to the same extent as EU carriers, and attempts to mitigate this differentiation may prove difficult.[44] Hence, environmental objectives for air transport, as laid down in EU legislation, can more easily be achieved working with and enforced vis-à-vis EU airlines to whom these EU rules apply directly. In the context of safeguarding strategic and other interests, this author opines that this is another argument in favour of keeping connectivity through EU airlines, i.e., protecting their EU nationality and maintaining internal control so as to serve other interests, such as pursuing environmental objectives. The creation of dependencies on non-EU airlines does not aid this cause.

In certain EU Member States, like the Netherlands, there is a trend of national and local governments moving away from a predominant focus on the economic benefits of aviation and increasingly focusing on balancing the interests of different stakeholders, including those from residents around the airport regarding noise,[45] and for the community at large to reduce emissions and provide cleaner air. The debate on aviation taxation also resurfaces sporadically; in September 2024, the Swedish government announced it would scrap an aviation tax, while one month later, the French government plans to raise its aviation taxes.[46]

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42. See, for instance, European Parliament Briefing, "Repatriation of EU citizens during the COVID-19 crisis" of 01-04-2020, and CJEU Case C-49/22, *Austrian Airlines (Repatriation flight)*.
43. See, Regulation (EU) 2023/2405 of 18 October 2023 *on ensuring a level playing field for sustainable air transport* (ReFuelEU Aviation).
44. See, for instance, Niall Buissing, *'EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?'*, 47(6) Air and Space Law (2022).
45. See, Niall Buissing, *'Challenging the 'Balanced Approach to Aircraft Noise Management' Principle: Will the Dutch Approach Stand or Will the Principle Prevail*?', 49(1), Air and Space Law (2024).
46. See, respectively, https://www.theguardian.com/world/2024/sep/19/sweden-cuts-flying-tax-emissions and https://www.bloomberg.com/news/articles/2024-10-02/french-plans-to-raise-taxes-disastrous-for-aviation-iata-says (accessed: 29 Oct. 2024).

This observation signalling the reset of EU and national strategic interests in terms of environmental, social and economic objectives as well as accompanying taxation measures, fits with the finding in Mr. Draghi's report that "EU countries are already responding to this new environment with more assertive policies, but they are doing so in a fragmented way that undermines collective effectiveness." His warning that "Uncoordinated national policies often lead to considerable duplication, incompatible standards and failure to consider externalities",[47] should, in this author's view, resonate strongly in the EU air transport sector, where EU airlines operate in a competitive global market and whose competitiveness is not served by fragmented rules.

3.4 Concluding remarks on the preservation of interests and autonomy of aviation

On the international level, the interlock between nationality designation and access to traffic rights, as bartered in Air Services Agreements, allows States not only to protect commercial interests by regulating and restricting access to their air transport markets but also to keep control of airlines to, among other things, enhance safety, support political and strategic objectives, and pursue national or collective EU interests. Some authors argue that the persistence of this traditional airline ownership and control framework has barred the airline business from 'normalising' as compared to other industries:

> .. while the overall aviation industry has matured and, in many cases, achieved long-term viability, the core of the industry, the airlines themselves, has not done so. […] Restrictions on ownership and control have resulted in a failure to create truly global companies, despite the international focus of most carriers.[48]

In this author's view, this commercial approach is too market-oriented. If anything, the increasingly entrenched geopolitical environment has added another layer of complexity to changing the ownership and control framework and exposes the risks of doing so. In the field of air transport, promoting EU and national interests,

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47. Draghi Report, Part A | A competitiveness strategy for Europe, p. 11.

48. B. Humphreys, The Regulation of Air Transport: From Protection to Liberalisation, and Back Again (2023), Chapter 13, Summary, COVID and the Future, at p. 234; see also, CAPA – Centre for Aviation, "Airline ownership and control rules: at once both irrelevant and enduring" (2017), published at: https://centreforaviation.com/analysis/reports/airline-ownership-and-control-rules-at-once-both-irrelevant-and-enduring-345816 (accessed 29 Oct. 2024) and B. Havel & G. Sanchez, "*Restoring Global Aviation's Cosmopolitan Mentalité*", 29(1) Boston University International Law Journal (2011).

most notably ensuring connectivity, goes hand in hand with protecting the sector's autonomy in a global changing landscape.

The EU's recent emphasis on strategic autonomy, as described in section two above, has evolved significantly, extending from security and defence to encompassing economic resilience. Although aviation has not yet been mentioned explicitly in this context, it is this author's strong belief that reducing vulnerability and dependencies on third countries and their carriers that could be exploited geopolitically, especially during natural disasters, war, or political unrest, fits well in this approach to safeguard EU and national interests. Accordingly, it provides another argument in favour of protecting EU nationality and keeping control of airlines internally.

The relationship between an airline's nationality and its home State, or the EU for that matter, appears not only to ensure the ability to respond more rapidly to crises but also serves strategic interests, most notably connectivity, and can help to protect from external dependencies, in this case, depending on non-EU airlines for such connectivity. This line of reasoning could even be further exploited to include promoting the EU's environmental sustainability objectives for aviation, which can more easily be achieved working with and enforced vis-à-vis airlines bearing the EU nationality, but that advocacy role is outside the scope of this article.

4. Protection of aviation's strategic autonomy in the EU

Turning to securing strategic autonomy for EU air transport services and Mr. Draghi's call to assess foreign investment exposure,[49] the exposure of EU airlines to foreign investment, which this article examines, is inextricably linked to ownership and control conditions as laid down in EU Regulation 1008/2008.[50] Foreign investment in EU airlines, while beneficial for increasing access to capital and operational expansion, may risk shifting the control outside of the EU, which, in theory, could lead to loss of nationality and undermine the region's ability to safeguard its economic, security and strategic interests in aviation and the services it provides.

In short, and generally, airline nationality requirements laid down in licensing (see EU Regulation 1008/2008) and designation conditions (in ASAs) confirm that EU carriers remain majority-owned and effectively controlled by EU nationals, which is

49. Draghi Report, 2024, Part B | In-depth analysis and recommendations, p. 222.

50. Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (EU Regulation 1008/2008), Art. 4(a) and (f).

vital for maintaining market access and operational licenses within the EU.[51] Hence, by requiring airlines to comply with nationality requirements and enforcing these restrictions, the EU protects its airlines from foreign takeovers or undue foreign investments and ensures that EU carriers' nationality and operational autonomy are preserved even in the face of cross-border investments or mergers.

The following sections will explore whether the relevant EU regulatory frameworks that apply to or are linked to foreign investment exposure sufficiently safeguard EU airlines' nationality and, by extension, the autonomy of the EU air transport sector.

4.1 Airlines' nationality protection schemes

In a previous publication, this author analysed the protection of airline nationality through ownership and control conditions of selected EU airline groups, specifically in their corporate governance structures. The analysis established that these groups utilise various corporate governance strategies to maintain compliance with nationality requirements. These strategies include using shareholding structures, such as holding companies or foundations, issuing priority shares, limiting shares with voting rights, and structuring boards to ensure effective airline control.[52]

These methods are tools through which an airline or group can construe and manage its corporate setup to protect individual airlines' nationalities. The next sections deal with other measures and frameworks that offer additional protection for airlines against unwanted foreign investment. They are designed to protect the airline's (EU) nationality, which, by extension, safeguards the preservation of strategic EU and national, as described in section 3. These frameworks thus contribute to the autonomy of the EU air transport sector, which is in the EU's strategic interest.

4.2 Other forms of protection through shareholding

4.2.1 Golden shares and State measures

A 'golden share' allows the owner to maintain control over the company, for instance, to prevent hostile takeovers. These shares grant special rights, such as managing changes in ownership, structuring shareholder arrangements, and setting authorisation requirements. They can also provide indirect control through mechanisms like veto and appointment rights. Golden shares, typically held by the

51. For an analysis, see Niall Buissing, *'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance'*, 49(6), Air and Space Law (2024).

52. Ibid.

government of the state where the company has its principal place of business, allow governments to control vital national companies after privatisation.[53]

In the late 1990s, the use of golden shares in the EU was significantly restricted through a series of cases before the EU Court of Justice (ECJ), scrutinising the State's role as a shareholder. The EU Commission found that the State's possession of golden shares distorted competition in the EU internal market and restricted the free flow of capital.[54] In the *Dutch Golden Shares* case, the Dutch State effectively used a veto to block a bid by the Spanish company *Telefónica* for the Dutch telecom company KPN.[55] Even though the State took the decision to block the bid in the capacity of a private shareholder, the ECJ concluded that the introduction of the golden share in the course of the privatisation of KPN by the Dutch State could be classified as a State measure.[56] The golden share was found to be an unjustified restriction likely to deter other investors.

A State cannot grant itself 'special rights' in the capacity of a normal shareholder; as a legislator, it must consider various interests when exercising its shareholder rights. Although golden shares, in theory, can safeguard (EU) nationality and, thus, by extension, help secure the strategic autonomy of the EU air transport, since EU governments no longer hold golden shares in airlines,[57] this avenue is not further explored here. Golden shares in airlines still exist in other parts of the world; the Malaysian government keeps its golden shares in Malaysian Airlines because "national interests supersede corporate considerations."[58]

4.2.2 The Takeover Directive

EU Directive 2004/25 *on takeover bids*, in this section also referred to as the Takeover Directive or the Directive, is another form of protection designed to limit the

53. See, for instance, B. Werner, "National responses to the European Court of Justice case law on Golden Shares: the role of protective equivalents" 24(7), Journal of European Public Policy (2016).

54. Ex Article 63 TFEU (ex Article 56 of the EC Treaty). See also, I. Antonaki, *Privatisations and golden shares: bridging the gap between the State and the market in the area of free movement of capital in the EU. Meijers-reeks. (2019).*

55. See, Joined cases C-282/04 and C-283/04 Commission v The Netherlands (golden share), para 22.

56. Ibid, para 22.

57. For an aviation-related case, see Case C-98/01, *Rights attaching to the United Kingdom's Special Share in BAA plc*.

58. See, "Govt unlikely to abandon golden share in MAHB" in The Malaysian Reserve of 17 February 2022, at https://themalaysianreserve.com/2020/02/17/govt-unlikely-to-abandon-golden-share-in-mahb/ (accessed 29 Oct. 2024). Brazil also holds a golden share in the Brazilian manufacturer of Embraer aircraft; see, "Brazil's Bolsonaro approves Embraer-Boeing tie-up" in Financial Times of 10 January 2019, at https://www.ft.com/content/bf0e473e-1525-11e9-a581-4ff78404524e (accessed: 29 Oct. 2024).

actions of 'hostile investors' in the targeted undertaking. The principal goal of this directive concerns the protection of shareholders, particularly those with minority holdings when a person or entity acquires a certain level of securities *carrying voting rights* or control in their undertaking.[59] The Directive requires States to regulate that in such a case, the investor is obliged to make an offer to the holders of the remaining securities "at an equitable price."[60] With regard to this *mandatory bid rule*, no distinction is made between public bodies and private undertakings as 'offerors", and no exemptions are made when governments take over a company in accordance with the Directive's procedures.[61]

Each EU State may set its own threshold for acquiring voting rights that confer control of a targeted companies that have their registered office in that State and "the conditions under which the board of the offeree company may undertake any action which might result in the frustration of the bid."[62] While that percentage must be laid down in national law, the Takeover Directive dictates that where an investor acquires 90% or 95% of the equity capital of the targeted undertaking, the holders of the remaining securities must sell those to the investor.[63] Meanwhile, the directors and/or the controlling shareholders of the targeted companies are limited under the Directive regarding the defensive measures they can employ to repel a hostile bid.

The mandatory bid rule has not yet been applied in aviation. The French State's 28% investment in the holding company AF KL is close to the currently applicable threshold of 30% in France.[64] An investigation into whether the French double voting rights for 'loyalty' shares or whether the French and Dutch States could arguably be considered to act in concert may potentially cross the threshold to launch a mandatory takeover bid is outside this article's scope.

The Directive is also relevant in the context of the airline 'majority ownership' rule in international and EU air law. Hypothetically, in a liberalised foreign investment environment in the EU, when foreign investors purchase that nationally fixed

59. Directive 2004/25/EC of 21 April 2004 *on takeover bids* (Takeover Directive), Art. 2.1(e).
60. Ibid., Art. 5.4 in conjunction with Art. 15(5).
61. Ibid., Art. 2.1(c), and As confirmed in C-74/16, par. 42 : "… the public or private status of the entity engaged in the activity in question has no bearing on the question as to whether or not that entity is an 'undertaking'."
62. Ibid., Art. 4(2)(e).
63. Ibid., Art 15, called 'the right to squeeze out'.
64. See, Article L. 433-3(I) of the French Monetary and Financial Code (*Code Monétaire et Financier*), see also Article 234-2(1) of the AMF General Regulation (*Règlement Général de l'Autorité des Marchés Financiers*).

percentage of the equity capital carrying voting rights or more, an offer must subsequentially be made to acquire all voting rights of the airline undertaking. Since such a change of control would alter the airline's nationality, which could have serious implications for the airline's operations, investors with the airline's best interest at heart would, therefore, think twice before making such an investment.

4.3 Protection of critical entities and against foreign investment

As variously mentioned, the EU is increasingly concerned about its relationship with the outside world, and the focus has shifted towards its interdependence and autonomy. From this perspective, and to the extent relevant for preserving national or EU interests, as described in sections two and three above, the EU has laid the foundations for two sets of frameworks to ensure the resilience of critical entities and infrastructure while protecting its undertakings against foreign investment.

The next section introduces the relevant regimes and concisely studies their applicability to the air transport sector and whether they offer additional protection for airline nationality, which, in turn, can help secure the strategic autonomy of the air transport sector.

4.3.1 Critical entities and infrastructure

As early as 2008, the EU enacted Directive 2008/114 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.[65] An evaluation of the Directive in 2019, highlighting the increasingly interconnected and cross-border nature of operations using critical infrastructure,[66] and changing dynamics on the world stage, provided a new impetuous to shift the approach towards a focus on ensuring the resilience of critical entities and led to the Critical Entities Resilience (CER) Directive of 2022.[67]

According to the CER Directive, critical entities "play an indispensable role in the maintenance of vital societal functions or economic activities in the internal market in an increasingly interdependent Union economy." In conjunction with sector-specific legislation, the Directive creates an overarching framework that addresses their resilience "in respect of all hazards, whether natural or man-made, accidental

65. Council Directive 2008/114/EC of 8 December 2008 *on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.*
66. Commission, Impact Assessment accompanying the Proposal for a Directive on the resilience of critical entities, Brussels, 16.12.2020, SWD(2020) 358 final.
67. Directive (EU) 2022/2557 of 14 December 2022 *on the resilience of critical entities and repealing Council Directive 2008/114/EC* (Critical Entities Resilience (CER) Directive).

or intentional"[68] The CER Directive defines "resilience" in this context as the "ability to prevent, protect against, respond to, resist, mitigate, absorb, accommodate and recover" from an "event which has the potential to significantly disrupt, or that disrupts, the provision of an essential service […]."[69] The Annex to the Directive and its Supplement specifically lists, among others, the energy and transport sectors, including air transport, as essential services.[70]

Recognising the need to increase the critical infrastructure protection capabilities in Europe and help reduce vulnerabilities concerning critical entities is a first step toward enhancing the protection of these EU undertakings. The CER must be implemented into national law, whereby the Member States must "adopt a strategy for enhancing the resilience of critical entities" by 17 January 2026 and "identify the critical entities for the sector listed in the Annex by 17 July 2026.[71]

4.3.2 Screening of foreign investors

In 2019, the EU adopted Regulation 2019/452, *establishing a framework for the screening of foreign direct investments into the Union*.[72] This Regulation on Foreign Direct Investment (FDI) allows the EU and its Member States to implement restrictive measures on FDI based on security or public order concerns, in line with specific requirements of the Regulation and World Trade Organization (WTO) commitments. Where it concerns investment into airlines, WTO rules do not apply to the air transport sector regarding foreign investment and the operation of traffic rights.[73]

Under the FDI Regulation, EU States must assess whether an FDI, such as leading to significant changes to the ownership structure or key characteristics of a company, is likely to negatively affect the EU's security or public order. They must consider all relevant factors, including:

> "in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies,

68. Ibid, recital (1) and (4).
69. Ibid. Art 2(2) and (3).
70. See, CER Directive and Commission Delegated Regulation (EU) 2023/2450 of 25 July 2023 supplementing Directive (EU) 2022/2557 by establishing a list of essential services.
71. CER Directive, Arts. 4(1) and 6(1).
72. Regulation (EU) 2019/452 *establishing a framework for the screening of foreign direct investments into the Union* (FDI Regulation).
73. See General Agreement on Trade in Services, Annex on Air Transport Services, Art. 1.3.

> by the government of a third country or is pursuing State-led outward projects or programmes."[74]

Other factors that may be considered include the FDI's potential effects on, inter alia, critical infrastructure, whether physical or virtual, including, amongst others, energy and transport, as well as land and real estate crucial for using such infrastructure.[75] Whether the EU States will classify air transport undertaking as 'critical infrastructure' under this regulation will be based on the security and public order considerations of each State and their political agenda. The Netherlands, for instance, has adopted a law pursuant to which Schiphol Airport and KLM qualify as providers of essential air transport services important for maintaining economic activities and vital societal functions under the heading of protecting the economic security of critical infrastructure. [76]

In January 2024, as one of five initiatives to strengthen economic security,[77] the EU Commission proposed repealing the FDI Regulation and replacing it with a Regulation on the screening of foreign investments.[78] The proposal's explanatory memorandum sets out the relationship between the screening mechanisms of foreign investments with other relevant Union policies, including the appropriate measures to protect legitimate interests under the EU Merger Regulation,[79] as well as countering the impact of foreign subsidies on fair competition in the internal market under Foreign Subsidies Regulation. As regards the overlap with the CER Directive, identifying an EU target as a critical entity should be included in the assessment of foreign investments. A full analysis of the relationship and consistency of these policies is not possible here and not yet timely.

4.4 Concluding remarks on the protection of airline nationality in the EU

Securing strategic autonomy for EU air transport services and managing airlines' foreign investment exposure can be tied to regulating ownership and control conditions with a view to maintaining and protecting the nationality of EU airlines. The protection of nationality within the EU's air transport sector is a multifaceted issue involving various regulatory regimes at the EU and national levels. To start,

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74. FDI Regulation, recital (13).
75. Ibid., Art. 4(1)(a).
76. See, Art. 7(3), *Wet veiligheidstoets investeringen, fusies en overnames* (Wet Vifo).
77. See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_363 (last visited: 24 July 2024).
78. Proposal for a Regulation *on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452*, Brussels, 24.1.2024, COM(2024) 23 final.
79. Council Regulation (EC) No 139/2004 of 20 January 2004 *on the control of concentrations between undertakings (the Merger Regulation), repealing Regulations 4064/89 and 1310/97*.

EU airlines have set up strategic shareholding schemes using holding companies and differentiating between shares for economic interest and those carrying voting rights to maintain the nationality of their daughter companies or subsidiary airlines.

Although other shareholding measures, such as 'golden shares' and the Takeover Directive, are currently not applied to the air transport sector, the existence of, for instance, the mandatory bid rule and the consequences of acquiring all voting rights for an airline's operations provide an extra layer of protection to changes in an airline's control and against hostile foreign takeovers.

The EU's increasing focus on its autonomy has led to, among other things, the Critical Entities Resilience (CER) Directive and the Foreign Direct Investment (FDI) Regulation. Both frameworks increase protection capabilities in Europe, and, depending on their implementation, the classification of 'critical infrastructure' and political agendas may provide, where and if necessary, additional tools to preserve airline nationality and, by extension, the interests they serve.

These regimes, in conjunction with other regulatory frameworks such as the Merger Regulation and the Foreign Subsidies Regulation, as referred to above, strategic shareholding measures and airline nationality protection schemes already in place, and designation arrangements in international aviation agreements with non-EU States, provide a comprehensive toolset for EU States to safeguard 'their' airline's nationality and competitiveness, including the operation of traffic rights and protection against foreign influence.

Whether the sector-specific EU Regulation 2019/712 on *safeguarding competition in air transport* can be seen as part of this toolset remains to be seen pending its successful application.

5. Concluding remarks

Securing the strategic autonomy of EU air transport in order to preserve the interests of the EU and its Member States implies the reduction of their dependencies on third countries for the provision of air services and raising the competitiveness of the sector. This author believes managing the exposure of EU airlines to foreign investment is an important element thereof. It is closely tied to the ownership and control requirements mandated by, among others, EU Regulation 1008/2008 and nationality requirements in Air Services Agreements (ASAs). This framework

ensures that EU airlines remain majority-owned and effectively controlled by EU States, and/or their nationals. It is essential not only for maintaining the nationality of airlines, which, inter alia, grants access to markets and operational licenses, but also for safeguarding the EU's economic, security, and strategic interests in aviation.

While foreign investment can provide capital and opportunities for growth, it can also pose risks, particularly when it leads to a loss of control over EU airlines. Such a shift could undermine the EU's ability to protect its interests, such as connectivity, especially in times of geopolitical tension, economic instability, or crises. By enforcing ownership and control rules, the EU and its Member States ensure that their carriers are protected from undue foreign influence, preserving both their autonomy and their ability to contribute to the EU's broader strategic goals, as well as broader national interests.

Maintaining a competitive EU air transport sector, both within the EU, where airlines of different nationalities compete and of the sector in the global market, contributes to ensuring long-term economic growth and financing the EU's broader environmental and social objectives. Furthermore, pursuing such interests is more easily achieved by working with carriers of the EU nationality, who share an intrinsic and holistic approach to follow the 'European way' of providing air services and everything that is part of that. Looking through this lens could warrant a re-evaluation, or even reappreciation, of maintaining a controlling link between airlines and States. In this way, airline nationality is not just a restriction but also an attestation of the link with a State, including the rights and, perhaps more importantly, the obligations that come with it.

The evolving geopolitical landscape and the EU's increasing focus on economic resilience and reduced dependency on non-EU actors have provided new impetus to this debate. The EU's recent regulatory developments, including the Critical Entities Resilience (CER) Directive and the Foreign Direct Investment (FDI) Regulation, offer additional tools for safeguarding airline nationality and autonomy. In conjunction with strategic shareholding schemes of airlines and other shareholding measures, they form a comprehensive system for protecting EU airlines from unwanted foreign investment while securing the region's interests in air transport services. Whether securing the strategic interest in the sector will be successful depends on the political willingness to apply these tools; experiences with past regulations to safeguard competition in air transport have not been promising, but perhaps now times are really changing.

Part C – Pursuing Sustainability Objectives

C1. "EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?"
Published in Air & Space Law 47, issue 6 (2022), pp. 577-600.

C2. "The Path Towards the Balanced Approach in the Netherlands: From Consensus to Litigation Over Schiphol Downsizing" (translation)
Published in Tijdschrift Vervoer & Recht, issue 6 (2023), pp. 198-207.

C3. "Challenging the 'Balanced Approach to Aircraft Noise Management' Principle: Will the Dutch Approach Stand or Will the Principle Prevail?"
Published in Air and Space Law 49, issue 1 (2024), pp. 1-33.

EU Air Transport and the EU's Environmental Agenda Struggle

A Leap of Faith or Can a CBAM Level the Playing Field?

Published in *Air & Space Law* 47, Issue 6 (2022), pp. 577-600.

Abstract

Air transport, like any sector, must become more sustainable to combat climate change and protect the environment. The EU's Green Deal sets out an ambitious environmental agenda to reach a climate-neutral continent by 2050. The "Fit for 55" legislative package provides sectoral measures, including air transport, to reduce emissions by 55% in 2030. When the additional costs required to comply with these environmental measures lead to competitive distortion, airlines and airports established in the EU and bound by the EU's environmental policy are poised to be negatively affected. More importantly, ticket price increases may lead to "carbon leakage" practices, where the reduction in emissions in one country leads to a rise in another. To mitigate these effects, the Carbon Border Adjustment Mechanism (CBAM) is presented as a possible solution. Applying an economic measure designed for the trade in goods, such as CBAM, to trade in air services is, however, not as simple as it may seem, and its application beyond EU borders is politically sensitive and questionable legally. While the design of a CBAM for aviation is currently on the drawing table, this article maps the different interests at stake and considers the measure in the context of different legal regimes.

Keywords: Sustainability, Environment, EU Green Deal, Fit for 55, Competition, Carbon leakage, Carbon taxation, Carbon Border Adjustment Mechanism (CBAM).

1. INTRODUCTION

Sustainability. It is the keyword at most aviation-related conferences, debates, and in airlines' media campaigns. Like any sector, air transport must reduce its environmental footprint to meet climate targets and avoid further climate change. There is a large consensus, especially in Europe and the United States and across the industry, including airports, airlines, manufacturers, the supply chain, air traffic management, and innovators, that a sustainable future is the only way forward. But how to get there? Aviation is under heavy scrutiny to get a greener footprint – or flyprint. Even though the contribution of air transport to the total level of CO2 emissions is limited, the percentage is expected to grow in the following decades.[1] With the technological advancement and know-how required for the large-scale use of alternate fuels and the electrification of aircraft even further down the line, the industry is under increasing pressure to reduce emissions in the shorter term. The pressure is part of a more significant trend of changing passenger expectations, litigation by environmental action groups and more political interference.[2] Governments, who traditionally have close links with aviation industry actors, increasingly exercise direct control through national laws or policy measures and indirectly influence the management and governance of, for instance, airports and airlines to meet their own climate ambitions.[3]

With its Green Deal of December 2019,[4] the EU Commission has set out one of the most ambitious environmental agendas to reach a climate-neutral continent by 2050.[5] On 14 July 2021, the EU Commission presented the '"Fit for 55" (FF55) legislative package' addressing, among others, sectoral measures for air transport. The EU aviation industry is on board with its own "Destination 2050" Sustainability

1. Before COVID-19, ICAO forecasted in *Environmental Trends in Aviation to 2050*, that emissions in 2050 could increase by a factor ranging from approximately 2 to 4 times the 2015 levels.
2. See, the Urgenda case in the Netherlands, Judgment of 20 Dec. 2019, ECLI:NL:HR:2019:2007 and a similar case before the Bundesverfassungsgericht, Order of the First Senate of 24 March 2021, BvR 2656/18, confirming the State's obligation to reduce greenhouse gasses emissions, the judgement of 26 May 2021, ordering Royal Dutch Shell to reduce its emissions, ECLI:NL:RBDHA:2021:5339 and a (failed) attempt to have more strict environmental conditions attached to the State aid granted to KLM during COVID, see judgement of 9 December 2020, ECLI:NL:RBDHA:2020:12440.
3. I.e., the ban on domestic flights coming into effect in France in April 2022, the announcement of the Dutch government on 24 June 2022 to reduce the number of flights at Schiphol Airport, or Israel's announcement to ban four-engine aircraft amid environmental concerns.
4. EU Communication, The European Green Deal, COM(2019) 640 final.
5. See, for instance, EU Regulation 2021/1119 *establishing the framework for achieving climate neutrality*, Brussels, 12-05-2021, EU Communication, *Pathway to a Healthy Planet for All - EU Action Plan*: *Towards Zero Pollution for Air, Water and Soil*, COM(2021) 400 final, and EU Commission proposal COM(2020) 563 final.

Roadmap,[6] published in February of the same year. Nevertheless, aviation stakeholders warn that the combination of FF55 measures will increase the risk of "carbon leakage", and that compliance leads to increased costs and, *de facto,* competitive distortion between EU and non-EU airlines.[7] And there lies the crux. Climate change is a worldwide issue, whereas air transport is a global business governed by a special international regime. Pollution does not stop at the border, and environmental measures come at a cost. To mitigate the negative side-effects of the FF55 measures for its own industry in conjunction with the cross-border nature of air transport, the EU Commission investigates whether a Carbon Border Adjustment Mechanism (CBAM) can be applied to the operation of international air services.

A CBAM for aviation has not yet been drawn up, but how the mechanism will be designed, and the measures qualified, can have considerable implications- and repercussions. Applying a CBAM to international air services is not just an economic or financial measure but is also politically and legally sensitive when considering international relations. This article analyses the significant interests at stake and, through studying the FF55 measures and CBAM, brings together areas of international air law, EU law, environmental law, and trade law.The CBAM mechanism, which will be analysed in more detail in section 3 of this article, is a tool derived from the trade in goods. It envisages preventing manufacturers of goods from moving their production outside the EU or benefitting from lower environmental standards elsewhere before importing the goods into the EU.[8] However, airports cannot relocate, nor can EU airlines move their 'Principal Place of Business' outside the EU.[9] Both are "homebound" by the State in which they are established;[10] as a corollary, they must abide by the EU's environmental standards, fuelling the debate who is influencing airlines behaviour and ultimately steering the airline's business decisions in this particular environment field. At the same time, these environmental standards cannot be enforced in the same manner vis-à-vis third States, including their airlines and airports.

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6. Destination 2050 - A Route To Net Zero European Aviation, SEO & NLR (February 2021), www.destination2050.eu (last visited: 29 August 2022).
7. See, https://a4e.eu/publications/the-european-green-deal-and-the-fit-for-55-package/ (last visited: 29 August 2022).
8. That is, CBAM as applied to trade in goods.
9. One of the requirements to be considered an EU airline ex Art. 4(a) of Regulation 1008/2008.
10. The establishment of airlines in a State concerns, amongst other things, licensing, nationality requirements and designation. The link between the State and airlines will be scrutinized in another article as part of the series for the PhD study: *"Who 'governs' the airline?"* (Working title).

On the international level, progress on environmental standards for aviation is slow. Eyes are on the International Civil Aviation Organization (ICAO), which will have its 41st triannual General Assembly starting in September 2022 to establish a long-term global aspirational goal (LTAG) for reducing CO2 emissions.[11] Albeit a changing momentum, will this be enough to reach consensus amongst its 193 Member States? With that in mind, are the EU environmental measures a necessary leap of faith into the unknown? And is a CBAM-like mechanism an appropriate 'fix' to level the playing field for carriers with their principal place of business in the EU that have no choice but to bear the costs of these environmental measures? Or is it yet another ambiguous paperwork tool with little gain?

This paper will not be able to answer all these questions, but it will set out, in section 2, the EU's environmental policy agenda for aviation and the applicable FF55 measures, their scope and their effect when applied in practice. Section 3 will identify the feasibility and implications of applying a CBAM to aviation from a legal and air policy perspective. The last section will examine the external dimension of the EU's environmental policies for air transport with special reference to international aviation law. This last part will draw from lessons learnt from the past and the current forces in play on the international level.

2. THE EU'S ENVIRONMENTAL POLICY LANDSCAPE FOR AVIATION

To comprehend the full breadth of the issues at stake, this section takes a step back to take stock of the environmental measures applicable to air transport and provide the backdrop against which these measures must be portrayed.

To meet the commitments made under the Paris Agreement (2015)[12] and limit the global temperature increase to 1.5 degrees, the European Green Deal of December 2019 sets out the EU Commission's strategy to achieve its vision for a climate-neutral Europe by 2050.[13] The objective of climate neutrality became binding with the adoption of the EU Climate Law of June 2021.[14] Specific plans for transport

11. See, *Report on the feasibility of a long-term aspirational goal (LTAG) for international civil aviation CO2 emission reductions*, ICAO Committee on Aviation Environmental Protection of March 2022.
12. Paris Agreement, COP21, Paris Climate Change Conference - November 2015.
13. EU Communication, *A Clean Planet for all - A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy*, COM(2018) 773 final.
14. Art 1, EU Regulation 2021/1119, *establishing the framework for achieving climate neutrality and amending EU Regulations 401/2009 and 2018/1999* ('European Climate Law'), 12-05-2021.

have been drawn up in the 'Sustainable and Smart Mobility Strategy'[15] and the 'Fit for 55' legislative package.[16] The FF55 legislative measures for air transport aim to reduce the consumption of conventional kerosine in aviation through taxation and capping and offsetting emissions while increasing that of sustainable alternative fuels, which use would be exempted from these economic measures. The industry for hydrogen fuel for aircraft and aircraft powered by hydrogen is not expected to mature soon and is, therefore, left out of the scope of this article.[17]

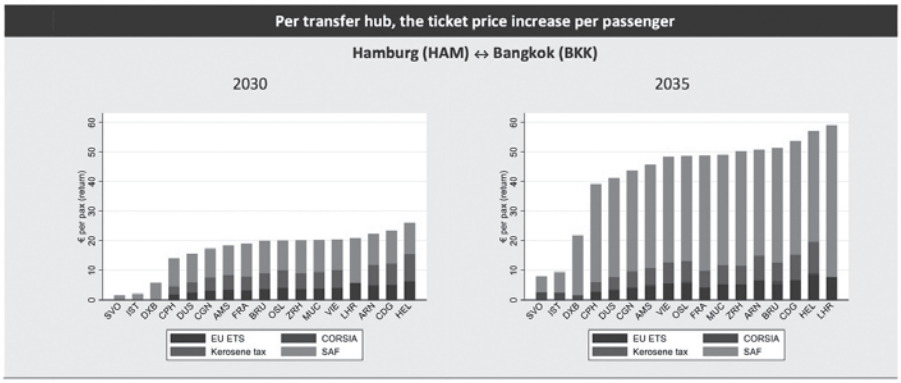
2.1 Competition and Indirect Effects at the International Level

Before addressing the FF55 measures applicable to aviation and their contribution to the 'level playing field' and carbon leakage, it is necessary to understand the correlation between cost increases and competition and how that can lead to carbon leakage. Introducing the FF55 measures will increase costs and thus lead to higher ticket prices. [18] This is particularly problematic for network carriers and those servicing third countries who, unlike airlines only active within the EU's internal air transport market, are in competition with non-EU carriers on these routes. Non-EU network carriers offering the same routes are often less affected by the cost increase due to FF55 measures, especially in long-haul (transfer) markets via non-EU hubs. Due to the uncertainty about price developments for traditional jet fuel and sustainable alternatives, it is challenging to predict ticket prices. A study suggests an average cost increase to non-EU destinations, for instance, Frankfurt-Tokyo, due to the FF55 measures of 50 euros by 2030 and 105 euros by 2035.[19] This cost increase will place EU airlines and airports at a competitive disadvantage compared to non-EU airlines and hubs servicing the same markets. The below paragraph illustrates the ticket price increase per hub on the route Hamburg-Bangkok. The cost increase of flights via non-EU hubs such as Moscow (SVO), Istanbul (IST) or Doha (DXB) is less than via EU airports.

C[1]

15. EU Communication, *Sustainable and Smart Mobility Strategy – putting European transport on track for the future*, COM(2020) 789 final, 09-12-2020.
16. EU Communication, *'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality*, COM(2021) 550 final, 14-07-2021.
17. See EU Study *Hydrogen-powered aviation*, McKinsey & Company (May 2020), i.e., page 39; "by 2035 or 2040, there would likely be enough hydrogen supply infrastructure in place for LH2 [hydrogen] aviation to take off", and *Destination 2050*, SEO & NLR (February 2021) at page 97.
18. See, *Aviation fit for 55. Ticket prices, demand and carbon leakage,* SEO & NLR (2022). *Effects of the Fit for 55 Package on the Dutch aviation sector,* CE Delft (2022), and section 3.5 of the study conducted by Schwingeler Consultancy, *Evaluation of the impact of Europe's initiative 'Fit for 55' on air traffic* (2021), confirming that "airlines operating hubs in the EU, 83% of the cost increase of 171.05€ is resulting from the SAF blending mandate, followed by 9% ETS and 8% energy taxation."
19. See, *Aviation fit for 55. Ticket prices, demand and carbon leakage,* SEO & NLR (2022).

Figure 4.3 Ticket prices increases for the Hamburg – Bangkok route



Source: SEO & NLR (2022)

As a result, because of the higher costs, passengers and traffic flows may move or be rerouted through points outside the EU, which will also affect the competitive position of EU airports. In. addition, this may lead to the "carbon leakage"-issue. In the context of the production of goods, carbon leakage occurs when businesses move their production to other countries with less stringent climate policies, or import goods from such countries, thereby evading additional climate costs and increasing, or at least not reducing, the total emissions, i.e. the reduction in emissions in one country leads to an increase in another.[20] In aviation, this phenomenon can occur when passengers fly with non-EU airlines or travel via non-EU hubs to avoid higher ticket costs. These flight patterns likely cause more emissions than the EU alternative.

2.2 The 'Fit for 55'-Measures Affecting Aviation

On 14 July 2021, the EU Commission presented a set of policy measures designed to reduce Green House Gas emissions (GHG) by 55% in 2030 compared to their 1990 levels. The package, also known as the '"Fit for 55" (FF55) legislative package', referring to the -55% reduction target, addresses, among others, sectoral legislation in the field of transport. For aviation, the most relevant new proposals, and the review of the existing acquis in the area of climate, energy, and transport policy, which will be analysed below, include:

- An introduction of the 'ReFuelEU Aviation' initiative aimed at boosting the use of Sustainable Aviation Fuels (SAFs) in the air transport sector;
- A revision/recast of the Energy Taxation Directive (ETD), in which context the taxation of international flights will be discussed.

20. See, for instance, the study *Assessment of carbon leakage protentional for European Aviation*, Transport & Environment (January 2022).

– An adaptation of the EU Emissions Trading System (ETS), with particular reference to changing the special treatment of the aviation sector and its relation to the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) of ICAO.
– The Carbon Border Adjustment Mechanism (CBAM) will be discussed in section 3.

2.2.1 The ReFUel EU Aviation Initiative

On 14 July 2021, as part of the FF55 Package, the EU Commission presented a "Proposal for a review of the Renewable Energy Directive (RED)"[21] to increase the binding share of renewable energy sources of the final energy consumption by 2030. The RED sets principles and the sustainability criteria for, among others, different types of alternative fuels. The production of raw materials for biofuels should, for instance, be genuinely sustainable and not be at the detriment of land used for food and feed purposes or lead to deforestation.[22] The RED sets the overarching framework and targets for using renewable energy, including in the transport sector. It is accompanied by a proposal for a Regulation on "Deployment of Alternative Fuels Infrastructure" (AFIR),[23] for road vehicles, vessels, and stationary aircraft. For air transport, this means the electricity supply "through a standardised fixed or mobile interface to aircraft when stationed at the gate or at an airport outfield position."[24]

The aviation-specific measures are laid down in the "Proposal for a Regulation on ensuring a level playing field for sustainable air transport"[25], also known as the RefuelEU Aviation Initiative, henceforth referred to as the 'proposed regulation for sustainable air transport'. This proposed Regulation presents a blending obligation for fuel suppliers to provide a minimum share of Sustainable Aviation Fuels at EU airports. [26] The use of SAF is pivotal for reaching climate targets, but in 2021 accounted for less than 1% of fuel consumption because of the high costs compared to conventional kerosene.[27] The existing regulatory framework is insufficient to facilitate

21. Proposal for a Directive amending Directive (EU) 2018/2001, EU Regulation 2018/1999 and EU Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing EU Council Directive 2015/652, COM(2021) 557 final 2021/0218 (COD).
22. Ibid, recital 31.
23. Proposal for a Regulation on the deployment of alternative fuels infrastructure, and repealing Directive 2014/94/EU, COM(2021) 559 final 2021/0223 (COD).
24. Ibid, Article 2(19).
25. Proposal for a Regulation on ensuring a level playing field for sustainable air transport, COM(2021) 561. 2021/0205(COD).
26. Sustainable Aviation Fuels refers to (advanced) biofuels, produced from biological resources such as plants or animal materials, synthetic fuels, or e-kerosine, from non-biological sources, and recycled that can be blended (drop-in) with conventional kerosene.
27. See, EUROCONTROL Data Snapshot #11 on regulation and focused logistics unlocking the availability SAF, 8 June 2021, available at https://www.eurocontrol.int/publication/eurocontrol-data-snapshot-11-saf-airports (last visited at 29 August 2022).

the tremendous challenges of increasing SAF production and making it available at a competitive price.[28] To push the uptake and supply of SAF, the RefuelEU Aviation proposal sets a binding blending mandate of 5% for 2030, increasing to 63% in 2050, with specific mandates for synthetic fuels. The proposed regulation places suppliers of aviation fuel in the EU under the obligation to ensure that all aviation fuel made available at EU airports contains a minimum share of SAF.[29] To avoid what is dubbed "fuel tankering", whereby excess fuel is carried from, in this case, non-EU airports to reduce the need to refuel at an EU airport, aircraft operators are obliged to uplift 90% of the yearly aviation fuel required at EU airports.[30] Both the aviation fuel suppliers and the aircraft operators have reporting obligations.[31] Based on these measures, EU and non-EU airlines departing from EU airports have no choice but to refuel with SAF-blended fuel due to the SAF-mandate of the fuel provided at these airports. Although the proposed Regulation makes no distinction between EU and non-EU aircraft operators, it is unclear how fuel tankering by non-EU operators can be avoided. With the increased environmental awareness, the practice of fuel tankering has become more questionable and the risk of it happening must also not be over-estimated.[32]

Nevertheless, there remains a risk of a competitive disadvantage for EU airlines and airports, caused by the extra fuel costs and increased ticket prices in situations where an EU airline, subject to the uplift of aviation fuel at EU airports, competes on a similar long-haul flight route with a non-EU airline, connecting via a non-EU hub airport, where there is no obligation to tank the more expensive SAF-blended fuel. Take, for instance, a Turkiye Airline flight from Amsterdam, the Netherlands, to Tokyo, Japan, via Istanbul Airport, Turkey; Turkiye Airlines must only buy the more expensive SAF-blended fuel at Schiphol for the leg between Amsterdam and Istanbul and can refuel cheaper conventional fuel at Istanbul for the second part of its journey. EU airlines operating direct or indirect flights via an EU hub must use the SAF-blend on a much more significant portion of their flights to the same destination. Similarly, transfer passengers of EU airlines passing through an EU hub may be more likely to switch routes with non-EU airlines through non-EU hubs. For instance, a passenger from Delhi Airport, India, en route to New York City, Unites

28. See, Impact Assessment (SWD(2021) 633, SWD(2021) 634 (summary)) accompanying a Commission proposal for a regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport, COM(2021) 561, section 2.2.
29. Art. 4, Proposal for a Regulation on ensuring a level playing field for sustainable air transport, COM(2021) 561. 2021/0205(COD).
30. Ibid. Art. 5.
31. Ibid. Art. 7 and 9 respectively.
32. See, for more information, Aviation Intelligence Unice, Think Paper #1, Fuel Tankering: economic benefits and environmental impact, June 2019, EUROCONTROL.

States, can fly via Doha, Qatar, and avoid the higher ticket costs associated with the SAF-blended fuel obligation.

2.2.2 Revision of the Energy Taxation Directive

Traditionally, the aviation sector benefits from a privileged tax regime where aviation fuel is exempted from taxation. In international air transport, the Convention on International Civil Aviation of 1944 (the Chicago Convention) only explicitly exempts fuel already *on board* an aircraft transiting foreign airspace.[33] Pursuant to provisions laid down in Air Services Agreements (ASAs), it is common practice to extend this exemption to fuel taken on board, i.e. tanked, based on reciprocity.[34] This practice results from the many bilateral air services agreements between States that explicitly exempt fuel taxation.

Within the EU, the Energy Taxation Directive (ETD) of 2012,[35] also exempts aviation from taxation of aircraft fuel by pointing at "international agreements", that is, ASAs, on this subject and the need to maintain the competitive position of EU air carriers. It left the door open for the EU States to "limit the scope" of the tax fuel exemption to international and intra-Community transport between them or waive the exemption in their bilateral air services agreements.[36] None of the EU States has used this option on their own account. In its proposal for the ETD Revision of 2021,[37] the Commission proposes to remove tax exemptions, such as the one for aviation, and stop the disadvantageous tax treatment of emerging fuels like biofuel. [38] Under the ETD Revision, Members States will have to apply a set minimum tax rate to energy products and electricity supplied for intra-EU air navigation, which would linearly increase during a transitional period of 10 years. Pursuant to ASAs with third countries referred to above, the obligation to apply a minimum tax rate to fuel only covers intra-EU flights, that is, flights between two airports located within the 27 Member States of the EU, including domestic flights, and not flights to third countries, either to or from an EU-airport and to cargo-only operations. [39]

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33. Article 24, Convention on International Civil Aviation, done at Chicago, 1944.
34. See, ICAO's Policies on Taxation in the Field of International Air Transport, 3rd Edition, Doc 8632.
35. EU Council Directive 2003/96 *restructuring the Community framework for the taxation of energy products and electricity* (Energy Taxation Directive).
36. See, Art. 14 of Directive 2003/96 (ETD of 2012), in conjunction with Consideration 23.
37. Proposal for Council Directive restructuring the Union framework for the taxation of energy products and electricity (Energy Taxation Directive, ETD) (COM(2021) 563 final), or ETD Revision.
38. See, Consideration (21) of the ETD Revision.
39. Art. 15 of the ETD Revision.

A fuel tax can contribute to the realisation of the 'internalisation' of external environmental damage in the cost price.[40] This puts a fairer price on tickets and may stimulate airlines to use more fuel-efficient aircraft or more sustainable fuels. The latter effect is, however, less incentivising in a market where such alternatives are not widely available yet, as is the case for sustainable alternatives to jet fuel. Since the ETD Revision only sets a minimum tax rate for fuel, Member States are allowed to impose higher tax rates. This could undermine the internal EU market's effectiveness for air transport and even lead to 'tankering' practices within the EU. Airlines also argue that the EU ETS, discussed in the next section, already puts a price on aviation emissions and that the ETD Revision leads to double taxation.[41] In terms of competitiveness, while the fuel tax, in principle, treats all carriers in the same manner, it affects EU carriers most as its application is limited to intra-EU flights where non-EU airlines are only in exceptional cases permitted to operate these so-called fifth-freedom services within the EU.[42] Nevertheless, the measure does have a distortive effect on competition in the long-haul market for transfer passengers as 'feeder' flights within the EU become more expensive. For instance, on a service from Barcelona, Spain, to Singapore, via Frankfurt, Germany, the fuel tax would apply to the stretch between Barcelona and Frankfurt. A non-EU carrier, for instance, Emirates, offering a service via its hub at Dubai Airport, will not have to pay a fuel tax. Although the example given may not be so much of a detour regarding flight distance, it can still lead to more carbon leakage if the non-EU airline uses less sustainable fuel than its European competitors.

2.2.3 Adaption of the EU ETS Regime for Aviation

The EU Emission Trading Scheme (EU ETS)[43] is the largest multi-national greenhouse gas (GHG) cap and trade scheme. The EU ETS proceeds from trade in allowances of GHG emissions and sets an absolute (declining) cap on such emissions caused by concerned activities in a number of industries. For aviation emissions, the EU did not want to await global consensus on this matter and launched the EU ETS Directive 2008/101,[44] (from now on referred to as the EU ETS Aviation Directive) to include aviation activities in the scheme for GHG allowance trading within the EU.

40. See, EU *Study on the taxation of the air transport sector*, Ricardo (July 2021).
41. See, A4E Position Paper, The Fit for 55 Package: Summary of the positions of Airlines for Europe, Brussels, January 2022.
42. The EU has, so far, only concluded comprehensive air transport agreements allowing such fifth freedom flights for the carriage of passengers with the US and Canada and through a horizontal agreement with Singapore. See also section 4.2.
43. EU Directive 2003/87 *establishing a scheme for greenhouse gas emission allowance trading within the Community*, as variously amended as to which see below.
44. EU Directive 2008/101, *amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community,* as amended by Directive 2009/29.

As of 1 January 2012, all flights arriving at or departing from an airport located in an EU State are included within the scope of the EU ETS Aviation Directive. Hence, flights within the European Economic Area (EEA) and from a point in a third State to a point in the EEA were to be subject to the ETS regime. Although the EU Court of Justice approved this extra-territorial application, the move of the EU was met with opposition by third States.[45] To not further escalate the frictions, the EU Council and Parliament decided on 26 April 2013 to 'stop the clock' and temporarily exempt international flights from some of the EU ETS obligations.[46] The suspension lasted until 31 December 2023 to facilitate the operationalisation of CORSIA.

With the FF55 legislative package, the Commission proposes to adapt the EU ETS for aviation from 2024 onwards.[47] The Commission suggests continuing to apply EU ETS on intra-EEA routes, including the UK and Switzerland, beyond 2024 and implementing the CORSIA scheme for EU-based carriers on routes to third countries. [48] European Parliament has put on the table applying the EU ETS to all flights departing the EU/EEA.[49] Many articles have been written about the scope of the EU ETS and its relationship with CORSIA,[50] and such analysis is, therefore, not included in this article. Moreover, at the time of writing, the final scope of the proposal is under interinstitutional negotiations between the Council, Parliament and the Commission. There are, however, several points relevant to note within the context of this article.

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45. *See*, CJEU in Case C-366/10, *Air Transport Association of America*, *American Airlines Inc.*, *Continental Airlines Inc.*, *United Airlines Inc.* v. *Secretary of State for Energy and Climate Change*, decision of 21 December 2011.
46. *See*, EU Decision 377/2013, and EU Regulation 2017/2392, amending Directive 2003/87/EC *to continue limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021*.
47. Proposal for a Directive *amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and appropriately implementing a global market-based measure* COM(2021) 552 final.
48. Proposal for a Directive *amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation* (EU) 2015/757, COM(2021) 551 final, 2021/0211(COD).
49. Report on the proposal for a directive of the European Parliament and of the Council amending Directive 2003/87/EC as regards aviation's contribution to the Union's economy-wide emission reduction target and appropriately implementing a global market-based measure (COM(2021)0552 – C9-0319/2021 – 2021/0207(COD)).
50. See, for instance, Mendes de Leon, '*Enforcement of the EU ETS: The EU's Convulsive Efforts to Export its Environmental Values*', Air & Space Law 37, No. 4 & 5 (2012), 287–306, and Erling, '*How to Reconcile the European Union Emissions Trading System (EU ETS) for Aviation with the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA)?,*' Air & Space Law 43, No. 4 & 5 (2018): 371–386.

From an EU perspective, the price signals provided by CORSIA are well below the EU ETS carbon price.[51] Thus, the CORSIA measures would only marginally remedy the climate impact of international flights, from points in the EU to points in third States and *vice versa*. The lower carbon pricing level within CORSIA also means a critical cost difference compared to the EU ETS scheme, contributing to competitive distortion between EU-based and non-EU-based carriers and carbon leakage. In practice, this means that on a flight from Lisbon, Portugal, to Delhi, India, via Paris, France, the more expensive ETS scheme applies between Lisbon and Paris, and CORSIA would apply between Paris and Delhi. In comparison, Qatar Airways would apply CORSIA on its flights from Lisbon to Doha and from Doha to Delhi. Because the EU ETS is already in play, EU airlines have been granted 'free allowances,' since 2012 to maintain a level playing field and 'fair competition' in relation to their non-EU competitors. The remaining certificates must be bought on the market. The discussions around the EU ETS revision currently focus on phasing out the free allowances for aviation much quicker, as early as 2025, if the Parliament has its way, instead of the Commission's proposal for 2027. In the five sectors where carbon leakage is deemed the greatest risk, the CBAM is proposed as an alternative to the free allowances, with the phasing out of the latter aligning with the phasing-in of the CBAM.[52] While it is not certain if a proposal for a CBAM for aviation will eventually see the light of day, without one, there is no similar mitigation for the loss of free allowances for the air transport sector.

Table Overview - Summary of proposed FF55 measures

	Indirect flight		***Direct flight***
EU carrier	**Stockholm - Amsterdam**	**Amsterdam – Tokyo**	**Stockholm - Tokyo**
	Blending mandate SAF Fuel Tax EU ETS	Blending mandate SAF No Fuel Tax CORSIA	Blending mandate SAF No Fuel Tax CORSIA
Non-EU carrier	**Stockholm - Istanbul**	**Istanbul – Tokyo**	**Stockholm - Tokyo**
	Blending mandate SAF (*possibly tankering*) No Fuel Tax CORSIA	No Blending mandate No Fuel Tax CORSIA	Blending mandate SAF (*possibly tankering)* No fuelTtax CORSIA

51. See, Impact Assessment Report accompanying the document Proposal for a Council Directive restructuring the Union framework for the taxation of energy products and electricity (recast), 2021 SWD(2021) 641 final at page 18 and Annex 7.

52. See, Proposal for a Directive *amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and Regulation* (EU) 2015/757, COM(2021) 551 final, 2021/0211(COD), recital 30.

The following section will first explain what a CBAM is, what the hurdles are to applying such a mechanism to aviation and in which form it can be applied. Section 4 will then consider a CBAM in light of international relations.

3. The Carbon Border Adjustment Mechanism

The FF55 package encompasses a proposal for a regulation establishing a Carbon Border Adjustment Mechanism,[53] henceforth referred to as the 'CBAM Regulation (2021).' For the time being, it only applies to trade in goods. This section will first explain CBAM as applied to trade in goods before dealing with whether and how a similar mechanism can be adapted for application to the operation of air services.

The Carbon Border Adjustment Mechanism, also known as border carbon adjustments (BCAs), is a familiar concept in world trade but has not often been implemented. The issue it addresses is simple; when products are produced under less stringent conditions in terms of GHG emissions, they are less expensive to manufacture and, therefore, more attractive for importers and consumers. To avoid production being moved to countries with lower standards and having these less environmentally friendly goods imported into the country, a CBAM aims to correct the price difference resulting from the different standards between the domestically produced and imported goods. Such price differences are expected to amplify in the years to come,[54] hence, discussions on a CBAM are gaining ground. This section will focus on the CBAM Regulation as proposed in the EU.

3.1 CBAM as applied to trade in goods

A CBAM has been defined as "a measure applied to traded products that seeks to make their prices in destination markets reflect the costs they would have incurred had they been regulated under the destination market's greenhouse gas emission regime."[55] The definition clearly distinguishes applicability to trade in *goods* and not to *services*. In other words, the price of goods is adjusted when crossing the border to match the costs of domestic goods in terms of their GHG production. In doing

53. EU Commission, Proposal for a Regulation of the European Parliament and of the Council establishing *a carbon border adjustment mechanism*, COM(2021) 564 final, dated 14.7.2021.

54. OECD, *Climate Policy Leadership in an interconnected world*: *What Role of Border Carbon Adjustments*? (2020), at section 30.

55. Cosbey, A. et al. (2012), A Guide for the Concerned: Guidance on the elaboration and implementation of border carbon adjustment, International Institute for Sustainable Development, see: https://www.iisd.org/library/guide-concerned-guidance-elaboration-and-implementation-border-carbon-adjustment (last visited: 16 Augustus 2022).

so, CBAM maintains a level playing field for manufacturers and deters practices that lead to carbon leakage.

So how does CBAM work? The proposal for a CBAM requires importers to purchase carbon emissions certificates for imports of goods not manufactured under emissions standards similar to those of the EU. By applying a carbon price to imported goods to match the carbon price applied to products manufactured in the EU, the CBAM foresees an EU import levy on specified products that internalises the costs of GHG emissions in the price importers pay for these imported goods. The EU Commission has identified six options for its implementation of CBAM.[56] Under the most effective option in terms of impact on reducing carbon leakage, importers of goods must submit CBAM certificates when importing goods into the EU and purchase those certificates at a price corresponding to that of the EU ETS allowances, thereby mirroring the price of EU ETS allowances to ensure a coherent approach to the pricing under the EU ETS. The "operator" of a -fixed-installation where goods are produced must make their verified embedded GHG emissions from the production of goods available to authorised declarants.[57] These "declarants" verify the emissions of the goods that are being imported and request compensation for the CBAM certificates.[58] National authorities of EU States sell CBAM certificates to such declarants according to specified procedures.[59] When authorised by the competent customs authorities, the declarant may release the certified goods for circulation in the EU market.[60] Fines may be imposed in case of non-compliance by the declarant of the procedures laid down in the Proposed CBAM Regulation (2021).[61]

The proposed regime with importers, declarants, and operators of plants as actors and liable persons has been derived from trade in *goods* and the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO), of which the EU and its Member States are a party. The proposed CBAM Regulation (2021) purports to seek compliance with these WTO commitments, and while arguments can be made against this claim, a further discussion of these falls outside the scope of this article. Since the proposal involves the management of customs and import regulations and trade agreements with third States, the EU Commission proceeds

56. EU Commission, Proposal for a Regulation of the European Parliament and of the Council establishing *a carbon border adjustment mechanism*, COM(2021) 564 final, at pages 7-8.
57. See, Art. 10 and following of the Proposed CBAM Regulation (2021).
58. See, Articles 7 and 8 of the Proposed CBAM Regulation (2021).
59. See, Articles 20 and 21 of the Proposed CBAM Regulation (2021).
60. See, Article 26 of the Proposed CBAM Regulation (2021).
61. See, Article 25 of the Proposed CBAM Regulation (2021).

from its exclusive competence in the field of trade policy. The question is whether this sole legal basis can be upheld for applying a CBAM to aviation because the regulatory context for trade in international air services and protection of the environment is different; in external aviation relations, as well as in environmental protection, the EU and its Member States share competencies.[62]

3.2 Applying CBAM to aviation

In accordance with the review clause included in the Proposal for a CBAM Regulation, the Commission will have to assess the possibility of expanding the proposal's scope to emissions of transportation services.[63] Whether the CBAM Regulation can be applied to air transport requires more legal and practical consideration.

First, the CBAM regime, as explained above, is designed for the trade in *goods* that are manufactured at fixed installations and imported into a State by an importer. Air transport is a matter of trade in air *services* on which passengers and goods are carried on a mobile asset, namely, an aircraft. While airports can arguably be considered 'fixed installations,' they are not responsible to compensate for CO2 emissions produced by the aircraft they are obliged to admit.[64] The provision of air services by carriers does not proceed from 'fixed' or 'stationary installations' but uses, on the contrary, mobile aircraft to provide these services. International air transport is the business of crossing borders, and the essence of aircraft being moveable assets renders the essence of the operation of air services 'flexible' in the sense that flights can be moved, rerouted, or even substituted. This means that air passengers can choose different services and routes to get from fixed-point A to point B, including, where applicable, the option to travel with an EU carrier or a non-EU carrier or via any intermediate point. Similarly, carriers can choose to change or provide different services. This interchangeability of flights provides a stark contrast to fixed goods moved across a border by an importer and subject to customs checks and clearances before reaching the buyer or consumer. In the EU ETS regime, by analogy, the airline is the responsible legal person to account for the

62. See, section 3 of the 'Subsidiarity Grid' of EU Commission, Staff Working Document Impact Assessment Report, Accompanying the document Proposal for a regulation *establishing a carbon border adjustment mechanism*; COM(2021) 564 final; SWD(2021) 643 final, section 2.2.

63. EU Commission, Proposal for a Regulation of the European Parliament and of the Council *establishing a carbon border adjustment mechanism*, COM(2021) 564 final, Art. 30.

64. See, for instance, Art. 8.24(a)(1) of the Dutch Aviation Act ('*Luchtvaartwet*'), pursuant to which the operator of the airport is obligated to admit traffic in accordance with applicable regulations. EU Regulation 1008/2008 on *common rules for the operation of air services in the Community* reflects a similar approach towards the position of the operator of the airport.

emissions of the aircraft used to provide its service. A CBAM for aviation could be adjusted accordingly, but there is an important caveat.

A second divergence to consider is that air services fall outside the scope of the WTO's General Agreement on Trade in Services (GATS), the counterpart for services of the GATT. The GATS does not apply "to measures affecting: (a) traffic rights, however, granted; or (b) services directly related to the exercise of traffic rights […]," [65], i.e., the operation of air services. Consequently, simply identifying the airline as the importer of the service and applying the CBAM as applied to goods, by analogy, to air services contradicts the aviation exemption from GATS and the special regime governing international air transport. In this special regime for aviation, air services are regulated by the Chicago Convention on international civil aviation (1944), dictating that no international air service to another State may be operated unless that other State has expressly agreed to the conditions for the operation of such services.[66] That is why air services are performed pursuant to a web of thousands of Air Services Agreements (ASAs) concluded by the 193 States parties to this convention. This means, in short, that the operation of international air services must be expressly permitted by the States that are party to the ASAs. These agreements are, however, silent on CBAM-like obligations or other environmental measures.

Next, how the measure will be defined, under international law, in a potential CBAM Regulation for aviation may also have consequences. The additional expenses can either be put on top of the ticket price as a charge or a tax or included in the ticket price through a levy. Suppose the measure is identified as a tax, in that case, it will be subject to the provisions of the Chicago Convention and established practice that exempts aviation from taxation, as well as the conditions on this subject that are agreed upon and laid down in the myriad of ASAs concluded by the EU,[67] and its Member States. If the measure is deemed a custom duty or charge, WTO provisions and procedures are in place and the measure may be inconsistent with general trade principles.[68] Or it can be portrayed as an internal measure "relating to the admission to or departure" from national airspace, in this case that of an EU/EEA State, or on "the operation and navigation of such aircraft while within

65. See, General Agreement on Trade in Services, Annex on Air Transport Services, Art. 1.3.
66. See Article 6 of the Chicago Convention.
67. See the agreements with the US (2007/2010), Canada (2009), Qatar (2021) and Oman (2021).
68. See, CATO Briefing Paper dated 9 August 2021, Nr 125, prepared by Prof. James Bacchus, *Legal Issues with the European Carbon Border Adjustment Mechanism*, at 3; available on the internet.

its territory."[69] Navigational rules are only valid in national airspace and cannot be extended to include the flight segment above non-EU/EEA territory.

And there lies the final crux. A CBAM for aviation would be complementary to the EU ETS and would be specifically designed to reinforce this regime for international traffic, including that beyond EU borders. The CBAM is meant to substitute the free allowances of EU carriers under the current EU ETS regime and bring it in line with a revised EU ETS cap. Under a CBAM for international aviation, third-country carriers benefiting from lower environmental standards outside the EU would be required to buy the CBAM certificates to mitigate the cost differences and thus pay an equal 'carbon price' for their flights compared to their EU counterparts. To calculate the cost difference, CBAM certificates would need to consider the flight emissions of segments outside EU airspace, making the measure extra-territorial in scope.

How the above considerations can be contemplated in a CBAM for aviation requires further research as the design of such a mechanism for the application to air transport has yet to be determined. However, the big remaining question is how the measure can be implemented. The following section will investigate two possible avenues: a unilateral introduction or through international agreement and take a closer look at the legal and political implications.

4. CBAM and International Relations

With its ambitious environmental agenda for aviation, the EU Commission sets a high but necessary target for reducing GHG emissions. As analysed in section 2 of this article, the FF55 measures for air transport will significantly impact carriers situated in the EU who, by virtue of their establishment, will have to adhere to said measures. To mitigate these environmental cost differences with airlines from outside the EU, the EU can attempt to impose a CBAM unilaterally on third-country carriers or by reaching international agreement with other countries about applying CBAM or on other environmental targets.

4.1 Unilateral Application

The Chicago Convention only allows States to apply domestic rules and regulations *internally* relating to the admission or departure of aircraft from national airspace and their operation and navigation while within its territory.[70] An application

69. See, Article 11 of the Chicago Convention.
70. Ibid.

beyond national borders, i.e. in the territory of another contracting State, would be contrary to the principle of complete and exclusive sovereignty over a State's own airspace.[71] Using Article 11 of the Chicago Convention to justify the CBAM, one could argue that aircraft emissions are inherent to the operation of aircraft and that the environmental measure applies upon admission into the combined airspaces of EU States, henceforth 'EU-airspace'. In accordance with Article 11, such measure would, however, need to apply without distinction as to nationality and thus cannot be used to oblige only non-EU carriers to purchase CBAM certificates. Perhaps even more important is whether the regime can be extended to include the flight segment above non-EU territory and whether third States will accept such unilateral action by the EU. Past experiences offer no conclusive answer in this regard. When the EU ETS regime was announced in 2008, the same legal basis, Article 11 of the Chicago Convention, was used to "[…] reserve[d] the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory."[72] As mentioned in section 2.2.3. of this article, the EU's move was met with resistance. In December 2009, three major US airlines and the Air Transport Association of America (ATA) submitted a claim about the legality of the measures, concerning the territorial jurisdiction of the EU, to a court in the UK, which passed these questions to the Court of Justice of the EU. The court ruled that EU legislation "may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States"[73] and:

> "As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated *in the light of the whole of the international flight* that its aircraft has performed or is going to perform from or to such an aerodrome, it must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, *the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself*, in particular where those objectives follow

71. Article 1 of the Chicago Convention.

72. See, Consideration 9 of the Preamble of Directive 2008/101 amending EU Directive 2003/87.

73. See, CJEU in Case C-366/10, *Air Transport Association of America*, *American Airlines Inc.*, *Continental Airlines Inc.*, *United Airlines Inc.* v. *Secretary of State for Energy and Climate Change*, decision of 21 December 2011, paragraph 124.

> on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol."[74] (italics added)

The reactions to the Court's decision that the EU ETS proposal did not infringe international law were vehement on the policy level. Important aviation States and trading partners of the EU and its Member States have criticised these proposals, which they consider unilateral actions infringing international law. To avoid retaliation measures, international flights are temporarily exempted from the EU ETS until 31 December 2023. But there is a different momentum now. The urgency for climate measures is much higher on the agenda than it was 10-15 years ago. This will significantly support the discussion of a potential CBAM for aviation, even beyond the EU. Nevertheless, it is doubtful that this time third States will accept without protest an environmental measure with 'extra-territorial' effects that the EU unilaterally imposes. They will likely argue that for such actions, international agreement is required, as to which see the next section, that ICAO is the appropriate forum for this and that the CORSIA scheme already has a global reach. To justify the 'export' of its environmental norms, the EU may argue, in return, that CORSIA standards are not strong enough to achieve the targets of the Paris Agreement and raise concerns about the lack of legal force of the ICAO standards and their relatively weak enforceability.

Other EU legislation aimed at reducing competitive disadvantages between EU and non-EU carriers, such as Regulation 2019/712 on safeguarding competition in air transport and its predecessor,[75] offer enforcement mechanisms, but these have not yet been applied and do not offer practical insight into the enforceability of such measures vis-à-vis third-country carriers, especially in the context of environmental measures.

4.2 International Agreement(s)

The most legally sound option to implement environmental measures in aviation would be to reach international agreement at the level of ICAO, for instance, through strengthening the existing CORSIA scheme or adopting a new treaty. On the international level, States will discuss adopting a Long-Term global Aspirational Goal (LTAG) for reducing CO2 emissions during the 41st Session of the ICAO General Assembly in September and October 2022. Notwithstanding the importance of agreeing on a global goal, a High-Level Meeting on the feasibility of

74. Ibid, paragraph 128.

75. Regulation (EU) 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004.

an LTAG for international aviation CO_2-emissions reductions concluded in July to recommend that:

1. ICAO and its Member States are encouraged to work together to strive to achieve a collective long-term global aspirational goal for international aviation (LTAG) of net-zero carbon emissions by 2050, in support of the Paris Agreement's temperature goal, *recognizing that each State's special circumstances and respective capabilities* (e.g., the level of development, maturity of aviation markets, sustainable growth of its international aviation, just transition, and national priorities of air transport development) *will inform the ability of each State to contribute to the LTAG within its own national timeframe*.
2. While recognizing that the LTAG is a collective global aspirational goal, and *it does not attribute specific obligations or commitments in the form of emissions reduction goals to individual States*, each State is urged to contribute to achieving the goal in a socially, economically and environmentally sustainable manner *and in accordance with national circumstances*.[76] (Italics added)

As already indicated by the inclusion of 'aspirational' in its title, these conclusions confirm that the LTAG is a call to action and does not present binding targets or timeframes. Should the EU wish to press the issue further with more concrete milestones, it must consider other routes, for instance, the conclusion of separate international agreements between the EU and third States and including a CBAM in the existing Air Services Agreements of the EU and its Member States with third States. Combined, the EU States have concluded many bilateral ASAs with third States. A large portion of these ASAs has been amended through so-called 'horizontal agreements' to conform with new developments in EU law concerning the EU nationality of carriers.[77] The EU and its Member States have also concluded various categories of comprehensive or vertical Agreements with certain States, encompassing not just traffic rights but all aspects of air transport, including environmental protection. The last part of this article will analyse if and to what extent these different types of ASAs have been used or can contribute to implementing environmental measures like the CBAM. The last-mentioned category, *comprehensive agreements*, provides a prominent platform to negotiate more stringent environmental measures to be applied between the EU and the

76. ICAO, Doc 10178, Report of the High-Level Meeting on the feasibility of a Long-Term Aspirational Goal for International Aviation CO2 Emissions Reductions, Conclusions, Montréal, 19-22 July 2022.

77. Carriers in the EU can be majority-owned and effectively controlled by an accumulation of different EU nationalities, ex Art. 4(f) of Regulation 1008/2008.

other party. The first of its kind and most used agreement between the EU and US stipulates:

> "When a Party *is considering proposed environmental measures* at the regional, national, or local level, it should evaluate possible adverse effects *on the exercise of rights* contained in this Agreement, and, if such measures are adopted, *it should take appropriate steps to mitigate any such adverse effects*. At the request of a Party, the other Party shall provide a description of such evaluation and mitigating steps."[78] (emphasis added)

Hence, if a proposed environmental measure will have an adverse effect on the operation of international air services, and the effect cannot be mitigated, an agreement must be reached through a Joint Committee. None of the vertical agreements that have been concluded with the US (2007/2010), Canada (2009), Qatar (2021) and Oman (2021) explicitly refer to the application of the EU ETS regime but instead foster cooperation at ICAO.[79] Even in one of the most recent agreements with Qatar, the parties agree to cooperate on implementing rules for the development of CORSIA and "recognise the need to take appropriate measures to prevent or otherwise address the environmental impacts of air transport *provided that such measures are fully consistent with their rights and obligations under international law*"[80] (italics added).

The EU could start negotiations to amend these agreements to include the CBAM or other environmental measures, like the taxation of aircraft fuel. The same can be explored in the context of the neighbourhood policy, where the EU and its Member States have concluded comprehensive agreements with Balkan and Mediterranean States, creating a Common Aviation Area encompassing the EU and these areas. The question remains whether these States are willing to follow the EU's stringent environmental policy.

In the context of *horizontal agreements*, when these ASAs are amended to substitute the traditional nationality clause of EU States with the 'EU nationality' clause, there is a window of opportunity to include environmental measures in the negotiations. This would, however, require a new negotiating mandate since the existing mandate

78. EU – US Agreement on Air Transport of 2007, as amended in 20210, Article 15(2).
79. Ibid, see, Attachment C - Joint Statement on Environmental Cooperation.
80. Agreement on Air Transport between the European Union and its Member States on the one part, and the State of Qatar, of the other part (2021), Article 16.

only covers designation issues.. A review of the 100s of horizontal agreements falls outside the scope of this article, but a recent one conducted with one of the EU's most important trading partners, namely China, is perhaps illustrative of this option; it does not have a specific clause on environmental protection.[81] In the case of *horizontal and traditional ASAs*, it will be a time-consuming effort to negotiate amendments to change these ASAs for implementing the CBAM and, generally, to align them with the ait transport provisions of the FF55 package. Unlike the more liberal comprehensive agreements, the horizontal and traditional agreements often contain clauses that regulate the volume of traffic between the two parties, limiting the frequency of services and capacity of different aircraft types. These clauses also include a prohibition of further limiting the volume of air traffic, except for limited reasons:

> "Neither Contracting Party *shall unilaterally limit the volume of traffic, frequency or regularity of servic*e, or the aircraft type(s) operated by the Designated Airline(s) of the other Contracting Party, except as may be required for customs, technical, operational, or *environmental reasons* under *uniform conditions* consistent with Article 15 of the [Chicago] Convention"[82] (italics added).

It is a matter of interpretation whether a CBAM can be regarded as a customs or environmental measure under which the number of frequencies or aircraft types may be reduced. Such an interpretation could potentially reduce the agreed capacity in case of non-compliance with the EU's environmental standards through a CBAM. However, without any further information on how a CBAM for aviation will be designed and, hence, qualified and an analysis of the environmental protection clauses in specific ASAs, it is premature to articulate opinions on the likelihood that a CBAM can be implemented this way.

5. Concluding Remarks

Under the EU Green Deal of 2019, the 'Fit for 55' Package, presented in July 2021, includes ambitious proposals for the air transport industry to reduce GHG emissions by 55% in 2030 compared to their 1990 levels. While industry actors underpin the importance of environmental measures to combat climate change, concerns are

81. Agreement between the European Union and the Government of the People's Republic of China on certain aspects of air services (2019).

82. See, ICAO Doc 9587 – Annex 5, Template Air Services Agreement, Article 16 (cont'd).

raised that the accumulative effect of the FF55 measures will disproportionally hit EU network carriers servicing third countries compared to their non-EU counterparts; the additional costs associated with compliance with the FF55 measures will lead to cost differences and a distortion of competition in these markets.

More importantly, however, cost differentiation may potentially result in 'carbon leakage' if carriers decide to offer different routes and passengers choose to fly non-EU airlines or fly different routes that are not or less covered by the EU's environmental measures. Consequently, the FF55 package does not achieve its full carbon reduction potential without balancing efforts. Paradoxically, it may even lead to carbon leakage and more CO2 emissions in specific markets instead of fewer emissions.

Can a Carbon Border Adjustment Mechanism provide a solution? Much will depend on how the current CBAM proposal designed for the trade in *goods* would be adapted for application to air transport *services* while respecting international trade standards. Would a proposal apply to EU airspace only or be extra-territorial in scope, to flight segments beyond EU borders, and if so, to the totality of the flight, or only to flight segments arriving in or departing from an EU airport? The latter may facilitate non-EU carriers with hubs near EU borders. However, whether more traffic will flow via, for instance, Istanbul will also depend on the Air Services Agreements that, in this case, Turkey has concluded with other states. Traditional bilateral ASAs often regulate and limit capacity and frequency and, thus, may not always allow for the additional flights required to facilitate an increased demand. In light of these capacity constraints, one could argue that the traditional system of bilateral air services offers some protection against 'carbon leakage', but only insofar States have not liberalised air traffic between them, which is contrary to the EU's Open Skies policy.

A perhaps more significant obstacle is the implementation of a CBAM. The 'royal way' under air law, through international agreement at the level of ICAO or amendments of ASAs, will be time-consuming and may not yield tangible results in the short time frame that the urgency of climate measures requires. Nevertheless, many States regard or have started to recognise climate change as an existential threat, which may facilitate new momentum to start discussions or negotiations on accepting a CBAM or even just present a CBAM to inspire other States to follow suit. A unilateral imposition of CBAM by the EU may face questions and possibly resistance from third States, as exemplified by the opposition to applying the EU-ETS scheme outside the EU. Third states will point to ICAO and CORSIA as the appropriate forum and the best route for international aviation to protect the environment in a global effort. While progress is being made on this platform, the

awaited Long-Term global Aspirational Goal for reducing CO2 emissions in aviation does not present binding targets and timeframes to individual States. The different approaches of the two regimes, i.e. cap and trading emissions of the EU-ETS and offsetting emissions by CORSIA, further complicate the discussion, and a solution, at the international level.

Whether the EU can push its environmental norms beyond EU borders by applying its environmental measures, including but not limited to EU ETS and CBAM, and whether and how mechanisms such as CBAM can be applied to aviation to mitigate cost differences must be considered coherently and comprehensively while avoiding duplication of efforts. The results of the upcoming ICAO General Assembly, as well as the outcome of the interinstitutional negotiations in the EU on applying the EU ETS globally, can influence the discussion and scope of a potential CBAM for aviation. In case the EU decides a CBAM for aviation is necessary, more research should be conducted on the possible design and evaluating the legal and practical implications of its application outside the territory of the EU, including the enforceability of such a measure vis-à-vis third countries.

The Path Towards the Balanced Approach in the Netherlands:

From Consensus to Litigation Over Schiphol's Downsizing[1]

Published in *Tijdschrift Vervoer & Recht*, Issue 6 (2023), pp. 198-207.

Abstract

Dutch noise policy at Schiphol has a long and complex history. The polder model of reaching consensus on measures to reduce nuisance for local residents has long been under pressure. The unilateral government announcement in June 2022 that Schiphol must reduce its capacity has further strained relations. The policy choice to implement *noise-related* operational restrictions via two 'tracks' places the "Balanced Approach" for noise-related measures at airports centre stage. In particular, the application of an experimentation regime in the first phase leads to much discussion and legal proceedings. This article describes developments in Dutch noise policy and contextualises the initiated processes and court cases in relation to European and international rules regarding this balanced approach and the wider context.

1. This English translation has been prepared for the purpose of this PhD manuscript and is based on the original Dutch-language article "De aanloop naar de Balanced Approach in Nederland: niet polderen voor een 'evenwichtige aanpak' maar procederen over krimp Schiphol", published in Tijdschrift Vervoer & Recht, no. 6 (2023). The initial translation was prepared with the support of translation software and subsequently reviewed and refined for accuracy, consistency, and legal terminology. While care has been taken to preserve the text of the original, certain passages and quotes may have been lightly adapted for clarity in English. All footnotes have been translated as well, though they frequently reference Dutch-language sources. In case of ambiguity or interpretative questions, the original Dutch text prevails. This article reflects developments up to and including 22 September 2023.

1. Introduction

Since the government's announcement on 24 June 2022, that the number of aircraft movements (AMs) at Schiphol must be reduced from 500,000 to 440,000 per year, the debate over shrinkage has engaged minds both at home and abroad. Less than a year later, developments occurred rapidly; on 3 April 2023, Schiphol announced measures that go significantly beyond the government's targets. Two days later, on 5 April, the preliminary relief judge blocked the proposed temporary measure intended to reduce AMs to 460,000 for that year, citing that the correct *Balanced Approach* procedure was not followed.

This was not the end of the matter. In parallel, the State rushed a *Balanced Approach* procedure with the aim of achieving 440,000 aircraft movements by 2024 and also appealed against the 2023 ban on the temporary measure. On 7 July 2023, the Amsterdam Court of Appeal issued a judgment lifting the ban; one day later, the Rutte IV cabinet collapsed. Initially, the cabinet's caretaker status appeared to affect political decision-making on the skrinkage dossier, but by 1 September it had become clear that the plans would go ahead. On 25 July, several airlines announced their intention to appeal in cassation against the Court of Appeal's judgment. A ruling is expected by the end of the year.

This article aims to provide insight into the various trajectories and events, placing them in context, analysing the legal proceedings already conducted, and looking ahead to the trials still ongoing. The article explicitly does not advocate for or against environmental measures—including noise policies—but focuses solely on the procedures and conditions to be followed when implementing noise-related restrictions.

The first part provides relevant background on the development of Dutch noise policy (Section 1) and outlines the circumstances that led to the current situation (Section 2). This is followed by a discussion of the main issues surrounding the temporary experimental scheme (Section 3) and the legal dispute it has generated (Section 4). The following section offers observations on the context and *Balanced Approach* procedure as deployed in the Netherlands (Section 5). The article concludes with final reflections (Section 6).

2. Background Dutch noise policy at Schiphol

2.1 Development of a legal and policy framework for noise policy

Due to the noise impact on the surrounding area, traffic rules for the use of the runway system at Schiphol and the surrounding airspace, as well as noise impact limit values, are laid down in the Airport Traffic Decree (ATD).[2] The first ATD dates from 2003 and has been amended and updated several times.[3] It uses limit values for noise at 35 fixed enforcement points. The 2008 ATD set the enforcement value based on a maximum number of 480,000 AM.[4]

The enforcement point system appears to be complex and inflexible. In the event of "an imminent exceedance of a noise limit at an enforcement point near a runway with relatively few noise-affected residents, it may [potentially] be necessary to switch to a runway with relatively many noise-affected residents."[5] The Ministry of Infrastructure and Water Management (I&W), hereinafter also referred to as the ministry, starts working on developing a new system. A consultation process involving administrators, residents, and the aviation sector led to the then-widely supported Alders agreement, which in 2008 recommended a system based on strict preferential runway use with a maximum growth to 510,000 AM in 2020.[6] The Alders agreement was updated in 2012, 2013, and 2015, with the latest update increasing the maximum number of AM to 500,000 in 2020.

An experiment with the "New Standards and Enforcement System" (*Nieuw Normen en Handhavingsstelsel*, NNHS) between 2010 and 2012 was successful and has since been adopted as policy. Overall, the new noise system minimises disturbance for local residents by prioritising the use of runways that cause the least noise wherever possible. To enable the introduction of a new ATD based on the NNHS, the Aviation Act (*Wet luchtvaart*, Wlv) was amended accordingly in 2016.[7] However, implementing a new ATD also requires Schiphol to obtain a new environmental permit, for which an environmental impact assessment (EIA) must be conducted.[8]

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2. AMvB, Decree of 26 November 2002 adopting an Airport Traffic Decree for Schiphol Airport (Schiphol Airport Traffic Decree) (Stb. 2002, 592).
3. For an overview, see, *Analysis equivalence criteria Schiphol*, RIVM report 2020-0219.
4. Explanatory Memorandum to the Decree of 18 September 2008 to amend the Schiphol Airport Traffic Decree in connection with better use of environmental space and amendment of the departure routes in an easterly direction from Runway 18-27 (Stb. 2008, 390).
5. MvT bij de Wijziging Wet luchtvaart, Kamerstukken II 2006/07, 34 098, nr. 3, p. 3
6. Consultation Document Balanced Approach for Schiphol, March 2023, section 3.1.
7. Schiphol Action Plan, p. 12-13.
8. Environmental Impact Assessment Decree to the Environmental Management Act.

2.2 Anticipatory enforcement

In anticipation of the legal embedding of the NNHS in the new ATD, the Inspectorate for the Human Environment and Transport (*Inspectie Leefomgeving en Transport*, ILT), which is responsible for supervising national airports, has been applying so-called "anticipatory enforcement" since 2015, at the instruction of the then State Secretary. This means that the ILT does not impose sanctions when noise limits at fixed enforcement points are exceeded, provided this is due to strict preferential runway use.

In legal proceedings brought by residents against the tolerated exceedances of the ATD, the court in 2018 noted that "the NNHS has already been applied for eight years" and that it was "expected to enter into force by the end of 2019 along with a revised Schiphol Airport Traffic Decree." [9] In 2019, the court reached the same conclusion: "Since the entry into force of the statutory regulation establishing the NNHS is foreseen for the end of 2019, this concerns a temporary situation that will come to an end in the foreseeable future."[10]

2.3 No nature permit

After the nitrogen ruling by the Council of State triggered the 'nitrogen crisis' in the Netherlands in late May 2019, the Dutch organisation *Mobilisation for Environment* (MOB) submitted an enforcement request to the Ministry of Agriculture, Nature and Food Quality (*Landbouw, Natuur en Voedselkwaliteit*, LNV); MOB argues that Schiphol does not hold a nature permit for its activities under the Nature Conservation Act (*Wet natuurbescherming*, Wnb), and asks the minister to take enforcement action.[11]

In the Schiphol Enforcement Order of April 2020, the Minister of LNV confirmed that, since 2017, Schiphol has been operating more AMs and may be causing higher nitrogen deposition than permitted under the applicable ATD 2008. To assess the deposition, Schiphol is required to apply for a nature permit. Until then, the Minister considers enforcement action to be disproportionate and rejects the request.[12]

At the time of writing, Schiphol has submitted a nature permit application that would allow for 500,000 AMs. In early 2023, the airport had already announced that

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9. District Court Noord-Holland 24 October 2018, ECLI:NL:RBNHO:2018:9181, consideration 7.3.
10. District Court Noord-Holland 12 March 2019, 19/58 and 19/171, recital 12.
11. Sections 2.7(2) and 2.8, Nature Protection Act. The Minister for Nature and Nitrogen is the competent authority for this permit.
12. Schiphol Enforcement Decision, 8 April 2020, see: http://puc.overheid.nl/doc/PUC_305658_17.

it had acquired sufficient nitrogen rights from farming businesses around Schiphol and Lelystad Airport.[13]

2.4 From growth perspective to vigilance mode

For a brief period, it was anticipated that the aviation sector could earn room for growth after 2020 by pursuing sustainability and innovation, potentially reaching a maximum of 540,000 AMs by 2024.[14] In early 2021, the Rutte III cabinet collapsed over the childcare benefits affair. A month later, the then-outgoing Minister submitted a new draft ATD based on the NNHS to Parliament.[15] Despite a warning that ending anticipatory enforcement might be delayed as a result—leaving a continued legal vacuum[16] —the House of Representatives declared the draft amendment to the ATD "controversial", thereby suspending its consideration until a new cabinet has taken office.[17]

In the second half of 2021, concerns mounted over the nature permit and the possibility that "the number of flights may need to be significantly reduced."[18] Because the complex nature permitting procedure—running in parallel with the ATD process—could take considerable time before a permit becomes irrevocable due to potential appeals, "a number of legal alternatives are being explored in parallel with the nature permit process"[19] to restore the legal position of local residents.

Furthermore, on 30 August 2021, the Foundation for the Right to Protection from Aircraft Nuisance (*Stichting Recht op Bescherming tegen Vliegtuighinder*, RBV) had formally summoned the State in civil proceedings to reduce the number of AMs.[20] On 5 November 2021, the ILT warned the government that, in future legal cases, the

13. NOS, "Schiphol: voldoende stikstofrechten opgekocht voor natuurvergunning" (Schiphol: sufficient nitrogen rights bought up for nature permit), 19 January 2023.
14. Letter from the Minister of Infrastructure and Water Management (I&W) dated 5 July 2019 (Parliamentary Papers II 2018/19, 29665, no 646, p. 6).
15. Draft amendment to Schiphol Airport Traffic Decree, 16 February 2021, I&W/BSK-2021/39589 .
16. Letter from the Minister of I&W dated 19 April 2021 (Parliamentary Papers II 2020/21, 29665, no 406, p. 2).
17. List of controversial issues as adopted by the chamber on 1 June 2021, Parliamentary Papers II 2020/21, 35718, no 49.
18. NOS, "Grote zorgen kabinet over Schiphol, aantal vluchten mogelijk fors omlaag" (Major Cabinet concerns about Schiphol, number of flights possibly sharply reduced), 8 December 2021.
19. Letter from the Minister of I&W of 3 November 2021 (Parliamentary Papers II 2020/21, 31936, no 829).
20. On 15 November 2023, the District Court of The Hague rules on the admissibility of RBV to act on behalf of local residents. The substantive hearing of the writ is scheduled for 30 January 2024, see https://www.beschermingtegenvliegtuighinder.nl/tijdlijn-civiele-procedure/.

legal vacuum caused by anticipatory enforcement might no longer be tolerated, particularly now that there was no longer a concrete prospect of embedding the NNHS in a new ATD—and that courts could decide to restore the legal position of local residents.[21] This leads to a growing sense in The Hague that urgent action on noise nuisance is needed.

3. A new balance vs a "balanced approach"

The coalition agreement, concluded on 15 December 2021, stated that reducing the negative effects of aviation and addressing challenges around the airport "requires an integral solution that offers certainty and perspective for both Schiphol's hub function and the airport's surroundings."[22] Six months later, in June 2022, the cabinet unexpectedly announced in an 'Outline Letter' the "decision" to cap 440,000 AMs at Schiphol in the coming years.[23] This figure is part of a search for "a new balance", but seems instead the result of a hasty and careless, largely internal process of only a few months to arrive at a rationale for shrinking Schiphol Airport. The self-conceived calculation method in a dubious "destination analysis"[24] is dismissed by three independent parties as "(highly) arbitrary and difficult to objectify", which "seems to ignore economic activity outside business services" and is "sceptical" about the index used to identify strategic destinations for Schiphol.[25] The selective adoption of findings from external studies, such as the exclusion of fleet renewal, and a summary proportionality assessment, also contributes to the conclusion that the outcome appears to have been leading.[26]

At the time, the decision lacked a clear legal basis or underlying rationale. Initially, the policy shift was justified on the grounds of noise pollution and emissions, with the reasoning that the aviation sector should also contribute to CO_2 reduction efforts. Less evident, however, is the weight the Ministry of Infrastructure and Water Management appears to assign to nitrogen emissions. A possible explanation may lie in the political context of the farmer protests earlier that year, although—unlike

21. Letter from the Minister of I&W dated 10 December 2022 (Parliamentary Papers II 2020/21, 29665, no 418), and note "signaal duur anticiperend handhaven Schiphol" (signal duration anticipatory enforcement Schiphol) , 5 November 2021, ILT-2021/60234.
22. Coalition Agreement 2021-2025, 15 December 2021.
23. See, Letter from the Minister of I&W of 24 June 2022 (Parliamentary Papers II 2021/22, 29665, no 432), hereinafter "Outline Letter 24 June".
24. Outline letter 24 June, Annex 3a: Destination analysis adequate accessibility.
25. Ibid, see Appendices 3b to d respectively, with reviews conducted by SEO Economic Research, Erasmus UPT and CE Delft.
26. Outline letter 24 June, Annex 5: Background note on proportionality.

in the agricultural sector—much remains uncertain regarding nitrogen deposition from aviation.[27]

After a period during which much remains unclear, in autumn 2022, it appears that the government is pursuing three tracks to implement the 'decision' to reduce the number of AM at Schiphol; the first two involve *noise-related* restrictions on the number of flight movements, first through an intermediate step, or a temporary measure, to 460,000 AM by November 2023, and then to 440,000 AM a year later. The third track is the development of a new standards system based on boundary values for noise and emissions by 2027.

The policy decision to prioritise noise reduction over emissions has been pivotal for the subsequent process and may significantly influence the outcome. This is because the introduction of noise-related operating restrictions at airports is subject to European and international rules requiring a *Balanced Approach*.

3.1 The Balanced Approach

The Balanced Approach ("BA") is a procedure developed by the *International Civil Aviation Organization* (ICAO), a United Nations (UN) organisation, and is laid down in Annex 16 to the Convention on International Civil Aviation of 1944, more commonly referred to as the Chicago Convention.[28] The text of the Balanced Approach reads:

> "The balanced approach to noise management consists of *identifying the noise problem at an airport* and then *analysing the various measures available to reduce noise* through the exploration of *four principal elements*, namely reduction at source, land-use planning and management, noise abatement operational procedures and operating restrictions, with the goal of addressing the noise problem in the *most cost-effective manner*" (emphasis added).

The standard clearly describes two main steps in the BA process: first, identifying the noise problem at an airport; second, analysing various noise abatement measures to resolve the issue and selecting the appropriate measures and the manner of implementation. ICAO has provided guidance on these matters.[29] Regarding operating restrictions, ICAO Contracting States also agreed that such

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27. See, Aviation Sector Opinion, Advisory Committee on Nitrogen Problems, 15 January 2020.
28. Convention on International Civil Aviation (1944), Annex 16, Volume 1, Part V, Balanced Approach to Noise Management.
29. ICAO Guidance Material on the Balanced Approach to Aircraft Noise Management (Doc 9829).

restrictions "should not be applied as a first resort, but only after consideration of the benefits gained from other elements [of the BA]."[30]

The EU has adopted ICAO's Balanced Approach concept and enshrined it more concretely in the EU Noise Regulation.[31] The EU Noise Regulation prescribes a similar procedure that ensures a "balanced approach" in which:

> "the range of available measures, namely aircraft noise abatement at source, land-use planning and management, noise abatement operational procedures and operating restrictions, are approached in a coherent manner in order to solve the noise problem for each individual airport in the most cost-effective way."[32]

A noise-related action is defined as any measure that "affects the noise environment around an airport", with an operating restriction being an action that "reduces the access or operational capacity of an airport."[33] The EU Noise Regulation also explicitly prescribes "operating restrictions should not be applied in the first instance, but only after the other measures of the balanced approach have been considered."[34] The steps involved in carrying out a BA procedure and in imposing operating restrictions are discussed in Section 5. The BA is, therefore, a lengthy and meticulous process. To expedite capacity reduction, the government set up an experimental scheme to circumvent the BA procedure.

4. The experimental scheme and implications for airport capacity

4.1 Ending anticipatory enforcement

The Outline Letter of 24 June clearly states that the government intends to prevent anticipatory enforcement by the ILT by November 2023, coinciding with the start of the 2023/2024 winter season as scheduled by the International Air Transport Association (IATA). As the new ATD remains pending due to the absence of a nature permit, this step should resolve the flawed legal position of local residents.

30. Resolution A39-1: Consolidated statement of continuing ICAO policies and practices related to environmental protection - General provisions, noise and local air quality, Appendix E.
31. EU Regulation 598/2014 of 16 April 2014 on the establishment of rules and procedures for the introduction of noise-related operating restrictions at Union airports within a Balanced Approach and repealing Directive 2002/30/EC (the "EU Noise Regulation").
32. EU Noise Regulation, Article 2.
33. Ibid.
34. EU Noise Regulation, Article 5(3)(d).

By ceasing anticipatory enforcement of the NNHS, the Ministry of I&W aimed to revert to enforcing the previous system of the ATD 2008. Since this enforcement point system could increase noise nuisance for local residents, the Minister of I&W stated in the Outline Letter that maintaining strict preferential runway use (i.e. NNHS) is critically important.[35] At the same time, reverting to the limit values of the enforcement points would lead to a reduction in the maximum number of AMs that can be processed at the airport. Further analysis shows that if current operational practices are applied to the limits in force at the time, the earlier estimate of 450,000–465,000 AMs must be revised downward, with only 410,000 AMs proving feasible. This is partly due to noise abatement measures and modified approach routes that have already been implemented.[36]

4.2 The Experimental Scheme

The Minister found a solution in the Aviation Act, as it permits him to deviate from established regulations through a ministerial regulation on an experimental basis, including "replacing a noise impact limit value set in the Airport Traffic Decree at a specific enforcement point with another limit value."[37]

By simultaneously updating the limit values at all enforcement points and adjusting them accordingly, the intention is to ensure that the rules for strict preferential runway use can be applied within the (new) limit values. In drafting this experimental regulation, the number of aircraft movements under the 2008 ATD—480,000—was used as a reference point. Still, internal calculations show that this must be scaled down to 460,000 AMs in order to remain within the equivalence criteria and to continue operating under the NNHS. As a result, the design of the scheme resembles something more than a small-scale experiment.[38]

The choice of this instrument is also noteworthy: strict preferential runway use was previously the subject of an experimental scheme,[39] and the Alderstafel already advised in 2013 that the combination of enforcement points is incompatible with the NNHS.[40] In addition, the Regulations Instruction (*Aanwijzingen voor de*

35. Outline Letter 24 June.
36. To70 memo, *Actualisatie effect op jaarvolume bij beëindigen anticiperend handhaven op Schiphol (Actualisation effect on annual volume when terminating anticipatory enforcement at Schiphol)*, 8 February 2023.
37. Aviation Act (Wlv) Art 8.23a, paragraph 1(b).
38. See, "Draft explanation of experimental regulation for internet consultation", available at: https://www.internetconsultatie.nl/experimenteerregeling_schiphol/b1.
39. Regulation of the State Secretary for Infrastructure and the Environment, of 9 July 2013, no IenM/BSK-2013/129725, to continue the NNHS between July and October 2013.
40. Advice "Alderstafel" Schiphol 2013.

regelgeving, Ar) emphasises in Note 2.41 that the primary purpose of an experiment must be the *collection of essential information*, and is therefore not anticipatory in nature. An anticipatory function is only permitted in the case of a transitional arrangement bridging the experiment and the final regulation.[41] However, when a new experimental scheme governs noise standards and the NNHS, "it can readily appear to constitute improper use of the experimental provision," according to an earlier opinion submitted to the House of Representatives.[42] Perhaps the most crucial reason why this regulation cannot simply be applied in its current form is that it *de facto* results in a reduction in airport capacity, which brings it under the scope of the Balanced Approach prescribed by the EU Noise Regulation—and EU law takes precedence over Dutch law. These and other considerations are addressed in Sections 4 and 5.

However, to implement the new regulation as early as November 2023, speed is of the essence. Royal Schiphol Group (RSG) must issue the capacity declaration for the winter season in early May, and the airport slot coordinator (ACNL) must have certainty by mid-April as to how many slots—defined as the time window in which an aircraft is allowed to take off or land—can be allocated to airlines in accordance with the EU Slot Regulation.[43] The experimental regulation was therefore published for consultation at the end of January.

4.3 Airport capacity and slots

A reduction in capacity at Schiphol has a direct impact on airline operations. At coordinated airports, airlines depend on slots to operate their flights. When an airline uses its allocated slots, it builds up what is known as a historical or grandfather right to that slot, which gives it the right to reuse the slot in a subsequent scheduling season.[44] If the airline does not do so—whether due to reduced operations or bankruptcy—the slot is typically returned and placed into the *slot pool*,[45] after which the slot coordinator must redistribute these slots to existing users and, with priority, to new entrants at the airport.

Where operating restrictions reduce the total capacity to below the number of accrued historical rights, airlines are required to surrender these rights; otherwise, they may be withdrawn. At the request of the Minister, the slot coordinator has

41. Aviation Act Art 8.23a, paragraph 6.
42. See answer to questions of the Lower House, "Anticipatory Enforcement of the New Standards and Enforcement System" by Prof H.E. Bröring & Prof A.R. Neerhof, 20 February 20220.
43. Regulation No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports (EU Slot Regulation).
44. EU Slot Regulation, Article 8.
45. EU Slot Regulation, Article 10.

issued an opinion on how such a capacity reduction could be legally implemented in practice.[46] In its capacity declaration for the 2023/2024 winter season, Royal Schiphol Group (RSG) revised the maximum number of aircraft movements downward, in line with the number of slots already returned, citing the special circumstance of facilitating phased recovery following the COVID-19 pandemic.[47] Earlier, the Minister of I&W had urged the airport not to release slots from bankrupt carriers in anticipation of the planned downsizing. Whether RSG has interpreted this guidance independently and whether such action is legally sound falls outside the scope of this article. According to the slot coordinator, as of May 2023, the airport had made a total of 17,000 fewer slots available.[48]

5. Legal procedures

The Ministry of I&W planned to introduce the Experimental Scheme before the final decision and legal confirmation of Schiphol's capacity for the 2023/2024 winter season in April-May. Subsequently, several airlines filed preliminary relief proceedings to prevent the implementation and application of the Experimental Scheme. They cite, among other reasons, the failure to follow the *Balanced Approach*, as briefly outlined in section 2 and explained in greater detail in section 5. This section addresses the legal proceedings that have already been taken or are being initiated in relation to the Experimental Scheme.

5.1 Preliminary Relief Proceedings

In the ruling of 5 April 2023, the preliminary relief judge recognised the urgent interest of the claimants and reprimanded the State; the prescribed *Balanced Approach* procedure for a capacity limitation had not been followed. The State's defences that the EU Noise Regulation does not apply to the cessation of anticipatory enforcement and the experimental scheme, because (i) the number of 500,000 AMs under the NNHS was never formally established and no legitimate expectations could arise from it (ii) there is no *new* operating restriction, (iii) the measures would expand operations rather than restrict them, and (iv) the measure does not constitute a noise-related action, did not stand.[49]

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46. ACNL, Policy Rule - Slot allocation in case of exceedance of historic rights, 13 February 2023.
47. AMS Capacity Declaration Winter 2023-2024, April 2023, available at https://slotcoordination.nl/slot-allocation/declared-capacity/.
48. Telegraph, "Schiphol already cuts flights this winter: 17,000 fewer take-offs and landings", 30 May 2023.
49. Rb. Noord-Holland (Haarlem district court) 5 April 2023, ECLI:NL:RBNHO:2023:3010, para 4.20, hereinafter "Preliminary relief judgment".

The State's assertion that the maximum of 500,000 AMs under the NNHS was never formally established is notable, as this number had been treated as a target for many years and was actively applied—not only in determining available capacity but also through anticipatory enforcement. The judge pointed to the periodic determinations made through fixed procedural steps by the Ministry of IenW and RSG; Schiphol's capacity declarations in recent years had unambiguously set the airport's capacity at a "legally binding" level of 500,000 AMs per year, with the draft ATD based on the NNHS serving as the formal reference point.[50] Because the State failed to legally embed the new system in a revised airport decree, the court ruled that the NNHS and the corresponding maximum of 500,000 AMs must be regarded as a set of written policy rules. Interested parties may derive rights from the application of these rules pursuant to Article 4:84 of the Dutch General Administrative Law Act (*Algemene wet bestuursrecht*, Awb). The fact that the cessation of anticipatory enforcement and the proposed regulation represent a change in policy does not, according to the judge, affect the applicability of European law.[51]

Even more striking is the State's argument that falling back on the old 2008 system means the BA procedure does not apply, since those standards were adopted prior to the entry into force of the EU Noise Regulation in 2016. Equally notable is the defence that there would be no capacity reduction in this case, because—based on the 2008 ATD as applied today—only 410,000 AMs would be possible, whereas the proposed scheme, following the adjustment of the limit values, would allow a maximum of 460,000 AMs.[52]

The court rejected both defences. The policy shift to revert to an earlier regulatory framework by ending anticipatory enforcement occurred after 2016, and the content of the experimental regulation—along with the maximum of 460,000 AMs—must be regarded as "an outcome of a policy decision to restrict operations at Schiphol."[53] The EU Noise Regulation has been in force in the Netherlands since 13 June 2016 and contains no exemptions from its application.

The final defence is legally the most compelling. By abandoning the draft ATD incorporating the NNHS and the ceiling of 500,000 AMs, the concrete prospect of legalisation disappears—undermining the justification for the tolerated practice of

50. Judgment in preliminary relief proceedings, grounds 4.23-4.27.
51. Judgment in summary proceedings, paras. 4.28-4.32.
52. See paragraph 3 above.
53. See respectively, Judgment in preliminary relief proceedings paras. 4.34 and 4.35-4.39.

anticipatory enforcement. According to the State, the termination of anticipatory enforcement does not constitute a noise-related action that would require an assessment of alternative measures under the BA procedure.

The preliminary relief judge acknowledged that anticipatory enforcement is, in principle, at odds with the State's enforcement obligation, and that enforcement may only be waived where there is a concrete prospect of legalisation of the unlawful situation. However, the State failed to convincingly demonstrate why the external factor of the missing nature permit now suddenly obstructs the legalisation of the NNHS at 500,000 AMs, or why continuation of anticipatory enforcement beyond 1 November 2023 would no longer be legally permissible.[54]

According to the court, the extent to which a change in policy perspective may be applied with immediate effect is also constrained by the policy and implementation history, on the basis of which airlines have aligned—and were entitled to align—their expectations, conduct, and decision-making.[55] Moreover, the policy change does not merely concern the cessation of anticipatory enforcement, but also involves a change of regime through a constructed scheme that results in the intended capacity limitation of 460,000 AMs.[56]

The preliminary relief judge concluded that he "cannot regard the proposed scheme as anything other than a vehicle used to work towards an operating restriction that the Minister seeks to implement more rapidly than would be possible under the Balanced Approach procedure," and that "the balancing of interests involved in the policy change—insofar as it includes the possibility of a capacity restriction—must be carried out within the framework of the Balanced Approach procedure."[57] By failing to conduct the BA procedure prior to the policy change, the State acted in breach of the EU Noise Regulation.

The court prohibited the State from adopting the proposed regulation for the 2023–2024 operating year and from terminating anticipatory enforcement. RSG was prohibited from declaring a reduced number of AMs and/or slots in the capacity declaration for the winter season in connection with the proposed scheme, or from taking into account the Minister's request and intention to reduce the number of AMs at the airport.[58]

54. Judgment in preliminary relief proceedings paras. 4.41 and 4.43.
55. Judgment in preliminary relief proceedings para. 4.45.
56. Ibid.
57. Judgment in preliminary relief proceedings paras. 4.51 and 4.56, respectively.
58. Judgment in preliminary relief proceedings paras. 5.1 and 5.7, respectively.

5.2 Appeal Proceedings

The Minister lodged an appeal against the judgment of the preliminary relief court. Having already determined the capacity for the winter season, he had, at that time, intended to adopt the Experimental Scheme—albeit in a revised form—for the subsequent operating year, so that it would apply to the capacity declaration for the summer season starting in April 2024. Despite the Court's serious doubts as to whether the State would be able to finalise the matter before the 13 September 2023 deadline, the Minister had an interest in overturning the contested judgment, as it would otherwise also preclude implementation at a later stage.[59]

In a landmark decision issued on 7 July 2023, the Court of Appeal overturned the first instance judgment. The appeal proceedings involved 13 grounds of appeal; however, this article focuses on four core issues that differ substantially from the decision made in the preliminary relief stage.

First, the Court held that there was insufficient basis to characterise the Experimental Scheme as a 'short-cut' towards 440,000 AMs. Although the Minister's statements "give cause for concern regarding the purity of motives," this was not sufficient to support the far-reaching conclusion that the State was using the Experimental Scheme for a purpose other than that for which it was intended.[60] Unlike the preliminary relief court, the Court of Appeal paid little attention to the functioning of the Experimental Scheme and its outcome—460,000 AMs—even though there were legitimate doubts as to the proportionality of the scheme and whether it did not exceed its aim.

Second, regarding the scope of the EU Noise Regulation, the Court found that the Experimental Scheme could not be classified as an operating restriction within the meaning of the Regulation. It left unresolved the key question of whether, in substance and in effect, the scheme 'reduces' access to or the operational capacity of an airport—precisely the core of the definition of an operating restriction in Article 2(6) of the Regulation, which defines it as: "a noise-related action that reduces the access to or operational capacity of an airport." Paragraph 5 defines a noise-related action as "any measure that affects the noise environment around an airport, [...] *including other non-operational actions* that may affect the number of people exposed to aircraft noise" (emphasis added). The title of the Regulation further underlines its relevance, referring explicitly to the establishment of rules

59. Amsterdam Court of Appeal 7 July 2023, ECLI:NL:GHAMS:2023:1589, paras. 4.7-4.8, hereinafter "Court of Appeal Judgment".

60. Court of Appeal judgment, para. 4.14.

and procedures "for the introduction of noise-related operating restrictions." The Court went a step further by stating:

> "However, the answer to this question is not decisive for the decision, as this is a temporary and short-term experiment, in preparation for possible future adjustments to the new ATD to be based on the [Aviation Act], for which the State does intend to follow the balanced approach procedure."

It is unclear on which legal provisions the Court bases its conclusion that a temporary and short-term experiment falls outside the scope of the EU Noise Regulation. This conclusion cannot be unequivocally derived from the text of the Regulation or its preamble, as the Court suggests. Nowhere in the text are such grounds for exemption—of any kind, whether temporary or otherwise—expressly provided. The Court's reasoning, that by the nature and spirit of the Regulation it cannot have been intended to subject a short-term and clearly delineated experiment to a comprehensive and time-consuming BA procedure, and that doing so would contravene the principle of proportionality, is in fact inconsistent with the objectives of the EU Noise Regulation and the procedural rigour it mandates through the Balanced Approachh. It is noteworthy that the Court attributes this due diligence to the justification of the Experimental Regulation itself, whereas the primary legal question is whether there has been a breach of the EU Noise Regulation—an instrument of Union law that takes precedence over national law and does not appear to allow for derogations of this kind.

In order to assess whether there has been a manifest breach of EU law, it is necessary to examine the legal framework of the EU Noise Regulation and the processes it prescribes. The judgment reveals no awareness of the systemic structure of slot allocation, historical (grandfather) rights, or the implications of a reduction in airport capacity. The Noise Regulation, in fact, explicitly addresses the risk of "distortions of competition" and the "impediment to the overall efficiency of the Union aviation network," and aims to "significantly reduce the risk of international disputes in cases where third-country carriers are affected by noise-related operating restrictions."[61]

I take the position that since 13 June 2016, the EU Noise Regulation has been fully applicable to all capacity reductions. The European BA sets out a clear and detailed procedural framework, which leaves little room for discretion. Even if the Regulation were interpreted as allowing for limited exceptions, the scope and

61. EU Noise Regulation, recitals 3 and 6.

impact of the Experimental Regulation in question would preclude its qualification. The Court appears to overlook the fact that the experimental provision in the Aviation Act (Wlv) allows for a one-year extension, and potentially longer in the case of a transitional arrangement.[62] Permitting Member States to conduct noise experiments outside the scope of the EU Noise Regulation—on the basis that they are temporary and time-limited—undermines the Regulation's effectiveness. The justification that the experiment is merely "preparatory" to "potential future amendments" of a new ATD, "for which the State does intend to follow the Balanced Approach procedure," is anticipatory in nature. Such an anticipatory justification is not the purpose of the experimental provision,[63] and pre-empts a procedure whose outcome is not yet determined.

Thirdly, with respect to the cessation of anticipatory enforcement, the Court held that the purpose of the EU Noise Regulation cannot be that a decision by the competent authority to begin enforcing limit values previously laid down in legislation—or to adopt other enforcement measures or policies—must first be preceded by BA procedure.[64] Unlike the court of first instance, the Court of Appeal paid little attention to the legal status of the policy or policy change in question, the rights that may be derived from it, and the way in which the change was introduced.

On the tolerated policy of anticipatory enforcement, the Court ruled that airlines could not reasonably expect it to continue indefinitely.[65] This is noteworthy: the cap of 500,000 AMs has been in place since 2008, and from 2015 to 2022, the explicit objective was to codify the tolerated policy into binding legislation. That the legislation ultimately failed to materialise in 2022 was the result of political developments, as discussed in Section 1. The argument that airlines could have adjusted their expectations at the end of 2021—on the basis of a broad reappraisal announced in the coalition agreement regarding Schiphol—is unconvincing, given the general wording of the agreement and the inherent uncertainties of political processes. What airlines could reasonably have expected, and over what timeframe, is a crucial issue—especially given that aviation is inherently a long-term industry, with strategic decisions on aircraft purchases and fleet size directly informing route and network planning.

62. See paragraph 3 above.
63. Ibid.
64. Court of Appeal judgment, para. 4.20.
65. Court of Appeal judgment, para. 4.26.

In the context of good governance, the State also has a duty to balance competing interests. In doing so, it enjoys a wide degree of policy discretion.[66] It is not the role of the Court to assess the substantive balancing of interests underpinning the policy change. On the other hand, with regard to the principle of material diligence, the Court might have taken into account the fact that the sector was neither consulted nor informed about the impending policy shift. Insofar as the State placed significant weight on restoring legal protection for local residents, it appears that insufficient consideration was given to alternative measures that could have prevented harm of this scale, in my opinion.

Now that the aforementioned objective has been abandoned and the justification for the tolerated policy no longer applies, the Court considers that the remaining question is whether airlines are being disproportionately affected. The Court concludes that, given the complex and competing interests, a termination accompanied by a nine-month transitional period—until the start of the 2024 summer season—is sufficiently balanced, falls within the limits of what the State is permitted to do, and does not impose a disproportionate burden on airlines.[67] Nevertheless, a nine-month transitional period is extremely short in view of the aforementioned procedural timelines for determining capacity, the legal and operational complexities surrounding slot allocation, and the long-term planning that is standard in the aviation sector. The Court takes into account that compensation for losses may be available. Whether, and how, such compensation will be calculated remains unclear at the time of writing; highly sought-after slots at major airports are sometimes sold for tens of millions of euros.

Finally, the reference to temporary measures—such as those adopted during the COVID-19 pandemic or in response to natural phenomena—as justification for not readily interpreting a temporary measure like the Experimental Scheme as a breach of, in this case, aviation treaties or bilateral air service agreements is incomprehensible.[68] Conducting a noise experiment cannot be equated with implementing necessary safety measures for passenger protection or safeguarding public health in exceptional circumstances. Nor does the temporary nature of the measure alter this: a breach of one year is still a clear violation, which may only be justified under (very) exceptional circumstances. That is not the case here. What is the value of a treaty provision, and of the commitments made under it, if either party can unilaterally and temporarily set it aside with such ease?

66. Court of Appeal judgment, paras. 4.27 and 4.28.
67. Court of Appeal judgment, para. 4.28.
68. Court of Appeal judgment, para. 4.22.

5.3 A new Experimental Scheme

Following the annulment of the preliminary relief judgment, the Minister was free to adopt the proposed Experimental Regulation—or a modified version thereof. At the time of the Court's ruling, it remained uncertain whether this could be finalised before 13 September 2023, the date by which Royal Schiphol Group (RSG) was required to issue its draft capacity declaration for the summer season. This was particularly uncertain given that a positive recommendation from the Schiphol Social Council was needed,[69] and that notification to—or consultation with—stakeholders and the House of Representatives was also required. Several airlines took matters into their own hands and announced on 25 July their intention to file for cassation against the Court of Appeal's decision.[70] Cassation proceedings were initiated on 30 August, and the Supreme Court is expected to issue a ruling by the end of 2023.

The fall of the Rutte IV government in July 2023 initially appeared to have potential consequences, but on 12 September 2023, the House of Representatives decided not to designate the matter as "controversial," despite the ongoing legal proceedings and political sensitivity.[71] On 1 September, the outgoing Minister of I&W announced that anticipatory enforcement would end as of 31 March 2024, in conjunction with the introduction of a revised Experimental Scheme allowing for 460,000 AMs.[72] Shortly thereafter, the ILT received the implementation mandate,[73] and the slot coordinator confirmed that—based on the draft capacity declaration for the summer season—a reduced number of slots would be made available accordingly.[74] An assessment of ACNL's policy rule "Slot allocation in case of exceedance of historic rights"[75] and the non-recognition of historic slot rights falls outside the scope of this article. Also on 1 September, the Minister of I&W announced that the outcome of the BA procedure would be notified to the European Commission. The next section provides a brief overview of this notification process.

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69. Aviation Act, Article 8.23(a)(1), the opinion must confirm that the experiment "may have a beneficial effect on the perception of annoyance". On 28 August 2023, the Schiphol Social Council issued a positive opinion, see letter "Advice on revised experimental scheme", reference u-23.083.
70. NOS, "Vliegmaatschappijen in cassatie tegen kabinetsbesluit over krimp Schiphol" (Airlines in cassation against cabinet decision on shrinking Schiphol), 25 July 2023.
71. See, list of controversial issues as adopted by the chamber on 12 September 2023, Parliamentary Papers II 2022/23, 36408, no 16.
72. Letter from the Minister of I&W dated 1 September 2023 (Parliamentary Papers II 2022/23, 29665, no 481).
73. Letter from Minister of I&W to ILT dated 11 September 2023 (Stcrt. 2023, 24546).
74. Aviation Week, "At Schiphol Airport, Airlines' Worst Fears Are Getting Real", 18 September 2023.
75. ACNL, Policy Rule - Slot allocation in case of exceedance of historic rights, 7 September 2023.

6. The Balanced Approach procedure in the Netherlands

A comprehensive analysis of the BA procedure, as initiated by the Ministry of I&W, does not fit within the scope of this article. However, for context, it is useful to provide some substantive comments and outline the follow-up steps of the procedure.

6.1 Consultation phase

The BA procedure requires that stakeholders be consulted. This includes, at a minimum, local residents, airlines, the airport, air traffic control, and businesses located at or near the airport.[76] The consultation phase of the Dutch BA procedure commenced on 15 March 2023 with the publication of a consultation document,[77] which forms the basis for the following observations. Interested parties were invited to submit views and alternative plans until 15 June.

Although the EU Noise Regulation allows some flexibility to adapt the BA to the specific characteristics of each airport and national legal context, the existence of a noise problem must first be established, and then defined on the basis of objective and measurable criteria. The associated objective must aim to resolve the identified problem. Thus far, the Ministry of I&W has not adhered to these basic principles. By announcing the intention to cease anticipatory enforcement and abandon the draft-ATD without offering a viable alternative, the government is effectively creating a problem whose sole apparent purpose is to justify capacity reduction. The selected target bears no meaningful relationship to the actual problem, and is set so high—and for such a near-term horizon—that it can only be achieved through short-term contraction. As such, the targed is disproportionate.[78]

The measures under consideration focused solely on a capacity reduction to 440,000 AMs. First, an operating restriction should only be introduced as a measure of last resort, and must not serve as the default starting point. In addition, several of the proposed combinations of measures exceed what is necessary to achieve the stated objective,[79] thereby violating the proportionality requirement inherent in the BA procedure.[80] It would have been reasonable to assess alternative capacity levels as part of the analysis.

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76. EU Noise Regulation, Article 6(2)(d).
77. Consultation Document Balanced Approach for Schiphol, March 2023, hereinafter "Consultation Document".
78. Consultation document, section 4.3 at p. 25.
79. Ibid., p. 38.
80. EU Noise Regulation, Article 5(6).

The announcement of a new standards-based system, to be developed by 2027 and based on boundary values for noise and emissions, while taking 440,000 AMs as the baseline, suggests a predetermined outcome. This points to a targeted methodology rather than an objective and balanced process in line with the BA framework. Other foreseeable developments—such as the planned airspace redesign, which aims to improve routing and distribution across four approach corridors and facilitate the less disruptive Continuous Descent Approach (CDA)—also affect the degree of (serious) noise nuisance experienced by local residents. Yet these factors are not accounted for due to the chosen timeline and methodological approach.

6.2 Follow-up process

Following the completion of the consultation phase, the submitted views must be assessed in order to arrive at a well-reasoned decision on the appropriate package of measures. A substantiated decision to impose an operating restriction must be notified to the other EU Member States and the European Commission at least eight months prior to determining the airport capacity to which the restriction will apply.[81] In his letter of 1 September 2023, the Minister of Infrastructure and Water Management announced that the outcome of the Balanced Approach procedure—452,000 AMs instead of 440,000—will now be notified, to meet the timeline for setting airport capacity by November 2024.[82]

The European Commission may, either on its own initiative or at the request of another Member State, review the procedure for introducing an operating restriction. The Commission has confirmed that such a review will take place.[83] However, the EU Noise Regulation does not attach formal consequences to non-compliance with procedural requirements. The Member State is merely required to examine the Commission's notification on the matter and to indicate its intentions prior to adopting the restriction.[84] That said, given the significant impact and potential precedent-setting nature of the case, it is not inconceivable that the Commission will broaden the scope of its review and adopt a more expansive interpretation of its role. If, following the Commission's assessment, the competent authority ultimately decides to proceed with the restriction, the Regulation provides that "appeal against operating restrictions to an appeal body other than

81. EU Noise Regulation, Article 8(1) and (2), the six-month notification period ends no later than two months before the determination of slot coordination parameters/airport capacity.
82. Letter from the Minister of Infrastructure and the Environment dated 1 September 2023 (Parliamentary Papers II 2022/23, 29665, no 481).
83. Aviation Week, "At Schiphol, Airlines' Worst Fears Are Getting Real", 18 September 2023.
84. EU Noise Regulation, Article 8(3).

the authority that adopted the challenged restriction".[85] It is highly likely that this option will be exercised, leaving the end of the shrinkage saga still far from sight.

7. Concluding remarks

The noise issue at Schiphol has a long and complex history, in which the State—particularly the Ministry of I&W—alongside stakeholders including local residents and the aviation sector, has sought joint solutions to address noise disturbance.

Over the years, various legal and policy measures have been introduced, but in 2022, the Ministry suddenly steered this course in a radically new direction. In doing so, the tradition of consensus-based policymaking—the so-called polder model—was notably set aside. The June 2022 decision amounted to nothing less than a ministerial ukase that stirred considerable unrest—and noise. In my view, this measure was, and remains, legally unsound more than a year later.

Given the political controversy, the ongoing proceedings before the Supreme Court, the unprecedented impact on Dutch aviation, and the caretaker status of the government, it is, in my view, both incomprehensible and irresponsible that the Experimental Regulation is being pushed through at short notice. With Schiphol's final reduced capacity declaration submitted in September 2023, a new chapter in the downsizing saga is about to begin—likely giving rise to further litigation, particularly regarding the withdrawal of historically held slots. The pending Supreme Court ruling could yet throw all of this into uncertainty.

Despite the timely notification of the outcome of the Balanced Approach procedure to Brussels, it is highly doubtful that the resulting measures can be implemented as early as November 2024. Given the significance and potential precedent-setting nature of the case, it is entirely possible that the European Commission will extend its review and require additional time. Only then will the Dutch government issue a final decision and incorporate it into Schiphol's capacity declaration. The option to appeal the operating restriction—an opportunity that will almost certainly be taken—will still be available at that stage. The risk of delays in implementing the outcome of the Balanced Approach procedure remains very real.

It is striking that the Netherlands—of all places—is failing to achieve a truly 'balanced approach': a kind of internationally and Europeanly grounded polder

85. EU Noise Regulation, Article 4(1).

model. Instead, we find ourselves entangled in policy "tracks," legal battles over an Experimental Scheme, a rushed BA process, and yet another attempt at redefining policy. Could this not have been done differently—more integrally? It remains to be seen which track, and which one first, will reach the finish line. One thing is certain: the battle over Schiphol's capacity reduction is far from over.

Challenging the 'Balanced Approach to Aircraft Noise Management' Principle

Will the Dutch Approach Stand or Will the Principle Prevail?

Published in *Air and Space Law* 49, Issue 1 (2024), pp. 1-33.

Abstract

In order to find a new balance between economic considerations and a healthy living environment, the Dutch government attempts to limit capacity at Schiphol Airport. Three 'tracks' are devised to effectuate its decision designed to reduce capacity, with the first two exclusively related to noise-related restrictions on the number of aircraft movements. Introducing such noise-related operating restrictions at airports requires a "Balanced Approach (BA) to aircraft noise management," as international and European law prescribes. Both tracks pursued by the government of the Netherlands are heavily disputed for not complying with the international BA principle and the Balanced Approach Regulation of the European Union. In the 1,5 years since the initial announcement, the Dutch approach to the BA has gained much international attention, and developments have followed one another in quick succession. This article attempts to provide a comprehensive overview of the developments that have been and are taking place and to put the BA in a broader, international context. The article will first study the BA concept and conditions at the international level (section 2) and how these have been transposed in and supplemented by the noise regime under EU law (section 3). The way the BA procedure in the present case is being conducted in the Netherlands and the results that have been notified to the EU Commission are then analysed against this background (section 4). While the EU Commission reviews the Dutch BA procedure, and questions about its enforcement powers arise, the last part places noise-related operating restrictions in the broader context of the EU internal air transport market (section 5) and international obligations vis-à-vis third States (section 6).

Keywords: Balanced Approach, Aircraft Noise Management, Noise Problem, Noise Measures, Noise-related Operating Restrictions, Capacity Reduction Airport, EU Balanced Approach Regulation, EU Environmental Noise Directive, Dutch Balanced Approach Procedure 2023, Traffic Rights, EU Internal Market, Environmental Measures.

1. INTRODUCTION

In June 2022, the Dutch Minister for Infrastructure and Water Management announced, to much surprise, the decision to reduce capacity at Amsterdam Airport Schiphol (AAS, or Schiphol) from 500,000 to 440,000 flight movements per year.[1] Having taken office earlier that year, the government is breaking with the trend to focus on growth. It has taken on the view that capacity at Schiphol should instead be based on a trade-off between economic considerations, such as network quality and the maintenance of Schiphol's hub function, but also a healthy living environment, noise reduction and other climate considerations. The approach, however, appears less balanced.

The Dutch government initiated a three-tier process to effectuate, or perhaps even attempt to impose, this policy change; the first two intermediate steps are exclusively noise-related restrictions on the number of flight movements at Schiphol aimed to reduce capacity first to 460,000 movements and further down in 2024. The third 'track' is developing a new system based on standards and values for limiting noise *and* emissions by 2027. This distinction is significant because rules at the level of the International Civil Aviation Organisation (ICAO) and European Union (EU) prescribe a Balanced Approach ("BA") for managing aircraft noise and introducing noise-related operating restrictions at airports.

The three tracks pursued in the Netherlands have many facets, each leading to more discussions and potentially straying off this article's course. To structure and restrict its scope, the first part will articulate the application of the BA for aircraft noise management, first in general terms, on both the level of ICAO and the EU and with particular attention to operating restrictions, followed by the Dutch government's approach in the second track. To understand the broader legal framework of the BA and place it in an international context, the second part can draw from the experiences in the aftermath of the first track, which has been heavily disputed for trying to circumvent the BA.[2] Because the envisaged capacity reduction to 460,000 flight movements that was set in motion for the summer season of 2024 has led to further international outrage, the Dutch government announced on 14 November

1. See, Hoofdlijnenbrief Schiphol ("Schiphol Outline Letter"), 24 June 2022, IENW/BSK-2022/156292.
2. An overview and commentary of the court proceedings on the experimental scheme by the author will be available (in Dutch) in *Tijdschrift Vervoer en Recht*, "De aanloop naar de Balanced Approach in Nederland: niet polderen voor een 'evenwichtige aanpak' maar procederen over krimp Schiphol" (The run-up to the Balanced Approach in the Netherlands: from consensus decision-making to litigating Schiphol shrinkage" translation provided by author)" Issue 6 of 2023.

2023 to suspend its measures under this track and focus on the BA of track two.[3] These events highlight the importance of the international dimension and warrant an analysis of the operating restrictions in light of the EU's internal market and obligations under international agreements with other States.

The Dutch application of the BA is unique, as are the developments surrounding it and its perceived consequences. Because the foundations of the BA as an international principle are tested for the first time, the Dutch case provides a perfect case to study the Balanced Approach in practice. Will the Dutch approach stand, or will the BA principle prevail?[4]

2. INTERNATIONAL FRAMEWORK FOR MANAGEMENT OF AIRCRAFT NOISE

2.1 State responsibilities under ICAO's Balanced Approach

ICAO's BA to aircraft noise management is not a detailed procedure but reflects an internationally agreed-upon concept to manage noise problems at individual airports. The concept was adopted by the 33rd ICAO Assembly in 2001 and has been reaffirmed repeatedly since.[5] Recognizing that solutions to noise problems need to be tailored to the specific situation at an airport, requiring an "airport-by-airport approach" and that States adopt diverging policies on noise management, ICAO's BA identifies the principal elements that the approach should consist of and the relationship between them, but leaves "the process for implementation and for decisions between [these] elements" to the Member States.[6]

Thus, the responsibility for implementing the BA is for individual States. Still, they should do so "with due regard to ICAO rules and policies" and "take full account of ICAO guidance, relevant legal obligations, existing agreements, current laws and established policies."[7] The latter is specifically relevant to traffic rights, which will be alluded to in sections 5 and 6.

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3. See, Stand van zaken Hoofdlijnenbesluit Schiphol, 14 November 2023, IENW/BSK-2023/345691.
4. This article takes account of developments and announcements up to and including 19 November 2023.
5. Assembly Resolution A33-7: Consolidated statement of continuing ICAO policies and practices related to environmental protection, Appendix C.
6. Ibid.
7. Ibid.

2.2 The Balanced Approach conditions

2.2.1 SARPs in ICAO's Annex 16

The Standards and Recommended Practices for the Balanced Approach to noise management are found in Annex 16, Volume 1, Part V, and require States to ensure that:[8]

> "The balanced approach to noise management consists of *identifying the noise problem at an airport* and then *analysing the various measures available to reduce noise* through the exploration of *four principal elements*, namely reduction at source, land-use planning and management, noise abatement operational procedures and operating restrictions, with the goal of addressing the noise problem in the *most cost-effective manner*." (*italics added*)

The Standard concisely and clearly identifies two incremental parts of the BA process: first, the identification of the noise problem at an airport, *and then*, followed by analysing various measures to reduce noise to solve the noise problem, the type of measures that should be considered and in what manner. ICAO has developed guidance material on these matters.[9]

Among other things, ICAO's Guidance Material stipulates that a transparent process provides for consultation with stakeholders, which should be clearly defined, at different steps of the BA procedure. Stakeholders include air carriers, airport authorities, States, nearby residential and business communities, and private and commercial entities that rely upon air transport. Further guidance on the essential steps and conditions for conducting the BA, namely, the assessment of the noise problem, the setting of a noise objective and the hierarchical position of operational restrictions as a last resort, will be analysed in the following sections.

2.2.2 Identifying the noise problem

A fundamental part of any Balanced Approach consists in identifying whether there is a noise problem at an airport. An *actual* noise problem exists where there is a difference between the assessed current and future noise situation on the one hand and the defined noise objective to be achieved.[10]

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8. On the binding force of SARPs, see, L. Weber, *International Civil Aviation Organization – An Introduction*, (2007); M. Milde, *International Air Law and ICAO*, 71–73 (2016).
9. ICAO Guidance Material on the Balanced Approach to Aircraft Noise Management (Doc 9829)
10. ICAO Guidance Material, Chapter 3.

Although noise annoyance is subjective, the assessment of noise levels on and around the airport for the purposes of a BA "should be based on objective and measurable criteria."[11] Many States continuously measure noise around airports for monitoring purposes using, for instance, 'noise contours' and noise indexes.

To assess the development of noise around an airport, a BA perceives from the basis of the identification of a "baseline" scenario of the noise situation as it currently exists, considering "existing noise controls and current operating and land-use regulations" and the projection of that what "is expected to occur based on existing plans". The baseline "should be assessed over a projected time period taking into account what is known about the fleet mix and fleet noise performance over that time period [..]," which "should be sufficiently long to take into account changes in the fleet mix, the longer-term nature of airport planning and other factors."[12]

2.2.3 The setting of the noise objective

ICAO does not provide guidance or requirements for setting a noise objective, recognising that States and their airports "may have different standards and policies regarding what constitutes a noise problem, how these may be assessed and what objectives are sought in airport-related noise programmes. "[13] The EU applies a Noise Abatement Objective (NOA) as to which see section 3.2.2.

Under ICAO's BA, a noise objective should be "identified and defined" to assess whether the evolution of the baseline noise scenario will satisfy the objective. It is "appropriate" to compare the baseline scenario with the noise objective to determine the existence, extent and characterisation of the noise problem *before* reviewing potential measures.[14]

2.2.4 Operating restrictions

Once a noise problem and noise objective have been identified, the ICAO BA encompasses four types of measures that can be considered. The first three, namely, reduction of noise at source through noise certification of an airline's fleet,[15] land-use planning and management, and noise-related operational procedures fall outside the scope of this legal analysis. An operating restriction is "any noise-related action that limits or reduces an aircraft's access to an airport" other than based

11. Assembly Resolution A39-1, Appendix C.
12. ICAO Guidance Material, section 4.1.6
13. Ibid., section 3.1.2.
14. Ibid., section 3.1.
15. Annex 16, Volume 1 to the Chicago Convention set noise limits for aircraft, categorizing them pursuant to increasing technology standards in Chapters 2, 3, 4 and 14.

on certification. ICAO Contracting States have agreed that operating restrictions "should not be applied as a first resort, but only after consideration of the benefits gained from other elements [of the BA]."[16]

The SARPs, Assembly Resolutions and ICAO guidance material on the Balanced Approach generally concern *limiting* or *restricting* operations of aircraft in the context of the growth of air traffic, creating a noise problem as compared to the current noise situation, for instance, when concerns arise on the "*expansion of existing airports* or *construction of new airports*." [17] When discussing local noise-related *operating restrictions* at airports, States have been primarily concerned with operating restrictions on the access of aircraft which comply with the noise certification standards, suggesting that there is no consensus on restricting capacity.[18]

A *reduction* of an airport's capacity is only marginally referenced in ICAO's Guidance Material on the BA; the category of "progressive restrictions" provides for a *gradual decrease* in the maximum level of traffic or noise over a time period of time before reaching a final level.[19] For instance, under such systems, using cap rules or noise quotas, "the use of quieter aircraft becomes necessary just to maintain a given number of slots."[20]

2.3 Enforcement of ICAO's noise measures

ICAO does not possess genuine enforcement powers. Its contracting States must take care of enforcement in their national legislations and through Air Services Agreements (ASAs).[21] The US has always been very vigilant about ensuring that States respect internationally agreed standards. This attitude has been evidenced in a noise-related dispute between the US and the EU, in which the US argued that the EU had not complied with the internationally agreed SARPs laid down in ICAO Annex 16. EC Regulation 925/1997 required foreign operators, including US airlines, to provide their aircraft's engines with 'hushkits' devices that diminish aircraft noise.[22] These aircraft were marginally compliant with the Chapter 3 certification standards of ICAO

16. Resolution A39-1: Consolidated statement of continuing ICAO policies and practices related to environmental protection – General provisions, noise and local air quality, Appendix E
17. Ibid., Appendix C
18. Ibid., Appendix E, on local noise-related *operating restrictions* at airports, deals with restricting access of *aircraft* which comply with the noise certification standards (*italics added*).
19. ICAO Guidance Material, section 7.2.1.
20. Ibid., section 7.3.3.
21. On enforcement of ICAO SARPs, see, M. Milde, International Air Law and ICAO, 185–195 (2016); see also J. Huang, *Aviation Safety and ICAO*, 69-71 (PhD Leiden, 2009).
22. EC Regulation 925/19997, also referred to as the 'hushkit regulation.'

Annex 16, Volume I. After protracted negotiations between the US and the EU, the EU withdrew Regulation 925/1997. Instead, the European Commission published Directive 2002/30/EC allowing EU States to introduce operating restrictions on aircraft that are marginally compliant with Chapter 3, provided that they do so in accordance with the BA set out in ICAO Assembly Resolutions A33-7 and 35-5.

States parties to ICAO are bound by SARPs unless they have notified ICAO that they find "it impracticable to comply … with any such international standard or procedure."[23] Since the Netherlands has not notified ICAO of a deviation of the BA Standard, it is bound by it. In addition, the EU, the Netherlands, and the other EU States are subject to Article 15(4) of the EU-US Agreement on Air Transport of 2007, as amended in 2010, which reads:

> "The Parties reaffirm the commitment of Member States and the United States to apply the balanced approach principle."

The question is, therefore, whether the Netherlands will respect ICAO's BA, with particular reference to such conditions as the proportionality of the noise objective and the proposed measures, their cost-effectiveness, apply operating restrictions only as a last resort and the involvement of stakeholders, as defined above, before adopting a decision to implement noise-related measures. If, in this case, the US finds it has not, the Netherlands and possibly the EU Commission may be requested in the Joint Committee established under the EU-US Agreement to clarify its position. On Monday, 13 November 2023, a special Joint Committee meeting convened in Brussels for this purpose. The position of the US is further alluded to in section 6.

Other avenues for enforcement are litigation, probably in the Netherlands, arbitration under the mentioned EU-US Agreement, proceedings under the Chicago Convention (1944),[24] and before the Department of Transportation (DOT) under the International Air Transportation Fair Competitive Practices Act (IATFCPA) of 1974, as amended.[25]

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23. See, Art. 38 of the Chicago Convention on international civil aviation. The Netherlands, and 192 other States, are parties to this convention, as well as to ICAO.
24. Article 84 - *Settlement of disputes*"If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.
25. 49 U.S.C. 41310 pursuant to which DOT may take action in response to anti-competitive, discriminatory, predatory or unjustifiable activities by a foreign government or foreign airlines against a U.S. airline. The DOT may take such action upon a complaint by a U.S. airline or on its own initiative.

2.4 Concluding remarks on the International Framework for Management of Aircraft Noise

As internationally agreed upon, the "Balanced Approach" concept provides global standards for noise management at individual airports. In this context, ICAO SARPs on aircraft noise must be observed in conjunction with norms laid down in the Standard and related materials, including ICAO Assembly Resolutions. These norms are formulated in general terms, leaving ICAO States ways and means to implement these norms, provided the BA concept is followed.

The BA Standard concisely and clearly identifies two incremental parts of the BA process: first, the identification of the noise problem, *and then*, followed by analysing various measures to reduce noise to solve the noise problem and the type of measures that can be considered. ICAO has developed guidance material on establishing a noise problem, the difference between the assessed current and future noise situation and the noise objective, which should be objectively defined and measurable. Measures should be weighed for their cost-effectiveness, and operating restrictions only be considered a last resort.

The Netherlands has not notified ICAO of a deviation from the BA Standard and is thus bound by it. Since ICAO cannot oblige States to follow its norms, including those pertaining to the BA, ICAO States must do so and have done so. The US is known for strictly requesting its aviation partners adhere to the agreed provisions, including those on adopting the BA, whose international dimension is dealt with in more detail in the second part of this article.

3. THE EU LEGISLATION ON AIRCRAFT NOISE

3.1 A brief overview of the EU regime on aircraft noise

In addition to the EU's legislation regulating noise at the source of aircraft,[26] the EU's policy on the management of noise from aircraft at major EU airports is governed by the Environmental Noise Directive 2002/49/EC (END),[27] and Balanced Approach Regulation 598/2004 (BAR).[28] Reducing noise pollution falls under the EU Environmental Action Programmes (EAP).[29]

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26. Directive 89/629/EEC on the limitation of noise emission from civil subsonic jet aeroplanes.
27. Directive 2002/49/EC relating to the assessment and management of environmental noise.
28. Regulation (EU) No 598/2014 on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Union airports within a Balanced Approach.
29. Decision (EU) 2022/59 on a General Union Environment Action Programme to 2030.

The END concerns the assessment and management of environmental noise emitted by major sources, including aircraft, with the aim to define "a common approach" intended to avoid, prevent and reduce the harmful effects of environmental noise.[30] EU States are required to report their commitment to assessing and managing noise produced by aircraft based on "noise maps" and "action plans" based on technical standards.[31] The END does not set binding EU-wide quality levels or targets for noise and leaves this to the Member States.[32] Limit values can be established by national legislation or environmental permit and/or planning conditions, but these must be incorporated in the action plans, including current and planned measures aimed at noise mitigation. The legal framework for noise in the Netherlands and the Dutch BA procedure will be dealt with in section 4.

3.2 EU Balanced Approach Regulation (BAR)

3.2.1 Transposition of ICAO's BA

The EU transposed ICAO's Balanced Approach concept via EU Regulation 598/2014 (BAR), reaffirming that the BA "should remain the foundation of noise regulation for aviation as a global industry" and with the view that the BAR "should substantially lessen the risk of international disputes in the event of third-country carriers being affected by noise-related operating restrictions."[33] The BAR has 'direct effect', meaning it applies directly in each Member State without transposition in national law.[34] Specifications of the BAR will be analysed below.

3.2.2 The definition of a noise problem and the Noise Abatement Objective (NAO)

The BAR requires that the noise situation at a Community airport is assessed in accordance with the END.[35] It also links the definition of the noise problem and the noise abatement objective (NAO) to the Member State's action plans under the END,[36] which are "designed to manage, within their territories, *noise issues* and effects, including noise reduction". At a minimum, it must include "an evaluation of

30. END, Art. 1(1).
31. END, Art. 5, and Directive (EU) 2015/996 of 19 May 2015 establishing common noise assessment methods according to Directive 2002/49/EC of the European Parliament and of the Council, with reference to the European Civil Aviation Conference Report Doc 29 (ECAC Doc 29).
32. Report from the commission, on the implementation of the Environmental Noise Directive in accordance with Article 11 of Directive 2002/49/EC, COM(2023) 139 final, under 3.
33. BAR, Recital 3.
34. See, ECJ decision of 5 February 1963 in Case No. 26/62 *Van Gend en Loos*; see also, for instance: M. Horspool & M. Humphreys, *European Union Law* 171–175 (2006).
35. BAR, Art 5(1).
36. BAR, Art 5(2) jo END. Art. 8 and Annex V.

the estimated number of people exposed to noise, *identification of problems* and *situations that need to be improved*" (italics added).[37] The BAR does not set rules on how a noise problem is to be defined, nor on establishing an NAO, as it assumes that this flows from the noise assessment process under the END:[38]

> "While noise assessments should be carried out on a regular basis in accordance with Directive 2002/49/EC, such assessments should only lead to *additional* noise abatement measures *if the current combination of noise mitigating measures does not achieve the noise abatement objectives*, taking into account expected airport development" (*italics added*)

This implies that establishing an NAO must be a long-term process and set in advance for it to be tested against the "current combination of noise mitigation measures" during regular noise assessments under the END. Only if such an assessment reveals that the NAO will not be reached, thus creating a noise problem, for which "*new* operating restriction measures may be required to address the noise problem," should additional measures be considered pursuant to a BA procedure, using the method, indicators and information in Annex I of the BAR.[39]

3.2.3 Consideration of measures for noise-related actions under the BAR

The BAR defines noise-related actions as "any measure that affects the noise climate around airports, for which the principles of the Balanced Approach apply [..]."[40] In line with ICAO's Balanced Approach, under the BAR, when Member States take noise-related action, they must consider four types of measures to determine the most cost-effective approach:[41]

(a) the foreseeable effect of a reduction of aircraft noise at source;

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37. END, Articles 3(t) and 8 and Annex V, under 1.
38. BAR, Recital 9, and Art 5.
39. BAR, Art 6(2). This view is supported by the requirements of Annex 1, which include under the *current inventory*, "a description of any environmental objectives for the airport and the national context. This will include a description of the aircraft noise abatement objectives for the airport" and "a description of the existing and planned measures to manage aircraft noise." It then requires a 'forecast without *new* measures,' i.e., a projection of the baseline scenario, thus taking into account the current measures and their effect towards the NOA as previously established. Such current measures explicitly include, amongst others, approach and take-off forecasts, projected future traffic mix and a detailed study of the noise impact on the surrounding area caused by modifying flight paths and approach and take-off routes.
40. BAR, Art 2(5).
41. BAR, Art 5(3).

(b) land-use planning and management;
(c) noise abatement operational procedures;
(d) not applying operating restrictions as a first resort, but only after consideration of the other measures of the Balanced Approach.

An operating restriction is defined as "a noise-related action that limits access to or reduces the operational capacity of an airport [..]."[42] Operating restrictions should only be applied as a last resort because of the possibility of "distorting competition or hampering the overall efficiency of the Union aviation network."[43] It may also lead to "exporting" noise problems to other Member States when traffic flows divert to other airports.[44] In line with general EU law principles, new measures or a combination of measures "shall not be more restrictive than necessary" (principle of proportionality) to achieve the NOA set for that airport and "shall be non-discriminatory."[45]

3.2.4 Procedural requirements of the BAR

The BAR requires stakeholders to be consulted. The consultation process must be organised in a "timely and substantive manner, ensuring openness and transparency as regards data and computation methodologies."[46] Interested parties, including at least local residents, representatives of businesses at or near the airport, the airport operator, airlines, air navigation service provider and the slot coordinator should have three months to submit comments.[47]

After completion of the consultation phase, the views submitted must be assessed and weighed to arrive at a balanced and comprehensive package of measures. If these measures include an operating restriction, the other EU Member States and the EU Commission must be given a six months' notice, ending at least two months, i.e. eight months in total, before the airport capacity to which the restriction applies is determined in the relevant scheduling period.[48] These periods refer to the start of the summer season as per April and the winter season as per November, as defined by the International Air Transport Association (IATA).

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42. BAR, Art 2(6).
43. BAR, Recital 6.
44. See, for instance, https://www.luchtvaartnieuws.nl/nieuws/categorie/3/airports/dusseldorf-airport-verwacht-dit-jaar-bijna-2-miljoen-nederlandse-passagiers-parking-vol-gele (last visited 19 November 2023).
45. BAR. Art 5(6).
46. BAR, Artikel 6, lid 2(d).
47. Ibid.
48. BAR, Article 8(1), referring to "the determination of the slot coordination parameters as defined in point (m) of Article 2 of Council Regulation (EEC) No 95/93" (the Slots Regulation).

The notification must be accompanied by a written report explaining the reason for introducing the operating restriction, the NOA, the assessment of measures and the evaluation of their cost-effectiveness, "including, where relevant, their cross-border impact."[49]

The EU Commission may, on its own initiative or at the request of another Member State, review the procedure for introducing an operating restriction. If it concludes that the correct procedure has not been followed, the BAR only prescribes that the Commission will *notifiy* the Member State of its finding. The BAR does not explicitly attach any consequences for not following the correct procedures; it only requires the Member State to examine the Commission's notification and inform it about its intentions before introducing the operating restriction.[50]

However, in view of the Dutch BA, given the potential impact of the operation restriction on the freedom to provide services, both in the internal air transport market as governed by EU Regulation 1008/2008 on *common rules for the operation of air services in the Community* and possible precedent-setting effect, as well as under Open Skies agreements with third states, the Commission can also check compliance and conformity with EU law and general principles, and where necessary, take legal action against the Member State, by launching a formal infringement procedure.[51] This dimension of the BA will be further discussed in sections 5 and 6.

Finally, if, after the notification phase and the Commission's assessment, the government of the Member State in question makes a definitive decision to proceed with an operating restriction. The BAR stipulates that there must be the possibility "to appeal against operating restrictions [..] before an appeal body other than the authority that adopted the contested restriction, in accordance with national legislation and procedures."[52]

3.3 Limited Application of the Balanced Approach in the EU

3.3.1 Noise-related actions without explicitly applying the BAR

A study on airport noise in the EU Member States of June 2022 confirmed that noise is considered an issue at many of the major EU airports.[53] However, there is

49. BAR, Article 8(2).
50. BAR, Article 8(3).
51. Article 25 of the Treaty on the Functioning of the European Union (TFEU).
52. BAR, Art. 4(1).
53. Study on Airport Noise Reduction, June 2022, section 3.4.

no indication of a systemic approach to the application of the BAR; even where national limit values exist, the noise problem is often not clearly defined by the competent authorities, and the identification of an NAO or strategy to noise abatement is lacking.[54] Noise-related actions are often linked to pre-existing environmental permits or planning conditions and dealt with under the national noise-management framework. The results of an examination of these noise-related actions are then "reported" through the END process.[55]

A range of noise-related actions has been taken or considered in the EU since the introduction of the Balanced Approach in 2002.[56] Several studies identify measures and case studies where such noise-related actions under different BA pillars were introduced at EU airports without going through an explicit BA procedure.[57] The selection of noise-related actions was often the result of stakeholder dialogue and compromise and/or benchmarking with other airports.[58] Only some examples exist where authorities initiated a formal BA procedure because some interpret the BAR as only applicable when operating restrictions are considered. [59]

3.3.2 Dublin Airport

In Ireland, the Airport Noise Competent Authority (ACNA)[60] applied the BA, as implemented in the Aircraft Noise Act,[61] because the Dublin Airport Authority (DAA) wished to replace two existing operating restrictions to provide for the airport's growth beyond 2025. The ACNA confirmed that DAA's planning application would create a noise problem when referenced against the situation that would otherwise pertain.[62] It then extensively researched an appropriate NOA within the BA context,[63] considering legislative requirements,[64] and core principles it had

54. Ibid, sections 3.4, 4.1.2 and 4.1.4.
55. Study, under 4.1.5.
56. Directive 2002/30/EC, the predecessor of the BAR, also prescribed a BA pursuant to the adoption of the ICAO balanced approach in 2001.
57. See, Aviation Noise Impact Management through Novel Approaches (ANIMA) Research, Deliverable D2.1 - *Pan-European overview of Existing Knowledge and Implementation of Noise Reduction Strategies* of 2018, and D2.5, *Critical review of Balanced Approach Implementation across EU Member States,* of 2019.
58. Study, under 4.1.5.
59. Ibid, section 3.4 at page 54, some authorities interpret the BAR only applicable when operating restrictions are considered of which few have been established since the introduction of the BAR.
60. See, https://www.fingal.ie/aircraftnoiseca (last visited 19 November 2023).
61. Aircraft Noise (Dublin Airport) Regulation Act of 2019 (the Aircraft Noise Act).
62. Chief Executive Order ref. ANCA/002/2021, dated 10 February 2021.
63. ANCA, Noise Abatement Objective Report, November 2021.
64. Ibid., section 5, derived from BAR, Recital 2 and Art. 1, END Art. 1 and ICAO Guidance material.

identified.[65] Having regard to this legislative and policy context, ANCA set the high-level objective for the NAO at Dublin Airport as follows:

> "Limit and reduce the long-term adverse effects of aircraft noise on health and quality of life, particularly at night, as part of the sustainable development of Dublin Airport."

In addition, the ANCA formulated expected outcomes to be achieved through this NAO; the number of people highly sleep disturbed and highly annoyed shall be reduced in 2030 by 30%, in 2035 by 40% and in 2040 by 50% compared to 2019.[66] The number of people exposed to aircraft noise above 55 dB L_{Night} and 65 dB L_{den} should be reduced compared to 2019.

The ANCA performed noise and environmental assessments,[67] held public consultations, and advised the planning authority accordingly.[68] The proposed measures within the "operating restrictions" category concerned shortening the night curfew by two hours. On 8 August 2022, the application received the green light, but an appeal was lodged. A decision is still pending.[69]

3.3.3 The United Kingdom (UK)

Applying a BA procedure similar to the BAR,[70] the UK government sets night-time operating restrictions at Heathrow, Gatwick, and Stansted at regular intervals. For the procedures conducted in 2017 and 2021, [71] the setting of the noise objective was part of the consultation process and was ultimately formulated as follows:

> "Limit or reduce the number of people significantly affected by aircraft noise at night, including through encouraging the use of quieter aircraft, while maintaining the existing benefits of night flights".

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65. Ibid., section 6.3.
66. Taking into consideration targets of the EU Environmental Action Plan, and standards of the WHO Environmental Noise Guidelines for the European Region 2018, as adopted by Directive 2020/367.
67. Overview at https://www.fingal.ie/aircraftnoiseca/documents-f20a0668 (last visited 19 November 2023).
68. ANCA, Regulatory Decision Report, 20 June 2022.
69. See, https://planning.agileapplications.ie/fingal/application-details/88548 (last visited 19 November 2023).
70. The Airports (Noise-related Operating Restrictions) (England and Wales) Regulations 2018.
71. DfT, Night Flight Restrictions at Heathrow, Gatwick and Stansted, Decision Document, July 2017 & 2021.

Achievement of the objective is measured against; the area of and the number of people in a specific night contour, sleep disturbance associated with night flights, the average aircraft noise using noise Quota Counts and the number of movements in the night quota period.[72]

As part of setting the regime beyond October 2025, consultations ran between 27 March and 9 May 2023 and included defining an NAO. To frame the consultation, the government published its revised overarching aviation noise policy statement: "The impact of aviation noise must be mitigated *as much as is practicable and realistic* to do so, limiting, and *where possible* reducing, the total adverse impacts on health and quality of life from aviation noise." (*italics added*).[73]

3.4 Concluding remarks on EU Legislation on Aircraft Noise

The EU's BAR is far more specific than ICAO's BA. Coupled with the EU Environmental Noise Directive, it provides a mechanism and tools for setting a noise problem and noise abetment objective. There can be no doubt about the EU BAR's binding force,[74] whereas the EU Commission must enforce its provisions. The BA is a concept for continuously managing noise problems at airports. In essence, comprehensive noise management requires the systematic application of measures under one of the four BA pillars, informed by effective noise monitoring. In that process, stakeholders must be involved through consultations.

Upon notification, the EU Commission may, on its own initiative or at the request of another Member State, review the procedure for introducing an operating restriction. Although not explicitly provided for in the BAR, the Commission can also check compliance and conformity with EU law and general principles when examining any operating restrictions. The possibility of, and reasons for, enforcement will be further discussed in section 6.

In practice, a wide range of noise-related actions have been adopted at EU airports. However, such noise actions have not always explicitly referred to the BA or the BAR because they did not concern *operating restrictions*. Very few examples exist where a BA under the BAR has explicitly been conducted. The cases examined above pertain to noise problems due to the airport's expansion plans or night-time

72. Ibid.

73. See,https://www.gov.uk/government/publications/aviation-noise-policy-statement/overarching-aviation-noise-policy (last visited 19 November 2023).

74. In case of conflict between EU law and national law, EU law prevails, as stated by the CJEU, to begin with, in its decision of decisions of 5 February 1963 in Case 26/62 *Van Gend en Loos* and of 15 July 1964 in Case 6/64, *Costa* v. *Enel*. This hierarchical order is known as the *supremacy of EU law*.

restrictions, the latter having a special position in the noise nuisance context. Until now, the BA has never been used to reduce airport capacity.

4. MANAGEMENT OF AIRCRAFT NOISE IN THE NETHERLANDS AND THE BA OF 2023

4.1 Aircraft noise in Dutch law

The END has been implemented into Dutch law via the Dutch Aviation Act (*Wet Luchtvaart*)[75] and the Aviation Environmental Noise Regulation (*Regeling omgevingslawaai luchtvaart*). The latest noise map for Schiphol was published in 2021.[76] The last environmental noise action plan for Schiphol dates from 2018.[77] A new action plan is currently being developed.

There are no binding limit levels for aircraft noise at airports in Dutch legal acts. Noise value limits for Schiphol Airport are instead imposed through, and enshrined within, the framework of the Schiphol Airport Traffic Decree (*Luchthavenverkeersbesluit*, or LVB). The "equivalence criteria" (*gelijkwaardigheidscriteria*) require that every new LVB must offer an equal or better level of protection.[78] The current LVB dates from 2008 and uses noise impact limits on fixed enforcement points. This system proved to be inflexible and complex to enforce.

Since 2010, a new system based on strict preferential runway has been tested and applied at Schiphol.[79] The new system was to be implemented in a new LVB, which required, among other things, a new environmental permit for the airport. In the meantime, the system was provisionally applied through "anticipatory non-enforcement" if exceeding the legally binding noise limits of the fixed enforcement points was the result of strict preferential runway use. Due to political and societal developments, the system was never incorporated into a new legally binding LVB. [80]

75. Dutch Aviation Act (Wet Luchtvaart), Title 8A.4.
76. Noise map Schiphol airport (Geluidsbelastingkaarten luchthaven Schiphol) 2021, available at: https://www.rijksoverheid.nl/onderwerpen/geluidsoverlast/documenten/rapporten/2022/06/30/geluidsbelastingkaarten-luchthaven-schiphol-2021 (last visited: 19 November 2023).
77. Action plan Schiphol 2018-2023 of 29 Augustus 2018 (hereafter: Action plan Schiphol).
78. Dutch Aviation Act (*Wet Luchtvaart*), Art. 8.17(7).
79. i.e. to use, where possible, the runways that cause the least noise nuisance.
80. See for an overview, Action plan Schiphol 2018-2023.

4.2 Recent developments in Dutch noise policies

On 24 June 2022, the new cabinet announced its 'decision' to reduce the number of flight movements at Schiphol to 440,000, following a three-tier approach.[81] First, it planned to stop anticipatory non-enforcement per November 2023 and return to the old system of the LVB 2008. By setting up and applying an experimental scheme, a possibility provided in the Dutch Aviation Act, the government can allow up to 460,000 flight movements per year.[82]

The use of this scheme is heavily disputed for circumventing the BA and has been challenged in court. Several airlines instigated legal proceedings at the District Court of Haarlem in the first instance. The judge made short work of the government's defences that the BAR did not apply and that the measure was, in fact, not a noise-related action but a policy change. The judge concluded that the government's decision led to a capacity reduction, for which the necessary Balanced Approach procedure as required under EU law was not followed. Consequently, the judge blocked the experimental scheme for the 2023 winter season, including future use of schemes to the same extent. [83]

The Dutch government appealed the matter before the Court of Amsterdam, which overturned the judgement in a surprising change of events.[84] Although the BAR does not provide for any exemptions, the Court reasoned, among other things, that it cannot be intended to include a temporary, short-term experiment such as in the case at hand. It also found that the government has the policy freedom to balance interests, including societal interest, and that the BAR cannot be intended to subject a policy change concerning enforcement, at the national level, to a formal and long-lasting n EU procedure. The judgement cleared the way for the government to apply the experimental scheme for the 2024 summer season. [85]

Although the airlines filed for cassation with the Supreme Court, the government implemented the experimental scheme to be applied as of April 2024. Consequent to setting in motion the reduction of Schiphol's capacity to 460,000 movements, it

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81. Schiphol Outline Letter, 24 June 2022.
82. In October 2023, The Netherlands Aerospace Centre (NLR) revealed that the government used old data to calculate the permissible number of flights under the experimental scheme, which data did not include fleet renewal since 2014. If these had been considered, NLR calculated that 487.000 flight movements would be possible. See: NLR, Analyse effect vlootverstilling NRM op basis van GP2023, 1 September 2023.
83. Rechtbank Noord-Holland, 5 April 2023, ECLI:NL:RBNHO:2023:3010.
84. Hof Amsterdam 7 juli 2023, ECLI:NL:GHAMS:2023:1589.
85. For a more detailed commentary on the court proceedings, see article referred to in footnote 2.

became apparent that all airlines operating at Schiphol would have to return slots with historical rights pro-rata for the 2024 summer season.[86] Requests for new slots could not be granted. Faced with the potential consequences and retaliation on the measures in the first reduction phase, the Dutch government has decided to suspend these measures but to continue with the BA procedure under track two. Section 6 will deal with the international follow-up in more detail.

While the battle in court raged on, the Dutch government simultaneously initiated a Balanced Approach procedure as part of the second step of its three-tier approach. Now that the first track has been suspended and the intermediate reduction to 460,000 movements is off the table, the Dutch government still pursues a capacity reduction through the Balanced Approach. The following section will study the conduct of the Dutch BA in light of international requirements and, more specifically, those of the EU's BAR.

4.3 The BA procedure in the Netherlands

4.3.1 The Dutch 'Balanced Approach' vs the BAR

The Dutch government has initiated a Balanced Approach procedure with the aim of measures resulting from that process to take effect by November 2024. The consultation phase of the underlying Dutch BA procedure started on 15 March 2023 with the publication of a Consultation Document.[87] Although the government has meanwhile produced a Notification Document, dated September 2023,[88] since the former is the leading document upon which the stakeholder's consultation is built, it forms the basis for the next part.

In its introduction, the government recognises that since 2006, "a large number of measures have been taken to mitigate noise nuisance in the vicinity of Schiphol based on intensive consultation between stakeholders – a unique approach, internationally."[89] In 2019, Schiphol Airport, in collaboration with other stakeholders, published a supplementary Schiphol Noise Reduction Implementation Plan covering 43 additional measures.[90] Indeed, over the years, various measures have been taken within the different BA pillars without explicitly labelling the process as

86. See, ACNL Policy Rule - Slot allocation in case of exceedance of historic rights, 7 September 2023.
87. Stakeholder Consultation document Balanced Approach procedure for Schiphol, March 2023 (hereafter: Consultation Document).
88. European Commission Notification document Balanced Approach procedure for Schiphol, September 2023 (hereafter: Notification Document).
89. Consultation Document, p.8
90. Parliamentary Paper 31936, no. 646.

such. Studies support this view, according to which the Netherlands is considered amongst the group of "pathfinders" with airports "at the forefront of extensive BA implementation in terms of breadth and depth of their approaches,"[91] and measures at Schiphol are used as examples of effective implementation following the BA concept.[92] Nevertheless, according to the government, despite these attempts to reduce noise nuisance and the use of a quieter fleet, perceived noise nuisance by local residents is still increasing. The Dutch BA procedure aims to set a maximum for the noise nuisance.

4.3.2 A brief analysis of the consultation

The Consultation Document does not define a noise problem other than stating that there is still a "need to reverse the upward trend" in *perceived* noise nuisance; that is, residents' perception that severe noise increases into a concrete noise target for the short term.[93] Perception of noise nuisance does not qualify as an objective criterion, as the perception of noise is subjective per se.

While there is no clear or objective definition of the noise problem, there is neither an objectively defined noise abatement objective (NOA) that can be linked to the solution or remedy of the noise problem. The noise objective was first presented during a technical session in January 2023, well after the announcement of the noise issue in June 2022 in the Schiphol Outline Letter. the Consultation Document sets specific reduction percentages for various categories of groups affected. The objectives of -20 % and -15 % for the day and night, respectively, are remarkably high, whereas no explanation is given for the urgent need to achieve this objective by November 2024.[94] Instead of the noise problem or current NOA being projected against the baseline scenario, taking into consideration current measures, the Dutch BA procedure projects the new NOA against a baseline reference situation in the future, that is, November 2024, thereby effectively bypassing the effect of autonomous and planned fleet renewal and other noise-related actions already conducted or planned for that period.[95]

In total, 23 potential noise abatement measures were identified and analysed. When referencing the analysis to requirements under the BAR, certain proposed combinations of measures result in an "overshoot" where the reduction is (far)

91. ANIMA study, p. 37; as referred to in footnote 57.
92. See ICAO Guidance material and ANIMA studies.
93. Consultation Document, p. 22.
94. Consultation Document, section 4.3 at p. 25.
95. Consultation Document, section 4.2.

more significant than the objective and thus "more restrictive than necessary."[96] Regarding operating restrictions, it exclusively considers a reduction to 440.000 flight movements. Since these should only be considered a last resort and not result in an overshoot, lower capacity reductions should also have been on the agenda.

As part of the consultation, stakeholders were asked to indicate their preferred package. Many respondents submitted alternative measures and plans, the most notable being Schiphol Airport's 8-point plan and the alternative plan submitted by KLM. On the one hand, the airport operator is opting for a quieter, cleaner and better Schiphol and going beyond the measures proposed by the government,[97] on the other hand, KLM's plan will require slightly more time to meet both night and day objectives, but in three years' time will lead to a stronger decline in noise than the plan proposed by the government.[98]

4.3.3 Notification of measures

On 1 September 2023, the responsible Minister announced that the Ministry "made a careful assessment and determined the final combination of measures."[99] The outcome of the BA procedure would, at that time, soon be notified to the EU Commission and other relevant parties to meet the deadline for establishing airport capacity for the November 2024 season.[100]

The assessment concludes, unsurprisingly, that only "a limited number of measures … contribute to achieving the noise objective in the short term", that is, by November 2024. Furthermore, a 'phased realisation' is proposed because not all noise objectives can be reached within this short timeframe. [101] Next to the measures to use quieter aircraft during the nighttime and a reduction of secondary runway use, the first step will cap the number of flight movements at 452,500 annually instead of the anticipated 440,00 flight movements. The number

96. BAR, Art 5(6).
97. See, https://news.schiphol.com/less-hindrance-as-a-result-of-a-curfew-and-banning-the-noisiest-aircraft-and-private-jets/ (last visited: 19 November 2023).
98. See, https://news.klm.com/klm-group-presents-plan-ensuring-greater-reduction-in-night-time-noise/ (last visited: 19 November 2023).
99. Notification Document, Introduction, p. 5.
100. Letter from the Minister of Infrastructure and Water management of 1 September 2023 (Kamerstukken II 2022/23, 29665, nr. 481).
101. Notification Document, Summary, p. 9, ""All this leads to the proposal to maintain the noise objective of minus 20 per cent in the 24-hour period and minus 15 per cent at night, *but to opt for achieving about 15 per cent of this as a first step* (by November 2024) *and achieving the remaining 5 per cent in the 24-hour period in a subsequent phase.*" (italics added).

of movements at night is limited to 28,700. The remainder of the noise objectives, with a potential further reduction, is to be achieved in a subsequent phase.

4.4 Concluding remarks on the Dutch BA of 2023

Although both ICAO's BA concept and the EU's BAR leave room for discretion to States to tailor the BA to the specifics of the airport and local legislation, it is required by international and EU regulations to establish the existence of a noise problem to begin with. In the EU, such a problem is considered where there is a difference between the current noise situation, projected in the future, and a long-term noise objective, taking into consideration current and planned measures. Where a noise problem exists, it must be clearly defined, using objective and measurable criteria, leading to a new NOA for the application of the BA to solve or remedy the noise problem.

The Dutch BA procedure does not adhere to fundamental principles. Instead, it appears to create a noise problem by setting a steep NOA in the near future. The objective and the short timeframe are not proportionate. Some of the proposed measures go beyond what is necessary to achieve the NOA, and the operating restrictions leading to a capacity decrease are not considered a last resort but are part of the starting point of the BA process.

In addition, with the June 2022 announcement to reduce capacity to 440,000 flight movements via the Balanced Approach while at the same time starting the development of a new system to be operational by 2027 based on a maximum of 440.000 flight movements, later dubbed track three, the government appears to create a noise problem to effectuate the desired capacity reduction. It runs counter to the BA principle to allow States to apply such a purpose-driven methodology and design the process in such a way as to achieve a pre-determined outcome.

Having concluded that the Dutch BA did not follow the BAR to the letter, the last part of this article will look at the potential impact of such operation restrictions on the provision of air services, both in the EU and vis-à-vis third States and how the BA and BAR can be enforced.

5. ENVIRONMENTAL MEASURES IN THE CONTEXT OF THE FREEDOM TO PROVDE SERVICES UNDER EU REGULATION 1008/2008

5.1 The Balanced Approach review in a broader perspective

Following the Dutch notification of the BA results to the EU Commission, EU Member States, and relevant third States, it is now up to the EU Commission to review the Dutch BA procedure for compliance with the procedural and substantive conditions of the BAR and assess the final combination of measures with particular attention to the operating restrictions. However, the Commission will also need to consider the impact of operating restrictions of this magnitude on the freedom to provide services in the EU internal air transport market, as established by EU Regulation 1008/2008,[102] and its precedent-setting effect, as well as freedoms under Open Skies agreements with third States, and more specifically, the potentially distortive effect on competition in these markets.

This section will place the assessment to be undertaken by the Commission in the broader context of the EU internal air transport market. It also addresses how such restrictions affect, and should be balanced with, the operation of traffic rights. Section 6 will look at international obligations towards other third States, most notably the US and Canada.

5.2 The relationship between the freedom to provide services, the operation of traffic rights and the availability of airport slots

The above mentioned EU Regulation 1008/2008 removes the barriers to operating traffic rights within the EU internal air transport market.[103] ASAs between EU States regulating the operation of air services between them are superseded.[104] This means that in the EU, subject to the availability of airport slots and absent restrictions caused by safety and environmental concerns, any EU national air carrier possessing an EU Operating Licence can fly anywhere within the internal market.

The number of available slots at an airport is determined based on the airport's capacity, expressed in terms of physical and environmental capacity. In this regard, environmental capacity also refers to the capacity of an airport to accommodate noise produced by aircraft while operating their traffic rights.

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102. EU Regulation 1008/2008 *on common rules for the operation of air services in the Community*.
103. See, Article 15(1) of EU Regulation 1008/2008.
104. See, Art. 15 (2) of EU Regulation 1008/2008.

Airport slots are thus operationally related to the exercise of traffic rights. Still, the availability of slots at specific airports, as such, is not a prerequisite for exercising traffic rights, except for the few cases where this has been explicitly negotiated in an ASA.[105] Nevertheless, operating restrictions resulting in reduced airport capacity may affect other arrangements of ASAs, such as the freedom to provide air services and the non-distortion of competition. This is even more tangible when fewer slots can be distributed to airlines than before, especially where these slots have previously been used and thus have a historical rights claim.

5.3 Restrictions on the freedom to provide air services

An operating restriction, such as the one notified under the Dutch BA, limits the freedom to provide services, including the freedom to provide air services. The Court of Justice of the EU (CJEU) and the EU Commission regard the provision of services as a "fundamental freedom" guaranteed by the TFEU. Hence, concerning the justification for such a restriction,

> "… it is settled case-law that national measures which are *liable to hinder the exercise of fundamental freedoms* guaranteed by the Treaty or make it less attractive may be allowed only if they pursue *a legitimate objective in the public interest*, are *appropriate* to ensuring the attainment of that objective, and *do not go beyond what is necessary* to attain the objective pursued."[106]

As to air transport, this judgement has been confirmed in *International Jet Management GmbH*,[107] and in the Decision on *Access to Karlstad Airport* which will be discussed in section 5.4.2 below. In short, any limitation to the freedom to provide air services must be justified pursuant to the achievement of a legitimate objective in the public interest and the proportionality principle. Similar wording and principles are also found in EU Regulation 1008/2008.

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105. Japan explicitly binds the exercise of traffic rights to slots at, for instance, Narita Airport.
106. Par. 50 of Case C475/11, *Kostas Konstantinides*, and CJEU case law mentioned in this judgment.
107. Case C628/11, Judgment of 18 March 2014, Par. 57: "According to the Court's settled case-law, Article 56 TFEU requires not only the elimination of all discrimination against providers of services on grounds of nationality or the fact that they are established in a Member State other than that where the services are to be provided, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services."

5.4 Environmental measures under EU Regulation 1008/2008

5.4.1 Substantive and procedural conditions of environmental measures

EU Regulation 1008/2008 dictates that the operation of traffic rights is "subject to *published* Community, national, regional and *local operational rules* relating to safety, security, *the protection of the environment* and the allocation of slots."[108] (*italics added*). When published, the envisaged capacity reduction at Schiphol Airport notified under the Dutch BA should be interpreted as "local operational rules" designed to protect the living environment.

The term "environment" is not further defined in EU Regulation 1008/2008; there is no reference to the regulation on the reduction of emissions via the EU Emission Trading Scheme (ETS) or CORSIA,[109] nor to the abatement of noise via the Balanced Approach Regulation. However, case law (see next section), as well as the title of ICAO Annex 16 named "Environmental Protection" encompassing norms for noise and emissions, confirm that operational restrictions aimed at abatement of noise must be regarded as an "environmental measure."

Following this rationale, an EU State wishing to limit or refuse the exercise of traffic rights on environmental grounds, such as by imposing a capacity reduction at an airport, can do so based on Article 20 of EU Regulation 1008/2008. The principal conditions for such environmental measures are the following:

1) The EU State must determine that there is an "environmental problem", in the present case, a 'noise problem';
2) That problem must be a "serious" one;
3) In principle, the EU State wishing to adopt the environmental measure must be able to provide "other modes of transport provide appropriate levels of service;" – see the French ban on short-haul flights adopted in 2022 and examined in section 5.4.3 below;
4) The envisaged environmental measure:
    a. must be non-discriminatory as to the nationalities of the operators of the aircraft, that is, the EU air carriers;
    b. may not distort competition between EU air carriers, nor yield the effect of distorting competition between EU air carriers;
    c. may not otherwise be contrary to EU law;

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108. See, Art. 19(1) of EU Regulation 1008/2008.
109. Carbon Offsetting and Reduction Scheme for International Aviation of ICAO.

d. may not be more restrictive than necessary to relieve the problems, in other words: it must meet the test of 'proportionality', which is also laid down in the BA procedure;

5) The environmental measure must have a limited validity period, not exceeding three years, after which it shall be reviewed.[110]

Once an EU State esteems that it complies with all these substantive conditions for environmental measures and "that action … is necessary", that EU State must follow the procedure prescribed by Article 20(2) of EU Regulation 1008/2008. This includes informing the other EU Member States and the Commission at least three months before the envisaged entry into force of the action/ measure and providing adequate justification. The measure may be implemented unless, within one month of the notification, a Member State contests the measure or the Commission "takes it up for further examination." The Commission may, at its own initiative or at the request of another Member State, suspend the measure if it feels the substantive conditions mentioned above are not satisfied. The procedure for adopting a suspension measure is also subject to compliance with general EU law, particularly the involvement of an advisory committee composed of EU States representatives and chaired by the Commission's representative.[111]

The next sections will look at two cases where environmental measures have been implemented in the EU; the decision Karlstad airport (1998) concerned noise measures, whereas the French ban on shorter domestic flights in France (2022) revolves around emissions.

5.4.2 The EU Commission's Decision on Access to Karlstad Airport (1998) [112]

In the case at hand, SAS's complaint targeted the Swedish government's prohibition of aircraft accessing the airport of Karlstad meeting Chapter 2 of ICAO's Annex 16 only, that is, noisier types of aircraft.[113] Generally, only the quieter 'Chapter 3' aircraft were permitted to use this airport.

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110. See, Art. 20 of EU Regulation 1008/2008.

111. See, Art. 25(2) of EU Regulation 1008/2008 in conjunction with the provisions of Council Decision 1999/468/EC, *laying down the procedures for the exercise of implementing powers conferred on the Commission.*

112. EU Commission Decision 98/523/EC of 22 July 1998 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/10/97) - *Access to Karlstad airport*

113. Ibid. par. 4: "scheduled air services may not be operated with aircraft which do not comply with the requirements of Part II, Chapter 3, Volume 1 of Annex 16 to the Convention on International Civil Aviation (hereinafter referred to as 'Chapter 3 aircraft')."

By restricting access to Karlstad airport to Chapter 3 aircraft, the EU Commission argued in its decision that the Swedish noise measures affected the operation of traffic rights secured by then Art. 3(1) of EEC Regulation 2408/92, preceding EU Regulation 1008/2008. The Swedish noise measures were qualified as an "operational rule" under Art. 8(2) of EEC Regulation 2408/82. The EU Commission argued that the Swedish measures are not permitted to infringe EU law, that is, the noise standards agreed upon in EEC Directive 92/14 which applied at that time. The EU Commission determined that these measures infringed said EU (then EEC) law standards. Citing jurisprudence of the CJEU, the EU Commission also held that restrictions on the freedom to provide air services by limiting traffic rights of EU carriers must be justified by reasons of public necessity and meet the principle of proportionality. [114] The latter principle implies that limitation of traffic rights is "unacceptable" if the envisaged result – noise reduction – can be achieved by less restrictive instruments. The Swedish measures were found to be "unacceptable" based on these arguments. The EU Commission concluded that the Swedish authorities were not entitled to impose operational restrictions at Karlstad airport going beyond those drawn up in EU law.

In another case concerning airport access around 2000, the establishment of new noise configurations also hampered access to Zurich Airport. The Swiss and German governments had agreed on adapting noise zones for landing traffic using South German airspace, but the German side did not ratify the agreement. Although court cases followed, EU law, as described and analysed in this article, was not or not yet applicable at that time, a further discussion of this case falls outside the scope of this article.[115]

5.4.3 The French ban on certain short-haul, domestic flights

In June 2021, a French Law imposed a ban on domestic flights on routes also served by several daily direct rail connections of less than 2,5 hours.[116] The measure was

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114. Ibid. par. 24: " … as the Commission has already indicated in relation to national measures adopted under Article 8(1) of Regulation (EEC) No 2408/92 (see, in particular, Commission Decision 95/ 259/EC of 14 March 1995, French traffic distribution rules for the airport system of Paris (4), any restrictions adopted under that provision must comply with the general principles governing the freedom to provide services as spelled out in the case-law of the Court of Justice ….", in which context the CJEU referred to its other fundamental decisions in this area, namely, Cases C-288/89 *Mediawet* (1991) ECR 4007 and C-76/90 (*Säger* v. *Dennemeyer* (1991) ECR 4221.

115. See, Regula Dettling-Ott, *Der Flughafen Zürich und die Auseinandersetzung mit der Bundesrepublik Deutschland über den An- und Abflug*: *The right to fly* vs. *The right to sleep*, in: Rechtsfragen rund um den Flughafen Zürich, Hrsg. Tobias Jaag, 2004.

116. Law No 2021-1104 on combating climate change and strengthening resilience to its effects on 22 August 2021.

adopted because of serious concerns about aircraft emissions' effect on climate change. Albeit the measure only applies domestically, the French State nonetheless notified the matter under Article 20 of EU Regulation 1008/2008,[117] and submitted its Law to the EU Commission on 17 November 2021.

The Commission went through all the conditions, as explained in section 5.4.1. It contextualised the French measures to the Commission's 'Green Deal' objective, calling for a 90 % reduction in greenhouse gas (GHG) emissions from transport by 2050. The EU Mobility Strategy promotes a multimodal transport system to effectuate this reduction. The Commission also considered that the French State had sufficiently addressed the other conditions drawn up in Art. 20(1) of the Regulation 1008/2008. On 1 December 2022, more than a year after its initial notification, the EU Commission held that the French measures complied with:[118]

- the general EU principles on non-discrimination based on the nationality, identity or business model of an air carrier;
- avoidance of distortion of competition;
- the proportionality principle, because the restriction of the freedom to provide services must be offset by the availability of affordable, convenient and more sustainable alternative transport modes, in this case, the French high-speed train (TGV);
- conditions on the administration of the measures by assessing *ex-ante* whether the alternative transport mode provides a reasonable alternative for travel by air;
- the "limited period of validity" upon which the French State must review its measures within 24 months after they enter into force and notify the Commission of its findings.

On 1 December 2022, the EU Commission approved the French measures.[119]

5.5 Concluded remarks on operating restrictions and the EU internal market

It follows that noise-related operating restrictions are not only subjected to the procedural and substantive requirements of the BAR, but also to other conditions, including, but not limited to, those laid down in general EU law and in EU Regulation

117. See, Art. 20(2) of EU Regulation 1008/2008.
118. Commission Implementing Decision (EU) 2022/2358 of 1 December 2022 on the French measure establishing a limitation on the exercise of traffic rights due to serious environmental problems, pursuant to Article 20 of EU Regulation 1008/2008.
119. Commission Implementing Decision (EU) 2022/2358 of 1 December 2022 on the French measure establishing a limitation on the exercise of traffic rights due to serious environmental problems, pursuant to Article 20 of EU Regulation 1008/2008.

1008/2008. This is especially relevant where traffic rights are affected, which is linked to the provision of air services and the availability of airport slots. The freedom to provide such air services in liberalised markets may only be restricted by the introduction of environmental measures, including noise measures.

The limitedly available cases where environmental measures have been implemented in the EU concerning the reduction of noise and emissions, confirm that operating restrictions that affect the freedom to provide services in the EU, must be seen in a broader context and considered diligently. States must thus consider the specific regulations governing the case in question as well as general EU rules and principles. Although the BAR only stipulates a notification procedure where the EU Commission can *inform* the Member State that it finds that the BA procedure has not followed the BAR and does not explicitly grant enforcement powers to the EU Commission (see section 3.2.4), through EU Regulation 1008/2008, the EU Commission can place its assessment of noise-related operated restrictions in the broader context of its obligations to maintain the EU internal air transport market, and subsequently approve or disapprove the notified measures.

In assessing the Dutch BA procedure and measures, the EU Commission must also consider their effect on international markets and its international obligations vis-à-vis third States. The last section (6) will delve into this international dimension, including the question of enforcement.

6. INTERNATIONAL OBLIGATIONS UNDER AIR SERVICES AGREEMENTS

6.1 International reactions to reduced capacity at Schiphol Airport

Concerns that the operating restriction and the reduced capacity at Schiphol will affect traffic rights and competition are not limited to the EU internal market. As a result of the measures under the first track of the Dutch government's three-tier approach, as alluded to in section 4.2, airlines from third States were already faced with the consequences of capacity reduction at Schiphol. Air India, for instance, has lost its slot at Schiphol and can no longer offer services to the airport.

US airlines have been more vehement about the reduced slot allocation. JetBlue, a new entrant at the airport, challenging the monopolist position of KLM and Delta on routes to, for instance, New York, similarly was not allocated slots it had applied for in the 2024 summer season. In retaliation, JetBlue has asked the US Department

of Transport (DoT) to revoke KLM's slots at JFK airport in New York.[120] Airlines for America even requested the DoT to defer a German airline's application for a foreign air carrier permit until after the special meeting of the Joint Committee, established under the EU-US Air Transport Agreement (ATA), which took place on 13 November 2023.[121] The DoT found that the capacity reduction to 460,000 flight movements indeed violated the EU-US ATA,[122] and ordered Dutch airlines to file their flight schedules in preparation for retaliatory measures while at the same time pressing for a diplomatic solution.[123]

On the day of the Special Joint Committee meeting between the EU, the US and the Netherlands, the EU Commissioner for Transport sent a letter to the Dutch Minister for Infrastructure, expressing "serious concerns" that the BA procedure for these measures had not been followed and explicitly informing the Dutch government that the EU Commission reserves the right to start infringement procedures for non-compliance with EU Law. Due to these concerns from the US and the EU Commission, the Dutch minister announced suspending the measures of the first track the following day.[124]

Although the capacity reduction to 460,000 flight movements for the 2024 summer season is suspended,[125] the measures resulting from the BA procedure in the second track are not. The analysis of the international dimension that the EU Commission will have to consider in its review of the Dutch notification under the BA is thus still relevant. It will do so from two angles; first, it will look at international obligations under air services agreements, most notably concerning traffic rights. The second part will deal with the enforcement of the BA.

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120. See, for instance, https://nltimes.nl/2023/09/29/jetblue-threatens-klm-schiphol-downsizing-plans (last visited: 19 November 2023).
121. Answer of Airlines for America to Application of USC GmbH for an exemption under 49 U.S.C. § 40109 and amended foreign air carrier permit pursuant to 49 U.S.C. § 41301 (Docket No. DOT-OST-2023-0107), Letter of 2 November 2023.
122. As to which see the next section (6.2).
123. See, US Department of Transport, Order 2023-11-6 of 2 November 2023.
124. See, *Stand van zaken Hoofdlijnenbesluit Schiphol*, (Status of outline decision Schipol, translation provided by author), 14 November 2023, IENW/BSK-2023/345691.
125. Due to planning and capacity constraints of airlines, the airport, and air traffic control, it is unclear if additional slots for the 2024 summer season can and will still be allocated. See also: https://nltimes.nl/2023/11/15/jetblue-may-still-lose-schiphol-airport-slots-despite-halt-downsizing-plans (last visited 19 November 2023).

6.2 Traffic rights and market access under Open Skies Agreements

In addition to the complaint that the BA was not applied for implementing the concerned operating restrictions of the first phase, the US and Canada also questioned the procedural and substantive aspects of the BA procedure in the second phase. However, the concise analysis below will focus on their grievance that the proposed measures are discriminatory, anti-competitive, and unduly restrict access to the transatlantic market.

Both the EU-US Air Transport Agreement of 2007, as amended in 2010, and the Canada-EU Air Transport Agreement of 20210,[126] contain provisions on the freedom to provide services in their respective markets and impose obligations on the parties when considering limiting the number of aircraft movements at airports based on environmental grounds:

> "The costs and benefits of measures to protect the environment must be carefully weighed in developing international aviation policy. When a Party is considering proposed environmental measures, *it should evaluate possible adverse effects on the exercise of rights* contained in this ATA, and, if such measures are adopted, *it should take appropriate steps to mitigate any such adverse effects*." (italics added)[127]

Canada is concerned that "restriction of flight movements may potentially be implemented in a manner that unduly impacts Canadian air operators", which approach would be contrary to the ATA's aim "to promote an international aviation system based on market competition – rather than governmental direction – among airlines in the marketplace." The same applies to the "fair and equal opportunity for the airlines of the other Party to provide the air services," especially with a view to new entrants and the ATA's requirements to be "non-discriminatory in slot allocation, access to airport facilities, and the application of environmental measures."[128]

The US DoT expressed similar concerns in its order of 2 November 2023, leading to the conclusion that the "Phase 1 noise reduction plan at AMS constitutes an unjustifiable and unreasonable discriminatory and anticompetitive practice." It also

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126. Agreement on Air Transport between Canada and the European Community and its Member States of 2010.

127. See, for instance, Article 18(3) of the EU-Canada ATA.

128. The response of the Government of Canada to the Balanced Approach Consultation is available at: https://www.internetconsultatie.nl/balanced_approach_schiphol/reactie/4d103394-c5ef-40ca-915a-baecca1a36b2 (last visited: 2 November 2023).

finds that the Dutch government "has imposed an unjustifiable and unreasonable restriction on access of an air carrier to the U.S.-Amsterdam market."

Canada and the US voiced genuine concerns; the number of slots that airlines had to return is currently calculated on a pro-rata basis, as put forward in section 4.2. This means that KLM, as the largest user of Schiphol Airport, must return, by far, the most slots as compared to other airlines. On the other hand, as the home carrier, it is more flexible to adjust its planning. When other or smaller users must give up slots, they may have to reduce frequencies or be unable to continue serving specific routes, leading to less competition on those routes.

The reduced capacity will also make it more difficult for new entrants to acquire slots at Schiphol Airport, further limiting the competitive environment. Although the measure to return slots at Schiphol may not intended to be discriminatory, the reduced competition due to reduced capacity has the potential effect to lead to positive discrimination in favour of the home carrier.

6.3 Enforcement of the Balanced Approach

On the management of aircraft noise, the ATA between the EU and US, includes an express reaffirmation of the "commitment of Member States and the United States to apply the balanced approach principle [of ICAO]."[129] It also imposes conditions on the process for "the imposition of new mandatory noise-based operating restrictions", including that "operating restriction shall be (i) non-discriminatory, (ii) not more restrictive than necessary … and (iii) non-arbitrary."[130]

Despite the condition in the EU-US agreement to apply the BA for noise-related operating restrictions, the US remained concerned that enforcement of the EU's BAR provisions was not clearly and effectively vested in Brussels but remained in the hands of Member States or even local authorities. To incentivise a change in European law that would grant appropriate "authority" to the EU Commission, the US was prepared to reward the EU side with additional passenger seventh freedom rights and greater rights concerning ownership and control of third-country airlines when the following condition was met:

> "4. Upon written confirmation by the Joint Committee, …, that the laws and regulations of the European Union and its Member States with regard to the imposition of noise-based operating restrictions at

129. See, Art. 15(4) of EU-US Air Transport Agreement of 2007, as amended in 2010.
130. Ibid. Art. 15(5).

> airports … *provide* that the European Commission has the authority to review the process prior to the imposition of such measures, *and where it is not satisfied that the appropriate procedures have been followed* in accordance with applicable obligations, *to take in that case, prior to their imposition, appropriate legal action* regarding the measures in question:"[131] (italics added)

The EU and the US disagree on whether the EU has enacted legislation allowing the Commission "to take appropriate legal action" that would trigger the additional rights. In subsequent Joint Committee Meetings, the EU Commission argued that the conditions are satisfied through Article 8 of the BAR. It further stated "that "appropriate legal action" in this context meant an infringement proceeding, or whatever procedure is provided for by EU constitutional law."[132] The US maintains that the commencement of infringement proceedings would not be adequate to *prevent* the imposition of noise restrictions that do not follow the balanced approach. The EU delegation contests that "nowhere in the ATA was it stated that the Commission must have the authority to "prevent the imposition of the restrictions in question."[133]

6.4 Concluding remarks on international obligations and enforcement of the BA

In the EU's relationship with the US and Canada, the application of the BA is reaffirmed explicitly through incorporation in the Open Skies Agreements with these States. This brings about obligations to comply with and uphold the provisions of these ATAs. The effects of the Dutch measures limiting airport capacity are inconsistent with the obligations under these agreements, where they may be considered discriminatory, having a distortive effect on competition and unduly impacting access of the air operators of the other State. So far, other third States have not been vocal about retaliation, but if the reduction continues to be effectuated, this may be the calm before the storm.

Concerning whether the EU Commission can take appropriate legal action where a Member State has not followed the BA procedure correctly, the Commission reiterated its right to start infringement procedures for non-compliance with EU law against the Dutch measures in the first phase of the reduction. Proceeding on the basis that the Dutch government has not applied the BA principle to the letter

131. Ibid. Art. 21(4).

132. Eighteenth Meeting of the U.S.-EU Joint Committee Record of Meeting April 19, 2016; Washington DC.

133. Seventeenth the U.S.-EU Joint Committee Record of Meeting June 4-5, 2015; Helsinki, Finland.

or followed the BAR by the book in the second phase, it remains to be seen if the EU Commission, following its assessment of the Dutch notification, will indeed take 'appropriate legal action' and enforce compliance with the BAR.[134]

7. CONCLUSION

The Netherlands and Schiphol Airport have often been applauded for their approach to noise management and for taking noise-related measures. A formal Balanced Approach (BA) procedure was never called for, but the long-standing, typically Dutch, practice of consensus decision-making ('*polderen*' in Dutch) involving all stakeholders through consultative structures matched the BA principle in full. This nearly romanticised reminiscence starkly contrasts the one-sided "Balanced Approach" currently being conducted and imposed by the Dutch government.

The BA principle is an internationally agreed-upon global standard for noise management at individual airports. The standard in ICAO's Annex 16 concisely and clearly identifies two incremental parts of the BA process: first, identifying the noise problem and *then* analysing various measures to solve the noise problem and the type of measures that can be considered. The EU's Balanced Approach Regulation is more specific and, coupled with the EU Environmental Noise Directive, provides a mechanism and tools for setting noise objectives, identifying problems and establishing the procedure for taking noise abatement measures in the EU.

By announcing a set of quantitative restrictions on Schiphol Airport's capacity in June 2022, before considering the different steps and conditions for taking noise-related operating restrictions under EU and international law, the Dutch BA procedure was flawed from the start. The "Balanced Approach" is built on the premise that different noise measures must be explored and exhausted first and operational restrictions only as an instrument of last resort. This process cannot start with announcing a pre-determined or 'expected' outcome, nor can it be purpose-driven to reach a desired end result, as appears to be the case here.

The Dutch BA procedure does not adhere to fundamental principles of international and EU law. Instead, it appears to create a noise problem by setting a steep NOA in the near future. The high objective and the short timeframe are not proportionate. Some of the proposed measures go beyond what is necessary to achieve the NOA,

134. When the Commission has issued its response to the Dutch notification under the BAR, the author intends to write and publish a follow-up article or note in this journal to analyse the decision.

and the operating restrictions leading to a capacity decrease are not considered a last resort but are part of the starting point of the BA process. The government's conclusion of the results of the Dutch BA comes as no surprise: the only way to achieve a large part of the noise reduction objectives is to reduce Schiphol's capacity. The sector's alternative plans to achieve the objectives, albeit partly in a slightly more extended -three-year- period, but without a capacity reduction, have been disregarded for not reaching the objectives in time.

Upon the Netherlands' notification of the outcome of the BA, the EU Commission must now review whether the BAR's necessary procedural and substantive requirements are complied with, including general EU rules and principles. It is also mandated to consider the notification of the operating restriction in the broader context of the EU internal air transport market, that is, EU Regulation 1008/2008 and its provisions on environmental measures, as well the international dimension of the open skies markets with States like the US and Canada.

It is questionable whether the Dutch BA will sustain the tests of proportionality, non-discrimination, and not having a distortive effect on competition that can be justified. International obligations have not been adequately observed, and the stakeholders' consultation and involvement in the process were marginal. The question remains whether the EU Commission will take "appropriate legal action" and to start an infringement procedure if it finds the Dutch BA procedure and measures incompatible with the BAR and EU principles.

The Dutch have a rich history of aviation pioneering, and the application of this first-of-its-kind Balanced Approach could have set an example for balancing different interests at a time of increased awareness for environmental measures. However, the scheme pursuant to which the Dutch BA has been framed, set up and conducted is anything but exemplary. This is a missed opportunity and a mistake that may come at a cost for Dutch aviation. However, it may not be too late to turn the tide.

Part D – Concluding Remarks

Airline Governance, Sustainability & Stakeholder Influence

1. Introduction

The concluding chapter brings together the different angles of this dissertation. It returns to the overarching research question; *How is airline governance in the European Union evolving through the interplay between shareholder-based corporate structures and stakeholder influence, and how do sustainability objectives, environmental and climate litigation, and geopolitical developments collectively reshape the regulatory framework governing EU airlines?"* – and evaluates the developments in light of the conceptual framework established in the Introduction of Part A. That framework clarified the key analytical terms used throughout this research: **sustainability** as a multidimensional concept encompassing not only environmental, but also economic and strategic considerations; **governance** as the structures and processes through which authority over airlines is exercised, shared, or contested, including both power and influence, and with particular attention to **stakeholder influence** as the mechanisms—formal or informal—by which actors beyond shareholders shape or seek to shape airline decision-making and accountability. These elements jointly frame what this study refers to as sustainable governance of aviation, and they form the basis for interpreting the findings from Parts B and C.

Seen through this lens, the evolution of airline governance reflects several intersecting developments highlighted in the Introduction and the Research Context. The historical attempted shift from airlines 'of a State' to airline undertakings operating in competitive markets has been tempered by recurring State interventions, a renewed policy focus on strategic interests and autonomy, and the expansion of sustainability-related regulatory obligations at international, EU and national levels. At the same time, the governance of airlines has arguably become more multi-level and multi-actor: complex multi-national **corporate governance** arrangements now operate alongside dense **regulatory governance** frameworks in international and EU law, while **stakeholder governance** in aviation, manifested through environmental and climate litigation, ESG developments, consumer expectations and community activism, has become more visible, particularly in some European countries.[1]

The primary research question and sub-questions reflect this multidimensional reality by distinguishing between the legal, institutional and regulatory mechanisms structuring ownership and control of airlines (Part B) and the evolving governance

1. See the list of examples in section 2.3.2 of the Research Context in Part A of this research.

pressures stemming from sustainability, litigation, and broader stakeholder and geopolitical dynamics (Part C).

Part D, therefore, proceeds in a structured sequence that gradually builds towards the concluding synthesis. Section 2 brings together the core insights of Parts B and C, identifying the governance dynamics that emerge when ownership and control structures, sustainability obligations, and stakeholder pressures are placed within the overarching conceptual framework. Section 3 refines this framework by clarifying the corporate, regulatory, and stakeholder governance dimensions and by outlining the stakeholder typology and governance levers used throughout the dissertation. Since the litigation angle is not addressed holistically in the articles of Parts B and C, section 4 examines environmental and climate litigation as one channel through which stakeholders seek to influence regulatory and corporate outcomes. The Part culminates in Section 5, which synthesises the findings by explicitly answering the sub-questions and the overarching research question, followed by a brief reflection on methodological scope and avenues for future research.

2. Core Observations and Integrated Findings

2.1 Ownership, Nationality and the State–Airline Relationship (Part B)

The analysis in Part B demonstrates that ownership and control remain foundational to the corporate and regulatory governance of EU airlines. Despite decades of liberalisation, nationality rules continue to anchor airlines to a specific 'home' State, which shapes their access to markets through Air Services Agreements and traffic rights, their exposure to State oversight, and the laws that define the distribution of corporate power and influence among shareholders.

The three articles in Part B collectively show that contemporary airline governance is characterised by increasingly complex corporate and ownership structures, including multi-jurisdictional holdings, diversified shareholder bases, and the use of differentiated voting rights or special powers. Yet these configurations do not displace the traditional constraints associated with substantial ownership and effective control. Rather, they demonstrate that nationality rules have adapted to modern corporate realities and now function as legal boundary conditions, determining and enabling access to international markets while constraining corporate structuring, relocation, and foreign investment choices. At the same time, these rules establish the jurisdictional nexus through which States and regulators exercise airline oversight, defining which State bears responsibility for regulatory control and which actors may legitimately intervene in an airline's governance. Part B also illustrates the continued relevance of the State as shareholder, guarantor, and 'crisis manager', underscoring that airline governance cannot be understood without considering its regulatory and geopolitical contexts.

These findings collectively address the sub-question guiding part B: How do legal and institutional mechanisms within international and EU law, and national company laws, shape and constrain ownership and control in the context of the corporate and regulatory governance of airlines in the European Union?

The nationality link between the owner of the aircraft and the State in which the aircraft is registered originates from the Paris Convention relating to the Regulation of Aerial Navigation (the 'Paris Convention') of 1919.[2] The current practice pursuant

2. Convention Relating to the Regulation of Aerial Navigation (signed 13 October 1919, entered into force 11 July 1922) 11 L.N.T.S. 173. Article 7 of the Paris Convention: "A*ucune société ne pourra être enregistrée comme propriétaire d'un aéronef que si elle possède la nationalité de l'Etat dans lequel l'aéronef est immatriculé*" which translated to "No company may be registered as the owner of an aircraft unless it possesses the nationality of the State in which the aircraft is registered." (translation provided by author).

to which airlines possess the nationality of the State designating them for the operation of international air services follows from the provisions of the Chicago Convention of 1944, in conjunction with, and as articulated in, the Transit and Transport Agreements of the same year (1944), which are attached to the latter convention.[3] Despite the liberalisation and globalisation of the international air transport market, airline nationality, the formalisation of "substantial ownership" and "effective control" criteria in a complex web of mostly bilateral Air Services Agreements (ASAs), remains pivotal for airlines seeking access to the operation of international traffic and transit rights.[4]

An analysis of the historical evolution of corporate law reveals that 'economic nationalism' is also applied in other sectors, and that legal tools, such as voting caps, golden shares, or control-enhancing mechanisms to underpin such 'economic nationalism', have been used across jurisdictions to preserve domestic control over strategic sectors, often through mechanisms that function as stealth protectionism, even as markets have formally liberalised.[5] Contrary to other global industries, such as digital and financial services, where nationality and ownership of undertakings play a less important and fundamental role in present days,[6] the persistence of nationality criteria in aviation underscores not only the strategic and economic interests of States in air transport, but also the political, including security dimensions, which are deeply embedded in the aviation sector.[7]

The unique and enduring link between airlines and their home States establishes another closely linked, distinctive aspect of airline governance. Historically, airlines have served as national diplomacy, economic policy and strategic instruments. Flag carriers, particularly during the mid-20th century, were synonymous with national prestige and diplomatic reach, as illustrated vividly by the Dutch example, where KLM's strategic decisions were deeply intertwined with the state's foreign policy, forming the "Iron Triangle."[8] Havel and Sánchez attribute the persistence of this link to a deep-seated 'nationalistic mentalité' that has long shaped the industry, whereby international aviation is conceived as a system that "comprises only

3. See, Part A, Research Context, section 2.1.1.
4. See, Part B, 'Navigating Airline Nationality: European Perspectives on Airline Shareholding and Corporate Governance', Air & Space Law 49(6), 2024.
5. For an in-depth analysis of this subject, see, M. Pargendler, 'The Grip of Nationalism on Corporate Law', Indiana Law Journal 95(2), 2020.
6. See, Part B, 'The Unique Link Between an Airline and a State', the Aviation and Space Journal, 2023(1).
7. See, Part B, 'Securing Strategic Autonomy for EU Airlines: An Assessment of Foreign Investment Exposure in the Air Transport Industry', the Aviation and Space Journal, 2024(3).
8. Marc Dierikx and Jean Guillaume Petit, *Holding Patters*: *Air Transport and Foreign Policy in The Netherlands*, (2025), Preface, p. xv. See also, Part A, Introduction.

airlines that are owned and controlled by the State, or, in more recent decades, by the citizens of the State, which designates them to fly international routes."[9] The maintenance of the industry's structure through ASAs, they argue, is based on "government barter, and not the entrepreneurial acumen of the airlines",[10] which shows the unique link between airlines' national affiliation, access to global routes and States' interests in aviation.

Although the era of explicit governmental control over airlines has largely given way to market liberalisation and privatisation, global events in the current era, such as economic and financial crises, the COVID-19 pandemic, and geopolitical tensions, demonstrate that States have never entirely relinquished their influential role, and do not wish to do so in most cases. Airlines frequently remain dependent on governmental support, monetary or otherwise, highlighting the sector's vulnerability to external shocks and its continuing importance to national economies.[11] Security concerns and the recent pursuit of States' strategic autonomy are also exemplary in this regard. These developments also underscore this interdependence, reinforced by protection schemes and instruments such as foreign direct investment (FDI) screening mechanisms,[12] and the Critical Entities Resilience (CER) Directive,[13] all aimed at safeguarding national and EU interests in the aviation sector.[14]

While Havel and Sánchez rightly point to the historical role of government barter and nationalist structures in shaping international aviation, the contemporary governance of airlines reflects a more intricate trade-off between multiple, and sometimes conflicting, interests. These include commercial viability, environmental sustainability, public service obligations, and geopolitical considerations. Rather than being solely rooted in ownership and state designation, airline governance today navigates a broader balancing act, one that is explored in further detail below.

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9. See, Brian F. Havel & Gabriel S. Sanchez, "Restoring Global Aviation's Cosmopolitan Mentalité," Boston University International Law Journal 29(1), 2011, pp 11-12.
10. Ibid.
11. See section 2.2 of Part A.
12. Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (FDI Regulation).
13. Directive (EU) 2022/2557 of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC (Critical Entities Resilience (CER) Directive).
14. See, Part B, 'Securing Strategic Autonomy for EU Airlines: An Assessment of Foreign Investment Exposure in the Air Transport Industry', the Aviation and Space Journal, 2024(3).

2.2 Sustainability Obligations and Stakeholder Pressures (Part C)

Part C shows that sustainability objectives—here in the environmental context—have become integral to airline governance in the EU. Regulatory obligations under international, EU, and national law increasingly frame the conditions under which airlines operate, from emissions reduction and noise abatement to reporting obligations and fuel-blending mandates.

At the same time, external actors employ a widening set of levers in what this research considers stakeholder governance: climate and environmental litigation, ESG-driven expectations, consumer scrutiny, activist initiatives, broader public accountability campaigns, and, in some contexts, legal challenges before courts. These mechanisms do not replace corporate or regulatory governance, but they create additional vectors of influence that can affect airlines' strategic priorities, operational practices, and risk management. The articles in Par C demonstrate that such pressures are often asymmetric across stakeholder groups, and that legal and societal contestation form one, but not the only, channel through which stakeholder influence materialises.

These observations contribute to answering the second sub-question: How are regulatory and stakeholder governance structures in the European airline sector being redefined through sustainability objectives, environmental and climate litigation, broader stakeholder influence and geopolitical dynamics?

The influence of sustainability objectives in aviation policy is particularly visible within Europe. Ambitious measures under the EU's Green Deal and the 'Fit for 55' legislative package have driven significant regulatory changes to reduce aviation emissions. The pursuit of environmental objectives at the EU and national levels, whether through emissions control, national 'gold plating',[15] or stricter noise regulation, has introduced substantial challenges for airlines' management and requires adaptation of business models, cost structures, and long-term operational planning.[16] Other measures, such as the proposed Carbon Border Adjustment Mechanism (CBAM) for aviation, overlap uneasily with the existing EU Emission Trading Scheme (EU ETS) and ICAO's global Carbon Offsetting and Reduction Scheme for International Aviation

15. Gold-plating is a term used to characterise the process whereby the powers or scope of an EU directive are extended when being transposed into the national laws of a Member State, which the European Commission described as "an excess of norms, guidelines and procedures accumulated at national, regional and local levels, which interfere with the expected policy goals to be achieved by such regulation" in European Commission, *Gold-plating in the EAFRD*, Directorate General For Internal Policies, 2014.

16. See, Part C, 'Challenging the Balanced Approach to Aircraft Noise Management Principle: Will the Dutch Approach Stand or Will the Principle Prevail?', Air and Space Law, 49(1), 2024.

(CORSIA). Global action in international civil aviation is increasingly strained: while multilateral mechanisms like CORSIA offer a baseline, they lack enforceable rules. At the same time, the EU seeks to project environmental standards beyond its borders, but such ambitions, illustrated by instruments like the EU ETS in its early years (2008-2012) and CBAM regimes, face mounting legal and diplomatic resistance.[17] The resulting tension between the EU's sustainability agenda, on the one hand, and the international framework and practices of environmental measures for aviation, on the other hand, exemplifies a broader dilemma confronting airlines: the need to reconcile stringent environmental imperatives with international competitiveness.

Alongside this regulatory and geopolitical context, societal expectations around sustainability have become more pronounced. These expectations may relate to noise and emissions performance, the credibility of climate strategies, or the perceived alignment of airlines with wider environmental and societal objectives. Such pressures form part of the wider landscape in which airlines' behaviour is contested. The interplay between Part B and C is explored below.

2.3 Interaction and Emerging Governance Dynamics

When read together, the findings from Parts B and C indicate an evolving governance landscape that is more multi-level and multi-actor than the traditional shareholder-centric model implies. Nationality rules and the ownership and control conditions continue to define the legal and regulatory positioning of airlines and the link with the 'home' State. At the same time, legal and policy sustainability obligations set boundaries and impact airlines' management and operations. The interaction between these dimensions becomes particularly apparent when regulatory requirements, environmental constraints, and broader societal expectations converge, producing overlapping layers of accountability that can influence both corporate and operational decision-making to maintain its 'license to operate' in the public perception.

These developments, as approached in conjunction, point to a governance configuration characterised by what could be called 'distributed authority'. States and regulators retain formal regulatory powers and oversight; corporate shareholders continue to exercise strategic discretion within the limits of their ownership of, and control over, the airline's management; and societal expectations shape the broader environment in which regulatory and commercial choices are made. Rather than displacing the shareholder-centric focus, these dynamics appear to reflect

17. See, Part C, 'EU Air Transport and the EU's Environmental Agenda Struggle: A Leap of Faith or Can a CBAM Level the Playing Field?' Air & Space Law 47(6), 2022.

a rebalancing in which different forms of power and influence intersect across regulatory, corporate, and societal domains. The integrated picture that emerges is one of governance shaped by constraints and drivers operating simultaneously at international, EU, national, and societal levels. This multi-layered configuration provides the foundation for the conceptual governance framework developed in the next section.

3. Governance Framework for Airline Stakeholder Influence

3.1 Positioning Corporate, Regulatory, and Stakeholder Governance

Building on the integrated findings above, the multi-layered governance configuration that characterises the airline sector can be understood through the three analytical dimensions introduced in the Introduction: corporate governance, regulatory governance, and stakeholder governance. Together, these dimensions capture the different ways in which direction and control over airlines may be exercised, shared, or influenced. While corporate governance concerns the internal structures through which managerial authority and shareholder oversight operate, regulatory governance reflects the formal exercise of public authority by States and EU institutions. Stakeholder governance, in turn, encompasses the influence exerted by actors who do not hold formal decision-making power but whose interests, resources, or expectations intersect with airline operations.

The present section further develops the above governance framework and examines how these dimensions interact in the contemporary aviation context.

3.2 From Shareholders to Stakeholders: Models and Typology

Traditionally, airline governance centred on shareholders through ownership and control structures, often in conjunction with commercial interests reflected in financial performance. This orientation aligns with the managerial and entrepreneurial governance models described in the Research Context,[18] both of which facilitate the fulfilment of nationality requirements through ownership and control by the airline's management, its owners or shareholder groups. These models also reflect the historical and widespread prioritisation of state and investor interests,[19] rooted in the nationalistic mentality discussed in section 2.1 above, pursuant to which airline governance was closely tied to the interests of the home State, either directly or through the protection of national investors.[20]

Over time, however, airline governance appears to have expanded to include a more diverse group of actors whose interests, expectations, or values intersect with airline operations. The stakeholder governance spectrum for airlines includes internal actors such as employees, works councils, and board members,

18. See section 2.3(b) of Part A.
19. See, for instance, Jan Walulik, 'At the core of airline foreign investment restrictions: A study of 121 countries', Transport Policy, Volume 49, 2016.
20. See also, section 2.1.4 of Part A.

who have a direct stake in the company's continued welfare, as well as external or interface stakeholders who are directly or indirectly involved in or affected by the airline's activities. These may include governments, financiers, industry partners, environmental organisations, and local communities, often organised in action groups.[21] The engagement of and advocacy by external stakeholders in the 21st century, especially in Europe, appears to be linked to heightened expectations around airlines' transparency, accountability, and sustainability practices, as indicated in requirements concerning EU airlines' reporting practices.[22]

Within this spectrum, stakeholders can also be distinguished and categorised according to the source and nature of their influence, as established in the Research Context. Institutional stakeholders—such as States, EU institutions and international organisations—shape the formal regulatory environment in which airlines operate. Economic stakeholders, including shareholders, investors and financiers, influence governance through ownership structures, capital allocation and the financial conditions attached to funding or support, increasingly incorporating ESG considerations into their assessments. Societal stakeholders, such as consumers, communities around airports and non-governmental organisations (NGO's), exert influence more indirectly through normative expectations, reputational pressures, or challenges to airlines' practices, including through administrative or judicial procedures. Examples across the airline industry illustrate how these different forms of influence may manifest. Trade unions have long been prominent in influencing employment conditions during salary negotiations, restructuring decisions, or bailouts. Other concrete examples discussed in the next section illustrate a shift towards greater stakeholder engagement. Environmental NGOs, local communities, and action groups have challenged airport expansions and advocated stricter noise and emissions standards, as seen in public debate and opposition to, for instance, Heathrow's third runway and the legal challenges surrounding Schiphol's operations. Investors have demanded credible climate strategies and ESG disclosures as a condition for continued financial support. Even passengers and consumers have begun to scrutinise airlines' environmental claims, contributing to new reputational dynamics that airlines must consider when making strategic and operational choices.

21. See, M. Carney & I. Dostaler, 'Airline Ownership and Control: a Corporate Governance Perspective', Journal of Air Transport Management, 12(2), (2006).
22. See, for instance, M. Rüger & S.U. Maertens, The Content Scope of Airline Sustainability Reporting According to the GRI Standards—An Assessment for Europe's Five Largest Airline Groups. Administrative Sciences, 13(1), 10, 2023.

Holistically, these developments suggest a broader pattern in which direction, control and influence over airlines are distributed among institutional, economic and societal actors, operating through legal, financial and normative channels. This understanding of stakeholder governance provides the analytical basis for the following subsections, which further examine the State's multi-layered role and the relevance of sustainability obligations as a channel for stakeholder influence. It also prepares the ground for the subsequent section, which considers in more detail how legal contestation and litigation function as mechanisms of influence in this broader framework.

3.3 The State's Multi-layered Role

States occupy distinct and sometimes overlapping roles in the governance of airlines, acting as top-down regulators, bottom-up shareholders, and broader public stakeholders. They may also serve as interested parties with a direct legal or procedural interest in specific cases or situations. As regulators, governments shape environmental standards and compliance frameworks through instruments such as the EU Emissions Trading System (ETS) and national legislation. As State shareholders, depending on the airline's governance structure, they may influence strategic direction, for instance by leveraging ownership positions to align corporate objectives with broader policy priorities. Where they do not hold ownership interests, States frequently participate as stakeholders in governance processes: developing policies or advocating public interests such as connectivity and climate objectives, or engaging in discussions on airport infrastructure, service levels, and accessibility.

This multidimensional involvement became particularly visible during the COVID-19 pandemic when several state aid packages were tied to sustainability conditions. It also illustrated how State's various capacities can interact, sometimes blurring the boundaries between public oversight, shareholder influence, and the pursuit of broader strategic or political objectives. Such interactions, in turn, complicate the delineation of "effective control" in both the corporate and regulatory sense. In this sense, because aviation companies operate at the intersection of public and private interests, and increasingly must comply with myriad public interests, State ownership, or at least an increased partial State ownership of an airline's shares, may offer a legitimate means to better balance strategic and public policy concerns with commercial shareholder expectations. While this remains subject to political and economic choices that fall beyond the scope of this study, the examples above illustrate how the State's multiple roles form an integral part of the regulatory governance environment in which airlines operate.

3.4 Sustainability as a Vector of Stakeholder Influence

While regulatory governance remains central to shaping the conditions under which EU airlines operate, its scope and tempo are often mediated by competing policy objectives, complex legislative processes, and the need to balance environmental aims with operational and competitive considerations. As a result, regulatory measures may advance incrementally or with compromises that reflect these trade-offs. In this setting, various stakeholders—such as environmental organisations, local communities, and consumer groups—may perceive regulatory action as insufficient or too slow to address the sustainability concerns that affect them directly. This helps explain why certain stakeholders seek to influence airline conduct through other channels, including financial conditions, normative expectations, or, in some contexts, legal or administrative challenges.

Against this backdrop, Environmental, Social, and Governance (ESG) considerations have widened the scope of airline governance within the context of this research. ESG expectations require airlines to respond not only to the interests of the company's shareholders, as would be the case under a strict interpretation based on airline ownership and control, but also to broader investor and societal demands regarding environmental performance, societal interests, and responsible management. Recent research suggests that airlines are incorporating ESG benchmarks into their corporate strategies, reflecting investor scrutiny and consumer expectations,[23] and, more recently, regulatory requirements.[24] Although this study does not examine ESG integration in depth, these observations help situate a recognition and awareness that airlines operate within an interconnected ecosystem in which stakeholder engagement, a social 'license to operate', and reputational considerations must be managed.

Stakeholder-driven governance may also involve more assertive forms of engagement and influence. Activist shareholders, NGOs, and local advocacy groups may call for stricter compliance and enforcement within existing environmental regimes or for more ambitious sustainability commitments.[25] While such efforts may

23. See, for instance, A.F. Caraveo Gomez Llanos, et al. "Rating ESG key performance indicators in the airline industry" (2024), *Environment Development Sustainability* (26), and Y. Abdi, X. Li and X. Càmara-Turull, "Impact of Sustainability on Firm Value and Financial Performance in the Air Transport Industry" (2020), *Sustainability* 12(23). See also, KLM Annual Report 2024, available at: www.klmannualreport.com/wp-content/uploads/2025/04/KLM-Annual-Report-2024.pdf (accessed: 21 November 2025).
24. See, for instance, the EU's Corporate Sustainability Reporting Directive 2022/2464 (CSRD) and E. Lidman, "Chapter 17: The EU Framework on ESG". Research Handbook on Environmental, Social and Corporate Governance. Cheltenham, UK: Edward Elgar Publishing, 2024.
25. For examples, see section 2.3(b) of Part A.

reflect legitimate concerns, they can also raise questions about representativeness, accountability, and the long-term viability of certain demands, particularly where they extend beyond what regulatory frameworks presently require.

These developments illustrate how sustainability considerations function as a channel through which institutional, economic and societal actors influence airline governance. They also show how the boundaries between corporate, regulatory and stakeholder governance may become more permeable where expectations and accountability mechanisms overlap. The interaction of these dynamics forms the backdrop to the increasing recourse, in some contexts, to legal contestation. While the articles in Part C refer to several instances of such contestation, they do not provide a comprehensive account of litigation as a governance mechanism. Given the role of courts in interpreting environmental obligations and shaping the operational environment for airlines, the next section examines climate and environmental litigation in greater depth.

4. Environmental & Climate Litigation and Judicial Interpretation[26]

4.1 Litigation as a Governance Mechanism: Scope, Definitions, and Relevance

Within the multi-layered governance configuration outlined in the previous section, litigation emerges as one of the channels through which stakeholders may seek to influence regulatory or corporate outcomes where, in their view, existing mechanisms appear constrained or insufficiently responsive. In this context, by interpreting open norms, adjudicating disputes on environmental impacts or operational impacts, or clarifying statutory obligations, courts can shape the regulatory environment in which airlines operate. In this sense, litigation functions not merely as a dispute-resolution mechanism, but as a tool through which economic or societal actors seek to address perceived gaps in regulatory oversight or to influence the regulatory or operational environment in which airlines operate.

For analytical clarity, it is important to distinguish between environmental and climate litigation. These two categories are sometimes conflated, but they differ not only in their legal bases but also in the type of causation that must be demonstrated and the remedies courts are able or willing to grant. Environmental cases often concern identifiable localised impacts, such as exceedances of noise limits or air-quality standards, or environmental permitting and often focus on site-specific impacts, allowing courts to assess causation and enforce compliance through targeted measures. Climate (change) litigation, by contrast, typically involves diffuse and cumulative contributions to global emissions and climate targets, which complicates causal reasoning and shapes the kinds of judicial orders that may be considered appropriate or effective. Both forms of litigation are relevant here, but they operate through distinct legal pathways and engage different normative and evidentiary frameworks. These differences frame the conditions under which litigation may influence airline governance, but a detailed doctrinal analysis of climate and environmental litigation lies beyond the scope of this study.

The discussion that follows is therefore not intended as a comprehensive account of climate or environmental litigation as such. Instead, within the governance framework developed in this study, comprising corporate, regulatory, and stakeholder governance, litigation represents one of the channels through which stakeholders may seek to influence the interpretation or application of regulatory and corporate obligations. Unlike external contextual factors such as fuel prices,

26. This section reflects developments up to 1 May 2025.

geopolitical disruptions, or market trends, litigation has the potential to reinterpret, clarify, or recalibrate the legal and regulatory standards in ways that may affect an airline's corporate behaviour and decision-making. It is for this reason that litigation is addressed in this concluding part: not because courts regularly direct airlines' operational decisions, but because judicial interpretation can influence the regulatory constraints and accountability environment in which corporate governance choices are made.

Building on the above distinction, this section explores in greater depth the role environmental and climate litigation has come to play within the airline governance landscape as defined in this study. As outlined earlier, stakeholder expectations around sustainability increasingly intersect with regulatory obligations, and litigation has become one of the avenues through which such expectations are expressed or contested. Stakeholders appear to leverage judicial processes not merely to resolve disputes, but also to influence corporate policies, regulatory decision-making and the interpretation of legal obligations. This 'judicial turn' can be understood in light of instances where courts are called upon to interpret and enforce open norms and general principles—such as the duty of care, precautionary principles, and proportionality—particularly in situations marked by perceived regulatory gaps or ambiguous legal standards.

To examine how this development intersects with airline governance, the analysis begins by situating climate litigation as a strategic phenomenon observed in several jurisdictions. It then turns to the Netherlands as a notable jurisdiction in thedomain of climate and environmental litigation, illustrating how judicial interpretation of open norms has influenced the international climate regime through landmark rulings. The discussion subsequently considers how certain cases have extended climate-related claims to corporate and director liability,[27] raising questions about organisational governance and individual accountability. Finally, these developments are contrasted with the more restrained judicial approach observed in jurisdictions such as the United Kingdom.

The section concludes by considering the implications of situations in which courts step into roles traditionally associated with regulators, and by reflecting on the potential challenges that such judicial involvement may pose for airline governance frameworks.

27. As further discussed in the next sections, with particular reference to section 4.4.3.

4.2 The Rise of Climate Litigation

Since the adoption of the Paris Agreement under the United Nations Framework Convention on Climate Change (UNFCCC) in 2015,[28] climate litigation has witnessed a marked rise globally, becoming an instrument for influencing climate-related legal duties across various jurisdictions. Litigation regarding climate change has also reached the International Court of Justice (ICJ), which was requested to decide on the "Obligations of States in respect of Climate Change." In its decision of 2025, the ICJ argued that States cannot exclusively rely on ICAO's CORSIA to meet their international obligations; rather, they must progressively tighten aviation measures in line with the temperature goal as agreed upon in the Paris Agreement of 2015, and other general environmental law-related instruments.[29] Litigants, including NGOs, citizen groups, indigenous communities, and public bodies, turn to judicial avenues to compel States and corporations to fulfil their climate obligations. This global phenomenon reflects a broader strategic use of climate litigation.

Climate litigation can broadly be categorised into two streams: cases against States and cases against private entities. Litigation targeting States commonly seeks to hold governments accountable for inadequate climate policies or failure to achieve emissions reduction targets. The landmark *Urgenda* case in the Netherlands—explored in detail in the subsequent section—was among the first to successfully oblige a State to increase its climate ambition based on human rights principles. Conversely, litigation against corporations seeks accountability from private entities whose business activities significantly contribute to climate change.

Europe, in particular, has emerged as a central hub for not only climate regulation but also the ensuing litigation. According to data from the Grantham Research Institute in 2022, climate litigation cases in Europe have increased sharply, from ten new cases filed in 2015 to a record 57 cases in 2021 alone.[30] This growth illustrates Europe's notable role in judicial approaches to the enforcement of climate obligations, in connection with the European Union's ambitious climate objectives and, as will be seen below, a judiciary receptive to climate-related claims grounded in human rights law.

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28. Paris Agreement under the United Nations Framework Convention on Climate Change, adopted 12 December 2015, entered into force 4 November 2016, UNTS Vol. 3156 No. 54113.
29. ICJ, *Obligations of States in respect of Climate Change*, Advisory Opinion, I.C.J. Reports 2025
30. Climate Litigation in Europe: A summary report for the European Union Forum of Judges for the Environment (2022). Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science and the European Union Forum of Judges for the Environment.

In other parts of the world, the number of climate litigation cases has also increased,[31] illustrating how courts have been and continue to be used as an instrument to enforce sustainability commitments in some contexts. While historically focused within domestic jurisdictions, recent trends have demonstrated increasing recourse to international courts.[32] Notable examples include the above-mentioned Vanuatu's initiative at the International Court of Justice (ICJ),[33] and several climate cases brought before the European Court of Human Rights (ECtHR, henceforth in this section also referred to as the Court), with only the *KlimaSeniorinnen* to date successfully alleging that Switzerland's climate inaction violated fundamental human rights.[34]

While a detailed analysis of these cases lies beyond the scope of this study, several elements of the *KlimaSeniorinnen* case merit attention.[35] First, the Court held that governments have a duty to take effective measures to meet climate targets and mitigate climate-related harm. Second, although the Court maintained a high threshold for individuals to qualify as victims, it broke new ground by recognising the standing of an association, thereby allowing a form of *actio popularis*.[36] While the broader implications for the Court's case law remain uncertain, this development may pave the way for pressure groups, activist organisations, or other representative bodies to bring claims on behalf of those affected by climate change.

The above high-profile cases illustrate instances in which courts engage with international climate obligations, interpreting open norms, general principles and the scope of human rights protection to include protection against climate change. This diversification of climate litigation, ranging from domestic court challenges and human rights claims to complex international disputes, highlights courts' role in interpreting and giving effect to international climate-related duties. Judicial

31. See Climate Change Litigation Databases of the Columbia Law School, available at: https://climatecasechart.com (accessed: 1 May 2025).
32. See, B. Mayer and H. van Asselt, "The Rise of International Climate Litigation." Review of European Community & International Environmental Law, vol. 32(2), 2023, pp. 175–84.
33. See ICJ, Advisory proceedings, Case No. 187 (2023). See also, S. Farran, "Vanuatu Leads Drive to Secure an Opinion from the International Court of Justice on State Responsibilities to Turn Words into Action on Climate Change." The University of Queensland Law Journal 42(3). 2023, pp. 411–32.
34. European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, General Chamber, Case 3600/20, Judgement of 9 April 2024.
35. For a full analysis, see, for instance, C. Heri, "KlimaSeniorinnen and Its Discontents: Climate Change at the European Court of Human Rights." European Human Rights Law Review, No. 4. 2024, pp. 317–31.
36. K. Dzehtsiarou, "KlimaSeniorinnen Revolution': The New Approach to Standing", The European Convention on Human Rights Law Review, 5(4). 2024, pp. 423-43.

interventions may serve not only to enforce compliance with existing standards but may, in some cases, scrutinise and influence their interpretation, particularly where national and international regulatory frameworks contain open norms or normative gaps.

These developments also draw attention to jurisdictions where courts have shown a particular readiness to engage with broadly formulated legal norms in climate-related disputes. As outlined in the previous sections, litigation tends to arise when regulatory standards are subject to interpretive discretion or when perceived gaps create uncertainty about the scope of environmental or climate-related obligations. The Netherlands exemplifies that dynamic: its courts have relied on duties of care, human rights provisions, and general principles of law to address such claims, resulting in decisions that have attracted international attention. This makes the Dutch experience an instructive example for understanding how judicial interpretation can shape both public and private decision-making in the climate context.

Against the above background, the following section provides an in-depth analysis of Dutch landmark cases, most notably *Urgenda* and *Shell*, which have become central reference points in discussions of judicial engagement with climate-related obligations.

4.3 Foundational Climate Litigation Cases in the Netherlands

Since around 2015, which marked the initial ruling in the *Urgenda* case addressed below, the Netherlands has emerged as a central jurisdiction for climate litigation, setting legal precedents with implications for environmental governance that resonate well beyond its borders. Central to this development is the Dutch judiciary's interpretation of broad and general legal norms, so-called "open norms" or principles of, for instance, good administration.[37] These broadly formulated legal standards grant judges interpretative discretion, especially where regulatory provisions or legislative guidance are absent or limited.

The landmark case *Urgenda Foundation* v. *State of the Netherlands* (2019), initiated by the environmental NGO Urgenda and some 900 citizens, vividly illustrates this judicial approach. In this groundbreaking decision, the Dutch Supreme Court ruled

37. In this context, referring to so-called "algemene beginselen van behoorlijk bestuur" which are the general principles of proper administration developed in Dutch administrative law and codified in the *Algemene wet bestuursrecht* (Awb). They include principles such as legality, proportionality, due care, reasoned decision-making and legal certainty, as established by case law of the Dutch administrative courts.

that the government was legally obliged to reduce greenhouse gas emissions by at least 25 per cent below 1990 levels by the end of 2020.[38] The Supreme Court anchored its reasoning explicitly in the open norm of duty of care derived from human rights obligations.[39] Specifically, the Court relied on Article 2 of the European Convention on Human Rights (ECHR), underscoring the rights to life and the State's positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction, as well as Article 8 ECHR concerning the rights to life and respect for private and family life which obliges the State to protect their right to their home life and private life.[40] This ruling not only demonstrated judicial willingness to interpret open norms expansively but also established an important judicial precedent, prompting subsequent litigation involving similar environmental claims against governmental and private actors.

Building on this momentum, the case of *Milieudefensie* v. *Royal Dutch Shell* (2021),[41] the 'Shell case', extended climate litigation into the private sector. Initiated by the environmental NGO Milieudefensie, the claim relied explicitly on the same human rights-based argumentation from Urgenda, notably invoking Articles 2 and 8 of the ECHR. The District Court held that Shell had an 'unwritten standard of care' under the Dutch Civil Code to reduce its global CO_2 emissions by 45% by 2030, stressing Shell's position as a major emitter and invoking international soft law instruments such as the UN Guiding Principles and OECD Guidelines.[42]

However, the Court of Appeal (the Court) overturned the concrete reduction order in 2024.[43] While it upheld the underlying legal principles—including the indirect horizontal effect of human rights and the recognition that corporations bear responsibilities to mitigate climate harm—the Court found that a specific 45% reduction target could not be derived from those sources. It reasoned that

38. Supreme Court of the Netherlands, *The State of the Netherlands v Urgenda Foundation*, 20 December 2019. ECLI:NL:HR:2019:2007.

39. Ibid., rec. 5.8.

40. See, for instance, Chapter 9, Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond, by Christine Bakker in, Climate Change Litigation: Global Perspectives, (Leiden, The Netherlands: Brill | Nijhoff, 26 Apr. 2021), and G. Van der Schyff, "*The Urgenda Case in the Netherlands on Climate Change and the Problems of Multilevel Constitutionalism.*" Constitutional Review 6(2). 2020.

41. District Court of Haarlem, *Milieudefensie et al v Royal Dutch Shell Plc*, 26 May 2021, ECLI:NL:RBDHA:2021:5339.

42. See, 'United Nations Guiding Principles on Business and Human Rights' UN Doc HR/PUB/11/04 (2011), and, 'OECD Guidelines for Multinational Enterprises on Reasonable Business Conduct', OECD Publishing (2023).

43. Court of Appeal The Hague, *Shell Plc v Milieudefensie (Environmental Defence) et al.*, 12 November 2024, ECLI:NL:GHDHA:2024:2100.

the applicable standards were too general or scientifically contested to impose binding obligations on a single private actor. Although viewed by some as a setback, the ruling nevertheless reaffirmed key legal foundations for future litigation by confirming that a company's duty of care may vary depending on its contribution to climate change and its capacity to prevent or mitigate harm.[44] The case was brought before the Dutch Supreme Court on 11 February 2025 through the filing of a writ of summons, marking the first step in what is likely to become a protracted legal process.[45] The said judicial interpretation of corporate duties has broader implications beyond the Shell case alone, as illustrated by new litigation targeting ING Bank.[46] ING faces scrutiny regarding its fossil fuel financing practice and corporate accountability in climate-related contexts.

The Dutch cases discussed above demonstrate how courts have interpreted open norms and human rights obligations in climate-related disputes, setting precedents that extend beyond the specific contexts in which they were developed. These interpretative approaches are also appearing in litigation involving environmental impacts, permitting decisions, and operational constraints, areas that are particularly relevant for sectors such as aviation. In several Dutch cases, disputes concerning noise, local environmental impacts, or climate-related duties have relied, directly or indirectly, on similar doctrinal foundations.

The next section examines these aviation-specific cases in more detail and considers how such judicial reasoning interacts with the regulatory and corporate governance of airlines and airports.

4.4 Climate and Environmental Litigation Targeting Dutch Aviation

As noted at the end of the previous section, the interpretative approaches developed in Dutch climate litigation have also emerged in aviation-related disputes. This is unsurprising given the regulatory characteristics of aviation: airlines and airports operate within dense layers of international, EU and national regulation; they are tied to a home-State jurisdiction; and they depend on the use of (public) infrastructure, environmental permits, and operational authorisations.

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44. See also, B. Johannsen, LJ. Kotzé and C. Macchi. "*An empty victory? Shell v. Milieudefensie et al 2024, the legal obligations of carbon majors, and the prospects for future climate litigation action*". RECIEL. 2025, pp. 1-9.
45. See, Reuters, "Climate activists take Shell case to Dutch Supreme Court", 12 February 2025, available at: www.reuters.com/sustainability/climate-energy/climate-activists-take-shell-case-dutch-supreme-court-2025-02-11/ (accessed: 1 May 2025).
46. See, www.ing.com/Newsroom/News/Milieudefensie-starts-climate-case-against-ING.htm (accessed: 1 May 2025).

Aviation is also highly visible to communities and consumers, making it a sector where environmental and climate-related concerns readily translate into public discourse, reputational pressures and legal contestation.

Litigation in the Dutch aviation context has accordingly taken multiple forms. Some disputes reflect climate-related arguments similar to those advanced in *Urgenda* and *Shell*, while others concern more traditional environmental impacts and litigation dealing with noise, local air quality, or the application of administrative procedures. A key example, which is analysed extensively in Part C, concerns the legal challenges surrounding the application of the Balanced Approach for Schiphol Airport. Although the procedure used aimed to reduce noise pollution, the dispute ultimately centred around the government's attempt to lower the airport's capacity.[47] In proceedings between the State and several airlines, an association of residents living near the airport joined the case as an interested party. Their participation underscores the role of local communities as stakeholders, reflecting the broader development in stakeholder-oriented governance discussed earlier. In these proceedings, the Court of Appeal explicitly referred to principles of good governance—particularly legality, proportionality, careful decision-making, reasoned justification, and legal certainty—as essential standards for allowing the government's proposed reductions in airport capacity.[48] However, the Dutch Supreme Court later overturned this decision on different grounds.[49] Therefore, the Schiphol proceedings illustrate how different stakeholders may use litigation to contest or shape the regulatory and operational environment in which airlines operate.

The following subsections examine three categories of aviation-related litigation:

i) disputes concerning environmental claims and public communications;
ii) cases extending human rights reasoning to airport impacts; and
iii) emerging efforts to attribute personal liability to directors and public office-holders in climate- or environment-related contexts

These cases offer insight into how judicial reasoning developed in climate litigation interacts with environmental and administrative disputes, and how these interactions shape the governance dynamics of the aviation sector examined in this study.

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47. See, Part C, Article 6.
48. See, Part C, Article 5.
49. Dutch Supreme Court, *International Air Transport Association et al v. the State of the Netherlands* (translated), 12 July 2024, ECLI:NL:HR:2024:1061.

4.4.1 From Capacity to Advertising: Litigation on Environmental Claims

Parallel to the proceedings concerning operational constraints at Schiphol, other aviation-related lawsuits have emerged, for instance, in the sphere of advertising, including allegations of greenwashing against KLM initiated by an environmental group. The group claims that the airline's advertisements misleadingly represent its sustainability efforts, particularly regarding carbon offset practices. The judicial response, in this case, reinforced consumer protection standards and environmental accountability,[50] prompting KLM to greater transparency and caution in its public sustainability claims.[51]

Similarly, an action group's complaint to the Dutch Advertising Code Committee alleged that flight holiday advertisements breached advertising standards by promoting fossil-fuel-related travel in a misleading and indecent manner. In another case, the activist approach originated from the Municipality of The Hague, which garnered international headlines for introducing a ban on public advertisements for fossil-fuel-related services, including air travel.[52] The travel industry association ANVR and TUI have challenged the ban before the court but lost the case at first instance.[53] At the time of writing, ANVR is exploring the option of appeal.[54]

The combined effect of these cases illustrates the range of legal scrutiny applied to aviation's climate- and environment-related messaging, the role of courts in evaluating public authority in this context, and the resulting influence on airline governance as elaborated in this work. In addition to disputes concerning aviation-related messaging and environmental claims, litigation has also drawn on human rights arguments, particularly in cases involving noise and local environmental impacts.

50. District Court of Amsterdam, *Fossil Free v KLM* (translated), 20 March 2024, ECLI:NL:RBAMS:2024:1512.
51. See, for instance, P. Verbruggen, "*De regulering van misleidende milieuclaims: Over fossielvrij/KLM en verder*" (The regulation of nisleading green claims: On the case of fossielvrij v. KLM and beyond), Tijdschrift voor consumentenrecht & handelspraktijken, Volume 3. 2024, pp. 124-132, and S. Truxal and T. Aras, *"Charting a 'Green' Flight Path for European Consumers? Allegations of Greenwashing in the Airline Industry"*, Journal of European Consumer Market Law 14(1). 2025, pp. 15-20.
52. The Guardian, 'The Hague becomes world's first city to pass law banning fossil fuel-related ads', 13 September 2024, available at www.theguardian.com/world/2024/sep/13/the-hague-becomes-worlds-first-city-to-ban-fossil-fuel-related-ads (accessed: 1 May 2025).
53. District Court of The Hague, ANVR and TUI Nederland v. Gemeente Den Haag, 25 april 2025, ECLI:NL:RBDHA:2025:6874.
54. NL Times, "Court approves ban on fossil fuel advertisements in The Hague; ANVR and TUI disappointed" available at: www.nltimes.nl/2025/04/25/court-approves-ban-fossil-fuel-advertisements-hague-anvr-tui-disappointed (accessed: 1 May 2025).

4.4.2 From Noise to Rights: Extending Human Rights Concepts to Aviation

Moreover, aviation-related climate litigation in the Netherlands has also extended into disputes framed in terms of human rights. Residents near Schiphol Airport initiated litigation against the Dutch government, arguing that persistent nighttime flight operations caused severe sleep deprivation and adversely affected their health and privacy rights under Articles 2 and 8 of the ECHR.[55] This case draws directly on the same human rights framework previously articulated in the landmark *Urgenda* and *Shell* cases, demonstrating how similar interpretative approaches to broadly formulated norms have been invoked to address environmental and public health concerns.

In its judgment, the District Court (the Court) concluded that the State had acted unlawfully by failing to enforce the existing legal framework for noise pollution around Schiphol and by systematically prioritising the airport's hub function over the rights of local residents. The Court found that this method of balancing interests did not meet the standards set by Article 8 of the ECHR for such cases. [56] While the Court refrained from imposing specific policy measures, it ordered the State to enforce existing noise regulations within one year and to establish accessible, effective legal protection for all seriously affected residents.[57] Concerned about the ruling's practical implications, several airlines and Schiphol Airport requested to intervene in the State's appeal. In an interim decision, the Court of Appeal granted this request but denied the motion to suspend the enforcement of the District Court's judgment.[58]

While the final judicial determination in this human rights claim—set against the backdrop of a complex and evolving regulatory noise landscape surrounding Schiphol—remains pending, its progression underscores the relevance of human rights norms as important interpretative tools in environmental and climate-related litigation involving the aviation sector.

4.4.3 From Entities to Individuals: Introducing Director & Personal Liability

In 2025, litigation targeting the aviation sector has prompted discussion about accountability extending from corporations and governments to individual directors and ministers. Although sometimes linked to broader debates over climate responsibility, this category of cases is grounded primarily in environmental

55. District Court of The Hague, *Foundation Right to Protection from Aircraft Noise v the State of the Netherlands* (translated), 20 March 2024, ECLI:NL:RBDHA:2024:3734.
56. Ibid. rec. 6.43.
57. Ibid. rec. 6.55
58. Court of Appeal The Hague, 25 February 2025, ECLI:NL:GHDHA:2025:195.

and public health concerns rather than in climate-specific obligations. A particularly controversial example is the Dutch Schiphol 'assault' case initiated in early 2025. In this criminal complaint, filed by over 900 local residents, directors from Schiphol Airport, KLM and Transavia and two responsible Dutch ministers are accused of committing assault due to persistent nighttime flight operations causing severe sleep deprivation.[59] The lawyer representing the claimants explicitly frames prolonged exposure to harmful levels of aircraft noise as a form of physical violence. In an interview, the lawyer acknowledges that the real aim is designed to address environmental pollution caused by aviation, but the assault framing strategically bypasses conventional criminal charges for environmental harm, which are considered harder to pursue successfully.[60]

This legal strategy reflects a new episode in strategic litigation, targeting individuals—particularly corporate executives and political officeholders—for failing to act decisively on climate and environmental issues. It is important to note, however, that Dutch case law has not recognised personal or director liability for environmental damage, whereas the Schiphol complaint does not alter that legal position. The case remains procedurally at a very early stage and does not imply the existence of such liability under Dutch law. The Schiphol assault case deliberately leverages criminal law to highlight the personal accountability of those in positions of authority, with the stated aim of prompting courts to consider whether environmental liability can extend to individuals beyond abstract corporate responsibility into direct personal culpability. This is consistent with discussions in other jurisdictions about individual responsibility for environmental or climate-related harms in which claimants increasingly seek to hold decision-makers themselves responsible for actions or omissions with significant environmental and public health consequences, as to which see also the next section.

Regarding the personal accountability of corporate officers, the Dutch Supreme Court established an enduring precedent nearly a century ago, ruling that directors and commissioners could be held personally liable for wrongful actions taken within their official capacities if those actions constituted an unlawful act.[61] In that case, directors were held accountable for presenting misleading financial

59. See, NL Times, "Locals press assault charges against Schiphol, KLM, Transavia", 9 December 2024, available at: https://nltimes.nl/2024/12/09/locals-press-assault-charges-schiphol-klm-transavia (accessed: 1 May 2025).

60. See, in Dutch, De Groene Amsterdammer, "Interview Macht & tegenmacht: Bénédicte Ficq", 12 maart 2025, available at: https://www.groene.nl/artikel/ceo-s-zijn-de-slimme-criminelen-met-aanzien (accessed: 1 May 2025).

61. Dutch Supreme Court, 25 november 1927, NJ 1928, 364 (Kretschmar/Mendes de Leon).

information.[62] This decision underscores that corporate decision-makers are not insulated from liability by their official positions when causing harm through negligent or wrongful conduct.[63] However, Dutch jurisprudence applies a high threshold for external personal liability, requiring a personal serious reproach, which is only met in exceptional circumstances.[64] This high threshold is relevant when evaluating attempts to extend liability for environmental or climate-related harms to individuals.

However, deploying criminal assault charges in climate litigation, such as the Schiphol assault case, raises concerns regarding potential legal overreach. Framing environmental harm as assault is provocative and legally unprecedented, raising questions about the practical and ethical boundaries of extending criminal liability. While such litigation strategically emphasises individual accountability, it may blur the lines between traditional criminal conduct and corporate or governmental negligence, potentially creating unpredictable legal standards and decision-making burdens. Such developments may have implications for governance, potentially influencing how corporate directors and ministers approach environmental decision-making, potentially leading corporate directors and ministers to adopt highly cautious or overly defensive approaches to environmental decision-making to mitigate personal legal exposure.

Ultimately, these developments illustrate a legal landscape where strategic climate litigation challenges conventional frameworks of corporate and governmental accountability. The Schiphol assault case serves as a critical test of how far personal accountability can be extended through the courts, highlighting the dynamic and potentially significant impacts of individual liability litigation on governance practices within industries, particularly aviation, with significant environmental footprints. At the same time, it is important to avoid overstating the implications of this early case: the Netherlands does not have an equivalent to the derivative action mechanism available under English law,[65] and therefore the procedural pathways for holding directors accountable can differ substantially between jurisdictions.

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62. See, W.A. Westenbroek, *Bestuurdersaansprakelijkheid in theorie*, diss. Rotterdam (Instituut voor Ondernemingsrecht nr. 108), Deventer: Wolters Kluwer 2017, at section 9.2.1.
63. A. Karapetian, Bestuurdersaansprakelijkheid uit onrechtmatige daad. Civielrechtelijke en strafrechtelijke normen voor bestuurders van noodlijdende ondernemingen. Deventer: Wolters Kluwer, 2019, sec 2.3.1.
64. See, for instance, Dutch Supreme Court, 8 december 2006 (Ontvanger/Roelofsen), ECLI:NL:HR:2006:AZ0759.
65. See, I.S. Wuisman, & R.A. Wolf, (2018). Directors' and Officers' Liability in the Netherlands at p. 317.

4.5 Contrasting Judicial Approaches: The UK

In contrast to the more proactive judicial developments observed in the Netherlands, courts in the United Kingdom have exhibited significantly greater restraint in climate litigation, particularly when directed against corporate actors or government policy. This judicial posture is shaped by several characteristics of the UK system: a strong tradition of deference to legislative and executive decision-making, strict standing and causation requirements, a preference for narrow statutory interpretation, and a predominantly procedural model of judicial review that focuses on legality and rationality rather than substantive reassessment of policy choices. These features make UK courts less receptive to arguments grounded in broad duties of care, international climate instruments, or open-norm reasoning.[66]

Prominent examples of this cautious approach include *ClientEarth* v. *Shell*, in which UK courts dismissed claims seeking stronger judicial oversight of corporate emissions strategies.[67] Similarly, in *Plan B* v. *UK Government*, the courts declined to compel the government to adopt more ambitious climate measures beyond existing policy commitments.[68] Another illustrative case, involving the University Superannuation Scheme (USS Ltd), further underscores the judiciary's reluctance to impose substantive climate-related obligations without clear legislative grounds.[69]

These judicial characteristics carry governance implications. Because UK courts are less inclined to extend climate or environmental duties through judicial interpretation, stakeholders seeking to influence aviation policy or corporate behaviour often cannot rely on the courts to recalibrate regulatory obligations. Instead, their primary avenues lie in political and regulatory processes, administrative oversight mechanisms, shareholder engagement, or public and consumer pressure.

66. For an overview of the UK courts' deferential and predominantly procedural approach to judicial review, including narrow standing and a strong emphasis on legality and rationality, see, for instance, M. Elliott, & J. Varuhas, Administrative law: text and materials (Fifth ed.). Oxford University Press (2017).
67. High Court of Justice, Business and Property Courts of England and Wales, Insolvency and Companies List (ChD), 24 July 2023, Case No: BL-2023-000215. Neutral Citation Number: [2023] EWHC 1897 (Ch). See also, for instance, P. Iglesias-Rodríguez, *ClientEarth v Shell plc and the (Un)Suitability of UK Company Law and Litigation to Pursue Climate-Related Goals*, Journal of Environmental Law 35(3). 2023, pp. 445–454. See also, E. Aristova, & L. Nichols, *Climate change on the board: navigating directors' duties*. Journal of Corporate Law Studies, 24(2). 2024, pp 479–514.
68. High Court of Justice, Queen's Bench Division, Administrative Court, 21 December 2021, Case No: CO/1587/2021. Neutral Citation Number: [2021] EWHC 3469 (Admin).
69. England and Wales Court of Appeal (Civl Division), 21 July 2023, Case No: CA-2022-001798. Neutral citation number: [2023] EWCA Civ 873.

As a result, litigation plays a more limited role as a governance mechanism in the UK than in jurisdictions where courts engage more actively with broad legal norms.

While an in-depth analysis of these judgments lies beyond the scope of this study, the jurisdictional contrast highlights how nationality and legal tradition indirectly shape the governance of airlines through climate and environmental litigation. Dutch courts have shown a greater willingness to interpret open norms broadly and actively address perceived regulatory shortcomings. This approach reflects, among other aspects, the Dutch legal culture of pragmatism, an articulated role for international law, especially international trade law, and a tradition of judicial engagement with public interest claims. In contrast, UK courts have adopted a more deferential posture, exercising caution not to overstep the boundaries of legislative and executive authority. However, these differences should not be overinterpreted as demonstrating that one jurisdiction is categorically "more favourable" to climate claims. Outcomes in specific cases, such as the Dutch and UK Shell proceedings, are based on the particular facts, legal bases, procedural posture, and available remedies in each system. A fuller explanation and examination of these judicial differences fall outside the scope of the present analysis but merit further comparative study.

In the context of this study, these differing judicial attitudes suggest that litigation as a governance mechanism operates differently across jurisdictions, without implying that one system is inherently more receptive to climate or environmental claims. Whereas Dutch courts may, directly or indirectly, shape regulatory obligations and corporate conduct through interpretive reasoning, UK courts generally reinforce the boundaries of existing statutory frameworks. The procedural tools available to stakeholders also differ; for example, the absence of a derivative action mechanism in Dutch law and the high threshold for personal liability further limit one-to-one comparison. For aviation stakeholders, the scope and effectiveness of litigation as a governance tool depend significantly on the airline's home State's jurisdiction. This position underscores the study's assumption that governance, within the broad framework used in this research, is influenced not only by corporate and regulatory structures but also by the judicial and societal environments in which stakeholders and airlines operate.

4.6 Concluding Remarks on Litigation, Governance and the Limits of Stakeholder Influence through the Judiciary

The discussion in this section is not intended to provide an exhaustive doctrinal account of climate or environmental litigation. Rather, it purports to examine how litigation functions within the governance framework developed in this study,

as one of the channels through which stakeholders may seek to influence the regulatory or accountability environment in which airlines operate. Courts do not determine the day-to-day operations or decision-making of airlines; however, by interpreting open norms, clarifying statutory obligations, or adjudicating disputes on environmental or operational impacts, they can be used as an instrument by stakeholders to influence the parameters within which corporate and regulatory governance unfold. Situating litigation within this framework helps distinguish it from external factors, such as geopolitical disruptions, which influence operational choices without altering the underlying allocation of authority.

In this framework, litigation may be best understood as part of a feedback loop within stakeholder governance. Stakeholder pressures, arising from ESG expectations, community concerns, or environmental advocacy, may lead to litigation when regulatory pathways are perceived as insufficiently responsive. When successful, such litigation can in turn feed back into regulatory governance by influencing how legal obligations or operational parameters are interpreted or enforced, or by prompting adjustments in corporate governance through decision-making, risk assessment and strategic planning. In this sense, litigation does not independently drive governance change but operates alongside, and sometimes in response to, the wider constellation of stakeholder, regulatory, and societal expectations.

Section 4 has examined how climate and environmental litigation, operating through different legal pathways, actors, and procedural avenues, intersect with the governance landscape of aviation. The cases reviewed range from global climate claims based on human rights and foundational Dutch judgments to aviation-specific environmental disputes concerning noise, environmental permitting, in some cases relying on similar human rights claims and even attempts to expand the scope of personal liability. All of these developments show that courts may be used as instruments for stakeholder advocacy and to influence the interpretation and enforcement of environmental or climate-related obligations, particularly where regulatory frameworks contain open norms or areas of legal uncertainty. While judicial decisions do not replace regulatory or corporate governance, they can affect the regulatory and operational constraints and accountability structures within which airlines operate.

Within this broader picture, the brief comparison of Dutch and UK case law illustrates how institutional traditions and judicial philosophies can affect the extent to which litigation functions as a governance mechanism. Dutch courts have been willing, in particular contexts, to engage with open norms and human rights

principles when assessing State or corporate obligations, whereas UK courts have generally adopted a more restrained, procedural model of review. These differences do not suggest that one jurisdiction is inherently "more favourable" to climate or environmental claims. Instead, they highlight that the possibilities for litigation to act as a channel of stakeholder influence depend partly on the legal bases, procedural routes, and remedial frameworks available within each jurisdiction. For airlines, this means that the scope and limits of litigation as a governance tool are linked. not deterministically, but materially, to the jurisdiction in which the airline is legally anchored.

It remains essential to interpret the cases discussed in this section with careful attention to their factual and procedural context. Judicial reasoning in climate and environmental litigation is shaped not only by the substantive legal basis of a claim, but also by the identity of the parties, the type of remedy sought, evidentiary thresholds, and the type of procedure, whether administrative, civil, or criminal, through which disputes reach the courts. Differences between proceedings cannot be attributed solely to jurisdictional divergence. Recognising differentiation factors is important to avoid overstating contrasts and to understand how litigation operates, in practice, as a governance mechanism within the boundaries established by each legal system. A fuller comparative analysis of these jurisdictional variations would require a more detailed doctrinal inquiry into procedural law, remedies, and human rights adjudication, an inquiry that falls beyond the scope of the governance framework developed in this study, but which may offer a valuable avenue for future research.

Viewed through the tripartite governance framework developed earlier, including corporate, regulatory, and stakeholder governance, litigation can interact with each dimension in distinct ways. In corporate governance, court decisions may influence the standards that directors and managers must consider in their decision-making when, for instance, assessing environmental or operational risks. For regulatory governance, litigation may prompt clarification or enforcement of existing rules, especially where administrative guidance is indeterminate. For stakeholder governance, legal action forms one of several channels through which societal stakeholders' concerns are articulated or contested. In this way, litigation contributes to shaping the environment within which governance authority is exercised, without displacing the primacy of corporate decision-making or regulatory authority.

Taken together, the developments reviewed in this section illustrate that litigation forms one part of the wider constellation of mechanisms through which governance dynamics around airlines evolve. Its influence remains context-dependent: shaped by institutional traditions, regulatory frameworks, procedural constraints, and stakeholder mobilisation. The cases discussed above show how judicial interpretation can affect the boundaries of regulatory discretion, the expectations placed on corporate actors, and the channels through which stakeholders pursue environmental or climate-related concerns. These observations form an analytical bridge to the concluding synthesis in the following section, which draws together the implications for the overarching research question of this dissertation.

5. Concluding Reflections: Redefining Airline Governance in the 21st Century

This concluding section brings together the insights developed across the different parts of this research to revisit the overarching inquiry that anchors this dissertation: who governs the airline? The analysis indicates that governance in contemporary European aviation cannot be understood solely through corporate structures, decision-making, or regulatory authority. Instead, it is the result of the interaction of the three governance dimensions developed in Part A: corporate governance, regulatory governance, and stakeholder governance, each shaping, constraining, or influencing the direction and control of airlines in different ways.

A second pillar of the conceptual framework of this research concerns the interpretation of sustainability in a multidimensional sense, encompassing environmental objectives, such as emissions reduction and noise, but also economic resilience, competitiveness, and strategic considerations linked to State interests and geopolitical developments. This multidimensionality is reflected in the findings of Parts B and C: corporate and regulatory governance frameworks set the parameters that determine airlines' capacity to comply with environmental obligations and to compete internationally; At the same time, strategic autonomy reasserts State and EU-involvement in the face of geopolitical interdependence.

A third conceptual anchor is the notion of stakeholder influence, understood through a typology that distinguishes institutional, economic, and societal stakeholders, each operating through distinct governance levers. Institutional actors shape the legal and regulatory governance framework. Economic share- and stakeholders influence airlines' corporate conduct through ownership and, for instance, capital conditions. Societal stakeholders exert normative, reputational, or legal pressure. As Part C illustrates, these forms of influence do not replace traditional governance arrangements but intersect with them, reinforcing or contesting corporate and regulatory authority.

Seen through this lens, the findings from Parts B and C indicate a governance configuration that is multi-level, multi-actor, and shaped by sustainability pressures in the broad sense used throughout this dissertation. Within this broad constellation, litigation constitutes one, but not the sole or determinative, mechanism through which stakeholders may attempt to influence or steer regulatory interpretation, operational parameters, or corporate accountability.

Climate and environmental litigation should be understood as analytically distinct from other parameters affecting airline governance. Climate (change) litigation generally targets systemic emissions reductions and often relies on human-rights-based or duty-of-care arguments. By contrast, environmental disputes in the aviation industry more commonly concern localised effects such as noise, air quality, permitting, or environmental claims in advertising and consumer protection. In some jurisdictions, the normative reasoning developed in climate judgments has informed or inspired arguments in aviation-related environmental proceedings targeting airlines and airports. However, the legal bases, parties, and evidentiary burdens differ significantly.

Across both categories, judicial decisions may clarify open norms, enforce existing obligations, or recalibrate regulatory frameworks, yet their effects remain contingent on jurisdictional context and the specific legal bases invoked. Litigation, therefore, complements, rather than replaces, the broader governance dynamics analysed in Parts B and C.Looking ahead, global shifts in governance paradigms and geopolitical developments will also continue to shape airline governance. The rise of the strategic autonomy concept in regions such as the European Union, initially rooted in security and defence concerns, has expanded to encompass economic resilience and the safeguarding of vital industries, including aviation. This recalibration of policy priorities reflects broader global tensions, particularly between major powers such as the United States, China, and the European Union, where economic interdependence can become a vulnerability in times of crisis or geopolitical instability.

Geopolitical tensions have become more pronounced in the 2020s, accelerated by events such as Russia's aggression in Ukraine and by shifting trade and industrial polices, most visibly in the US-China relations. These dynamics have informed recent EU policy proposals, initiated by Mario Draghi's report on Europe's competitiveness and vulnerability in a rapidly evolving global economic order. Draghi underscores the need to balance sustainability ambitions with economic resilience, emphasising strategic autonomy and economic competitiveness as cornerstones of future policy.[70] For EU airlines, this translates into navigating a complex balance: maintaining competitive viability, ensuring compliance with environmental policies, and responding to heightened judicial scrutiny in certain jurisdictions. Within the international environmental regulatory framework, litigation may function as a tool not only for environmental accountability but also as one channel through which stakeholders seek to influence governance outcomes. Courts, especially in jurisdictions

70. See, Part B, Article 3.

like the Netherlands, have at times become venues for stakeholders wishing to test international regulatory frameworks or the application or interpretation of environmental and climate-related norms.

While judicial interventions can provide accountability and ensure consistency with existing legal frameworks, they also carry risks. Expansive interpretations of broadly formulated open norms, such as the duty of care or proportionality requirements, may generate legal uncertainty, raise concerns about the appropriate institutional balance, or lead to fragmented governance outcomes across jurisdictions. This research argues that clearly defined regulatory norms remain the preferable avenue for the regulatory governance of airlines, with courts complementing rather than substituting the roles of legislators and regulators.

Ultimately, these judicial and geopolitical developments may point to an ongoing evolution rather than a wholesale transformation in airline governance. The traditional governance model, dominated by State interests, including foreign policy and trade considerations, as well as shareholder gains, is accompanied by forms of stakeholders' influence expressed through regulatory processes, and, in some jurisdictions, litigation. Stakeholder engagement and judicial interpretations may contribute to redefining aspects of governance responsibilities and accountability for airlines, directors, and public authorities. However, the scope and direction of such developments remain contingent on the applicable legal, regulatory, and in some cases, political frameworks, as well as the jurisdiction in which they take place.

Returning to the guiding inquiry of this research — who governs the airline? — this final part formulates explicit answers to the research question and the two sub-questions that structure the dissertation. Before addressing them directly, it is useful to briefly recall the conceptual framework developed in Part A of this research, which combines the tripartite governance interpretation, namely corporate, regulatory and stakeholder governance, a multidimensional understanding of sustainability, and the typology of stakeholders and their influence.

Articles in Part B primarily address the corporate and regulatory dimensions of governance and provide the basis for answering Sub-question 1:

1. How do legal and institutional mechanisms within international and EU law, and national company laws, shape and constrain ownership and control in the context of the corporate and regulatory governance of airlines in the European Union?

The findings in Part B show that airlines' regulatory governance remains fundamentally shaped by the unique link between an airline and its home State, a link embedded in international air law through bilateral Air Services Agreements (ASAs). The nationality conditions in ASAs, expressed through substantial ownership and effective control requirements, and, in some cases, the Principal Place of Business, determine which airline can be designated to operate international air services under those ASAs and govern the airline's access to foreign markets, traffic rights, and the State responsible for regulatory oversight. These nationality rules continue to anchor airlines to a specific legal and regulatory jurisdiction, forming the structural foundation of regulatory governance in the sector.

Within this international framework, national company laws define the corporate forms, shareholding arrangements, voting rights, and governance structures through which ownership and control are maintained. These laws determine which forms of shareholding are permissible, how foreign investment is limited or conditioned, and how control-enhancing mechanisms, such as loyalty shares, voting caps, or golden shares, may be used to preserve national or EU ownership and control. EU competition law adds another regulatory layer, together shaping a complex legal architecture that delineates who may effectively control an airline and through which means. This configuration reflects the corporate dimension of airline governance and the internal allocation of decision-making authority.

These corporate and regulatory structures are influenced by strategic considerations that constitute part of the broader sustainability framework applied in this dissertation, including also economic resilience, competitiveness, and strategic autonomy. Recent geopolitical developments and crises have highlighted the importance of maintaining connectivity, safeguarding essential transport services, and avoiding excessive dependency on non-EU actors. Instruments such as the Foreign Direct Investment Screening Regulation and emerging EU strategic autonomy policies reflect an effort to ensure that control over EU airlines remains within the Union, thereby supporting the sector's long-term viability, resilience, and strategic positioning. These strategic goals interact with corporate and regulatory governance by reinforcing the rationale for retaining effective control within the EU and by shaping the conditions under which foreign capital may participate in airline ownership.

Articles in Part C, complemented by the elaboration in Part D, address the regulatory and stakeholder governance dimensions that provide the basis for answering Sub-question 2:

2. How are regulatory and stakeholder governance structures in the European airline sector being redefined through sustainability objectives, environmental and climate litigation, broader stakeholder influence and geopolitical dynamics?

The analysis in Part C shows that sustainability objectives have become an important driver of change in the regulatory environment in which airlines operate. Environmental obligations, including emissions-reduction, market-based measures, fuel-blending mandates, and noise-management requirements, shape the conditions under which airlines may access and use infrastructure, price their services, and plan their networks. These obligations are implemented through international standards, EU legislation, and national measures; they feed into the regulatory governance framework that structures airline behaviour. In the multidimensional understanding of sustainability used in this dissertation, these environmental requirements interact with concerns about economic resilience and competitiveness: regulatory choices must accommodate both decarbonisation and the need to maintain viable connectivity and a level playing field with non-EU carriers.

Within this evolving regulatory context, stakeholder influence plays a role in how sustainability objectives are interpreted, contested, and operationalised. Drawing on the stakeholder typology developed in Parts A and D, institutional, economic, and societal actors deploy distinct governance levers. Institutional stakeholders, including States, EU institutions, and international organisations, design and implement environmental and climate-related rules and can recalibrate them in response to political pressure or geopolitical developments. Economic stakeholders, such as shareholders, investors, and financiers, incorporate environmental and social criteria into funding conditions and risk assessments, thereby linking access to capital with sustainability performance. Societal stakeholders, including communities around airports, NGOs, and consumer groups, exert normative and reputational pressure and resort to legal avenues where they perceive regulatory or political inertia.

Part C's examination of the Dutch application of the Balanced Approach to noise management at Schiphol illustrates how these forms of stakeholder influence may translate into legal and political contestation. Local communities, environmental organisations, and parts of the political sphere have pressed for stricter noise and environmental limits, while airlines and airports have invoked international and EU rules to challenge unilateral restrictions. Courts have been called upon to assess whether national measures comply with the Balanced Approach framework as well as broader EU and international obligations. These dynamics illustrate how

stakeholder pressure can trigger changes in regulatory interpretation, expose tensions between environmental objectives and market access, and reveal the limits of national discretion within an integrated legal regime. They also demonstrate how environmental policy choices in one Member State can provoke responses from other States and market actors, particularly when perceived to affect competitiveness or connectivity, thus linking local governance disputes to geopolitical and internal-market considerations.

Within the stakeholder governance setting, environmental and climate litigation form part of a broader repertoire of stakeholder tools to influence the regulatory framework or corporate conduct. As elaborated in Part D, climate litigation and environmental disputes are analytically distinct. Nevertheless, the reasoning developed in climate judgments can inform arguments in environmental proceedings, and both types of litigation may influence how regulators and market participants understand and apply existing norms. Courts may clarify open standards or enforce procedural requirements and climate or environment obligations. Their role, however, is jurisdictionally contingent and operates alongside the legislative and regulatory frameworks and may inform corporate decision-making.

These findings show how stakeholder governance interacts with regulatory and corporate governance and set the stage within which the main research question can be answered:

> "How is airline governance in the European Union evolving through the interplay between shareholder-based corporate structures and stakeholder influence, and how do sustainability objectives, environmental and climate litigation, and geopolitical developments collectively reshape the regulatory framework governing EU airlines?"

Taken together, the findings of this dissertation show that airline governance in the European Union is evolving through the interaction of corporate, regulatory, and stakeholder governance dimensions, each shaped in turn by the multidimensional sustainability interpretation and a complex geopolitical environment. The foundations of airline governance remain rooted in the corporate and regulatory mechanisms analysed in Part B: nationality rules in Air Services Agreements continue to provide the legal basis for the designation of airlines to operate international air services, while ownership and control requirements determine who may own and control an airline, which, in turn, is based on the corporate shareholding structure.

Against this backdrop, as explored in Parts C and D, regulatory and stakeholder governance are being incrementally reshaped by sustainability objectives, environmental obligations, and broader societal expectations. Environmental rules structure and constrain the operational and commercial environment in which airlines function, while the multidimensional sustainability framework applied here highlights that these environmental aims must be balanced with economic resilience and strategic considerations. Institutional, economic, and societal stakeholders deploy a range of governance levers, from regulatory design and capital conditions to normative pressure and legal challenges, to influence how these sustainability objectives are interpreted and implemented.

Within this stakeholder landscape, litigation operates as one jurisdictionally contingent mechanism through which stakeholders seek to shape or influence regulatory or corporate outcomes. Litigation does not displace corporate or regulatory governance; rather, it interacts with them in specific contexts, contributing to the gradual evolution of governance practices in some jurisdictions but leaving the underlying corporate and regulatory structures intact.

Finally, geopolitical dynamics, including shifting power relations, economic security concerns, and the EU's ambitions for strategic autonomy, overlay these developments and shape the political and regulatory priorities that guide regulatory governance choices. These dynamics reinforce the importance of maintaining effective control over EU airlines within the Union as part of both regulatory and corporate governance, supporting the sector's long-term resilience and competitiveness. Viewed through the broader sustainability lens applied in this research, these geopolitical considerations interact with environmental, economic, and strategic objectives and influence how regulatory measures are designed and implemented.

In sum, reflecting on who truly governs airlines in the 21st century, this dissertation concludes that governance in aviation has become intrinsically multi-dimensional, operating across the interconnected domains of corporate, regulatory, and stakeholder governance. Authority over airlines is no longer exercised from a single locus; instead, it emerges from the interaction of corporate directors and shareholders, governmental and EU regulators, economic and societal stakeholders, and the geopolitical forces that shape the conditions under which airlines operate.

This evolving constellation of actors is situated within an international landscape defined by shifting power relations, the pursuit of strategic autonomy, concerns

about economic security, and intensifying global competitiveness. In this context, airlines face pressures driven by domestic societal environments and broader geopolitical realignments, requiring them to reassess strategic priorities and navigate competing expectations for sustainability, resilience, and market performance.

Across these pressures, governance unfolds through structures and processes in which direction and control are exercised, shared, or contested, as understood in the conceptual framework established in this dissertation. Formal power remains anchored in institutional regulatory authority and oversight, ownership and control arrangements, and corporate decision-making. Yet stakeholder influence, for instance, through legal contestation, public accountability and societal scrutiny can shape how that power can be used or constrained.

These developments show that contemporary airline governance is characterised not by a displacement of traditional frameworks, but by the growing interdependence of governance levels, the diversification of actors capable of shaping outcomes, and the continual balancing of environmental, economic, and strategic objectives. The governance of EU airlines is therefore best understood as a dynamic and contested space, where power and influence intersect across legal, political, economic, and societal domains. This dynamic is likely to persist as sustainability imperatives evolve, geopolitical tensions deepen, and the aviation sector continues to reconcile its environmental obligations with its economic and strategic functions.

This study has adopted a conceptual approach to airline governance. It therefore does not assess the empirical effects of litigation on corporate decision-making or measure how stakeholder pressures materialise in day-to-day governance practice. Its analysis of environmental and climate litigation is limited to illustrating how such disputes may interact with regulatory and stakeholder governance; it does not provide a comprehensive doctrinal account of causation, remedies, or long-term behavioural impacts across jurisdictions.

These limitations point to several avenues for further research. First, the relationship between litigation and corporate governance warrants closer examination, particularly how boards interpret litigation risk, integrate environmental and climate obligations into strategic planning, or adapt internal governance processes. Second, the dynamics of stakeholder influence and participation would benefit from interdisciplinary study, combining legal, political, and organisational perspectives—and from a more granular, typology-based analysis of how specific stakeholder groups exert influence within and beyond formal legal frameworks.

As governance pressures continue to evolve in response to sustainability objectives, stakeholder expectations, and geopolitical developments, further research will be essential to understand how authority, accountability, and influence in the aviation sector are likely to be reshaped in the years ahead.

To conclude, airline governance in the 21st century is not only a legal or corporate issue—it is also a significant policy or even political one: how competing voices are weighed, how interests are balanced, and which norms ultimately shape the path forward. This balancing test will be a challenge in the forthcoming era. Yet, as Eddie Rickenbacker, an American World War I fighter pilot, is often credited with saying: "*Aviation is proof that given the will, we have the capacity to achieve the impossible*." [71]

71. This quote is widely attributed to Eddie Rickenbacker, though its precise origin is not clearly documented. Rickenbacker is a Medal of Honor recipient, and later CEO of Eastern Air Lines. He was known not only for his military accomplishments in World War I, but also for his role in shaping early commercial aviation in the United States.

Selected Bibliography

Books and Book Chapters

- Dierikx, M. and Petit, J.G., *Holding Patterns: Air Transport and Foreign Policy in The Netherlands* (Brill, 2025).
- Haanappel, P.P.C., *The Law and Policy of Air Space and Outer Space: A Comparative Approach* (Kluwer Law International, 2003).
- Huang, J., *Aviation Safety and ICAO* (PhD Leiden, 2009).
- Leleur, I., *Law and Policy of Substantial Ownership and Effective Control of Airlines* (Routledge, 2016).
- Mendes de Leon, P.M.J., *Introduction to Air Law* (11th edn, Kluwer Law International, 2022).
- Mendes de Leon, P.M.J. and Maarsen-Neumann, E., 'Ausländische Luftfahrtunternehmen mit Hauptsitz in der EU/EWR', in Hobe, S. and von Ruckteschell, N. (eds), *Kölner Kompendium des Luftrechts, Vol. 2: Luftverkehr* (Carl Heymanns Verlag, 2009).
- Mendes de Leon, P.M.J., 'The Future of Ownership and Control Clauses in Bilateral Air Transport Agreements: Current Proposals and Legal Obligations', in S. Hobe et al. (eds), *Consequences of Air Transport Globalization* (Heijmans Verlag, 2003)
- Masson-Zwaan, T.L. and Mendes de Leon, P.M.J. (eds), *Air and Space Law: De Lege Ferenda – Essays in Honour of Henri A. Wassenbergh* (Kluwer Law International, 1992).
- Milde, M., *International Air Law and ICAO* (3rd edn. Eleven International Publishing, 2016).
- Milligan, J., *European Union Competition Law in the Airline Industry* (Kluwer Law International, 2017).
- Morrell, P.S., *Airline Finance* (4th edn, Routledge, 2013).
- Lelieur, I., 'Law and Policy of Substantial Ownership and Effective Control of Airlines: Prospects for Change' (Routledge, 2016).
- Truxal, S., *Competition and Regulation in the Airline Industry: Puppets in Chaos* (Routledge, 2012).
- von den Steinen, E., *National Interest and International Aviation* (Eleven International Publishing, 2006).
- Havel, B.F., *Beyond Open Skies: A New Regime for International Aviation* (Kluwer Law International, 2009).
- Humphreys, B., *The Regulation of Air Transport: From Protection to Liberalisation, and Back Again* (Routledge, 2023).

- Waymouth, C., 'Is "Protectionism" a Useful Concept for Company Law and Foreign Investment Policy? An EU Perspective', in *Company Law and Economic Protectionism* (Cambridge University Press, 2010)

Journal Articles

- Antonaki, I., 'Keck in Capital: Redefining Restrictions in the Golden Shares Case Law' (2016) 9(4) *Erasmus Law Review* 177–188.
- Aristova, E. and Nichols, L., 'Climate Change on the Board: Navigating Directors' Duties' (2024) 24(2) *Journal of Corporate Law Studies* 479–514.
- Carney, M. and Dostaler, I., 'Airline Ownership and Control: A Corporate Governance Perspective' (2006) 12(2) *Journal of Air Transport Management* 65–73.
- Dempsey, P.S., 'Competition in the Air: European Union Regulation of Commercial Aviation' (2001) 66(3) *Journal of Air Law and Commerce* 979–1154.
- Dzehtsiarou, K., '"KlimaSeniorinnen Revolution": The New Approach to Standing' (2024) 5(4) *European Convention on Human Rights Law Review* 423–443.
- Erling, J., 'How to Reconcile the EU ETS for Aviation with CORSIA?' (2018) 43 *Air & Space Law* 371–386.
- Giapponi, C. and Scheraga, C., 'Cross-Cultural Factors and Corporate Governance Transparency in Global Airline Strategic Alliances' (2007) 46(2) *Journal of the Transportation Research Forum* 103–121.
- Haanappel, P.P.C., 'Airline Ownership and Control, and Some Related Matters' (2001) 26(2) *Air and Space Law* 90–103.
- Hadjiyianni, I., 'The European Union as a Global Regulatory Power' (2021) 41(1) *Oxford Journal of Legal Studies* 1–29.
- Havel, B.F. and Sanchez, G.S., 'Restoring Global Aviation's Cosmopolitan Mentalité' (2011) 29 *Boston University International Law Journal* 1–40.
- Heri, C., 'KlimaSeniorinnen and Its Discontents: Climate Change at the European Court of Human Rights' (2024) *European Human Rights Law Review* 317–331.
- Iglesias-Rodríguez, P., 'ClientEarth v Shell plc and the (Un)Suitability of UK Company Law to Pursue Climate-Related Goals' (2023) 35(3) *Journal of Environmental Law* 445–454.
- Johannsen, B., Kotzé, L.J. and Macchi, C., 'An Empty Victory? Shell v Milieudefensie and the Prospects for Future Climate Litigation Action' (2025) 34 *RECIEL* 270–278.
- Jones, A. and Davies, J., 'Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate' (2014) 10(3) *European Competition Journal* 453–497.

- Kole, S.R. and Lehn, K.M., 'Deregulation and the Adaptation of Governance Structure: The Case of the U.S. Airline Industry' (1999) 52(1) *Journal of Financial Economics* 79-117.
- Kucko, M., 'The EU–Qatar Air Transport Agreement: Bound to Succeed?' (2020) 45(3) *Air and Space Law* 231-244.
- Mayer, B. and van Asselt, H., 'The Rise of International Climate Litigation' (2023) 32(2) *RECIEL* 175–184.
- Mendes de Leon, P.M.J., 'New Phase in Alliance Building: The Air France/KLM Venture as a Case Study' (2004) 53 *Zeitschrift für Luft- und Weltraumrecht* 359–385.
- Schneider, S., 'An EU Perspective of Fair Competition in Global Air Transport' (2020) 45(4) *Air and Space Law* 415–440.
- Spitzeck, H. and Hansen, E.G., 'Stakeholder Governance: How Stakeholders Influence Corporate Decision-Making' (2010) 10(4) *Corporate Governance: The International Journal of Business in Society* 378-391.
- Truxal, S., 'State Aid and Air Transport in the Shadow of COVID-19' (2020) *Air and Space Law* (Special Issue) 61–82.
- Truxal, S. and Aras, T., 'Charting a "Green" Flight Path for European Consumers? Allegations of Greenwashing in the Airline Industry' (2025) 14(1) *Journal of European Consumer Market Law* 15–20.
- Verbruggen, P., 'De regulering van misleidende milieuclaims: Over Fossielvrij/KLM en verder' (2024) *Tijdschrift voor Consumentenrecht & Handelspraktijken* 124–132.
- Walulik, J., 'At the Core of Airline Foreign Investment Restrictions: A Study of 121 Countries' (2014) 49 *Transport Policy* 234–251.
- Werner, B., 'National Responses to ECJ Case Law on Golden Shares: The Role of Protective Equivalents' (2016) 24(7) *Journal of European Public Policy* 1063–1081.
- Wouters, J., 'European Company Law: Quo Vadis?' (2000) 37(2) *Common Market Law Review* 257–307.
- Wouters, J., 'Private International Law and Companies' Freedom of Establishment' (2001) 2(1) *European Business Organization Law Review* 101–139.
- Zhang, L., 'The Middle East Air Blockade: Revisiting the Jurisdictional Inquiry of the ICAO Council' (2021) 46(1) *Air and Space Law* 135–150.

Legislation and Treaties

(a) International Instruments

- *Convention Relating to the Regulation of Aerial Navigation* (Paris Convention, signed 13 October 1919, entered into force 11 July 1922) 11 LNTS 173.

- *Convention on International Civil Aviation* (Chicago Convention, adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.
- *International Air Services Transit Agreement* (adopted 7 December 1944, entered into force 30 January 1945) 84 UNTS 389.
- *International Air Transport Agreement* (adopted 7 December 1944, entered into force 30 January 1945) 171 UNTS 387.
- *Warsaw Convention* (Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed 12 October 1929, entered into force 13 February 1933).
- *Montreal Convention* (Convention for the Unification of Certain Rules for International Carriage by Air, adopted 28 May 1999, entered into force 4 November 2003).
- *Montevideo Convention on the Rights and Duties of States* (adopted 26 December 1933, entered into force 26 December 1934).
- *General Agreement on Trade in Services (GATS)* (1995), Annex on Air Transport Services.
- *United Nations Framework Convention on Climate Change (UNFCCC)* (adopted 9 May 1992, entered into force 21 March 1994).
- *Kyoto Protocol to the UNFCCC* (adopted 11 December 1997, entered into force 16 February 2005).
- *Paris Agreement under the UN Framework Convention on Climate Change* (adopted 12 December 2015, entered into force 4 November 2016) UNTS Vol. 3156 No. 54113.
- *Annex 16, Volume I to the Chicago Convention – Environmental Protection: Aircraft Noise* (Balanced Approach framework, as amended).

- *Agreement on Air Transport between the European Union and the United States of America* (2007, as amended 2010).
- *Agreement on Air Transport between the European Union and the State of Qatar* (2021).
- *Agreement on Air Transport between the European Union and Canada* (2010).
- *Agreement between the European Union and the Government of the People's Republic of China on Certain Aspects of Air Service*s (2019).

(b) European Union Legislation

- Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports.
- Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (*EU Merger Regulation*).

- Council Regulation (EC) No 847/2004 of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries.
- Regulation (EC) No 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community.
- Regulation (EU) No 925/1999 on the limitation of noise emission from civil subsonic jet aeroplanes [retained for continuity].
- Regulation (EU) No 598/2014 of 16 April 2014 on noise-related operating restrictions at Union airports within a Balanced Approach.
- Regulation (EU) No 1321/2014 of 26 November 2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances.
- Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (*FDI Regulation*).
- Regulation (EU) 2019/712 of 17 April 2019 on safeguarding competition in air transport.
- Regulation (EU) 2021/1119 of 30 June 2021 establishing the framework for achieving climate neutrality (*European Climate Law*).
- Regulation (EU) 2022/2560 of 14 December 2022 on foreign subsidies distorting the internal market (*Foreign Subsidies Regulation*).
- Regulation (EU) 2023/2405 of 18 October 2023 on ensuring a level playing field for sustainable air transport (*ReFuelEU Aviation*).
- Directive 89/629/EEC on the limitation of noise emission from civil subsonic jet aeroplanes.
- Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports.
- Directive 2002/49/EC of 25 June 2002 relating to the assessment and management of environmental noise (*Environmental Noise Directive*).
- Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse-gas emission allowance trading within the Community, as amended.
- Directive 2004/25/EC of 21 April 2004 on takeover bids (*Takeover Directive*).
- Directive 2004/109/EC of 15 December 2004 on the harmonisation of transparency requirements relating to information about issuers whose securities are admitted to trading on a regulated market.
- Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection.
- Directive 2009/12/EC of 11 March 2009 on airport charges.
- Directive (EU) 2015/996 of 19 May 2015 establishing common noise assessment methods according to Directive 2002/49/EC.

- Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law.
- Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, as amended by Directive (EU) 2017/828 of 17 May 2017 (*Shareholder Rights II*).
- Directive (EU) 2022/2557 of 14 December 2022 on the resilience of critical entities (*Critical Entities Resilience Directive*).
- Directive (EU) 2022/2464 of 14 December 2022 amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) 537/2014, as regards corporate sustainability reporting (*CSRD*).

- 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 Decision*).
- Commission Decision 98/523/EC of 22 July 1998 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (*Karlstad Airport Decision*).

(c) Selected National Instruments

Netherlands
- *Wet luchtvaart* (Dutch Aviation Act), as amended.
- *Besluit luchthavenverkeer Schiphol* (Schiphol Airport Traffic Decree), Stb. 2002, 592.
- *Besluit van 18 september 2008 tot wijziging van het Besluit luchthavenverkeer Schiphol* (Amendment to the Schiphol Airport Traffic Decree concerning use of environmental capacity), Stb. 2008, 390.
- *Regeling van de Staatssecretaris van Infrastructuur en Milieu van 9 juli 2013, nr. IenM/BSK-2013/129725* (Regulation continuing the NNHS between July and October 2013).
- E*xperimenteerregeling Schiphol* (Experimental Scheme for Schiphol, draft 2023).
- *Wet natuurbescherming* (Nature Protection Act).
- *Wet veiligheidstoets investeringen, fusies en overnames* (*Wet Vifo*).

Other
- *Luftverkehrsnachweissicherungsgesetz* (*Germany*).
- (*Germany*)
- *Code de Commerce* (*France*)
- *Code Monétaire et Financier (France)*
- *Aircraft Noise* (*Dublin Airport*) *Regulation Act* (2019).
- *The Airports (Noise-related Operating Restrictions) (England and Wales) Regulations* (2018).
- *Decreto Ley 2,564* (Dicta Normas Sobre Aviación Comercial), (Chile), 21 March 1979.

Key International and Policy Documents

- *ICAO Assembly Resolution A33-7* (Consolidated statement of continuing ICAO policies *Aktiengesetz* and practices related to environmental protection – Appendix C).
- *ICAO Assembly Resolution A39-1* (Consolidated statement of continuing ICAO policies and practices related to environmental protection – General provisions, noise and local air quality).
- *ICAO Doc 9587 – Policy and Guidance Material on the Economic Regulation of International Air Transport* (3rd edn, 2008).
- *ICAO Doc 9626 – Manual on the Regulation of International Air Transport* (3rd edn, 2018).
- *ICAO Doc 9829 – Guidance Material on the Balanced Approach to Aircraft Noise Management*.
- *ICAO Doc 10178 – Report of the High-Level Meeting on the Feasibility of a Long-Term Aspirational Goal for International Aviation CO_2 Emission Reductions* (Montréal, 19–22 July 2022).

- *European Commission, An Aviation Strategy for Europe* (COM(2015) 598 final).
- *European Commission, The European Green Deal* (COM(2019) 640 final).
- *European Commission, Sustainable and Smart Mobility Strategy – Putting European Transport on Track for the Future*(COM(2020) 789 final).
- *European Commission, "Fit for 55": Delivering the EU's 2030 Climate Target on the Way to Climate Neutrality*(COM(2021) 550 final).
- *European Commission, A Clean Planet for All – A European Strategic Long-Term Vision for a Prosperous, Modern, Competitive and Climate-Neutral Economy* (COM(2018) 773 final).
- *European Commission, Pathway to a Healthy Planet for All – EU Action Plan: Towards Zero Pollution for Air, Water and Soil* (COM(2021) 400 final).
- *European Commission, White Paper on European Governance* (COM(2001) 428 final).
- *European Commission, Proposal for a Regulation Establishing a Carbon Border Adjustment Mechanism* (CBAM)(COM(2021) 564 final).
- *European Commission, Proposal for a Council Directive Restructuring the Union Framework for the Taxation of Energy Products and Electricity* (ETD Revision) (COM(2021) 563 final).
- *European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence* (COM(2022) 71 final).
- *European Commission, Interpretative Guidelines on Regulation (EC) No 1008/2008 – Rules on Ownership and Control of EU Air Carriers* (2017/C 191/01).

- *European Commission / DG MOVE, Ex-Post Evaluation of Regulation (EC) No 1008/2008 on Common Rules for the Operation of Air Services in the Community* (Ricardo–AEA Report, 2018).
- *European Commission / DG MOVE, Study on the Practice of Public Service Obligations in Europe* (ERA, 2018).
- *European Commission, Report on the Implementation of the Environmental Noise Directive* (COM(2023) 139 final).

Other Reports

- *World Economic Forum, A New Regulatory Model for Foreign Investment in Airlines* (2016).
- *OECD, Climate Policy Leadership in an Interconnected World: What Role for Border Carbon Adjustments?* (2020).
- *OECD, Tax Challenges Arising from the Digitalisation of the Economy – Administrative Guidance on the Global Anti-Base Erosion Model Rules (Pillar Two)* (2023).
- *Draghi Report, The Future of European Competitiveness* (2024).

Samenvatting (Dutch Summary)

Duurzaam Bestuur van de Luchtvaart

Veranderende Wind: van Aandeelhouders naar Belanghebbenden

De luchtvaartsector opereert op het snijvlak van economie, politiek en internationale betrekkingen. Sinds de liberalisering van het luchtvervoer is de vraag naar luchtvaart exponentieel gestegen, terwijl staten en internationale organisaties steeds meer strategische, maatschappelijke en milieudoelstellingen aan de sector verbinden en de samenleving dit ook steeds meer verlangt. Deze spanning vormt de achtergrond voor de centrale onderzoeksvraag van dit proefschrift: **wie bestuurt de luchtvaartmaatschappij?**

Het proefschrift onderzoekt hoe traditionele nationaliteits- en eigendomseisen (zijnde eigendom en controle) hun blijvende invloed uitoefenen op het bestuur of de bredere governance van luchtvaartmaatschappijen, en hoe tegelijkertijd duurzaamheid en stakeholderinvloed nieuwe dimensies van governance introduceren. De aanpak is artikel-gebaseerd en combineert doctrinair en vergelijkend juridisch onderzoek.

Na de inleiding (Deel A) zijn de zes artikelen thematisch geordend in twee delen:
- **Deel B – Eigendom en Controle van Luchtvaartmaatschappijen**: de fundamentele rol van eigendoms- en nationaliteitscriteria in de luchtvaart.
- **Deel C – Het Nastreven van Duurzaamheidsdoelstellingen**: de toenemende invloed van milieu- en duurzaamheidsdoelstellingen op governance.

Het slothoofdstuk (Deel D) verbindt de inzichten en analyseert hoe governance in de luchtvaart zich ontwikkelt van een aandeelhouder-georiënteerd model naar een breder stakeholdermodel, waarin milieu- en duurzaamheidseisen, rechterlijke toetsing en strategische autonomie een steeds grotere rol spelen.

Deel B – Eigendom en Controle van Luchtvaartmaatschappijen

1. De Unieke Band Tussen een Luchtvaartmaatschappij en een Staat
   Aviation and Space Journal, 1(2023), pp. 4-16

Dit artikel onderzoekt de historische ontwikkeling en juridische wortels van nationaliteits- en eigendomseisen in de luchtvaart. Vanuit het Verdrag van Chicago (1944) wordt de unieke relatie tussen staten en hun "eigen" luchtvaartmaatschappijen verklaard. Het artikel laat zien hoe economische nationaliteit en strategische belangen vanaf het begin stevig zijn verankerd in de luchtvaartregelgeving, in contrast met andere sectoren zoals digitale diensten of financiële markten. Nationaliteit blijft in de luchtvaart bepalend voor toegang tot markten en verkeersrechten. Daarmee wordt blootgelegd dat nationaliteitscriteria niet slechts technische voorwaarden zijn, maar fungeren als instrumenten voor staatsinvloed, bescherming en strategische autonomie, en dat eigendoms- en controlecriteria diep verweven zijn met politieke en veiligheidsdimensies.

2. Navigeren door de Nationaliteit van Luchtvaartmaatschappijen: Europese Perspectieven op Aandelenbezit en Corporate Governance bij Luchtvaartmaatschappijen
   Air & Space Law 49(6), 2024, pp. 609-636

Dit artikel plaatst ownership en control in de context van economisch nationalisme en onderzoekt de toepassing daarvan onder de EU-regels van Verordening 1008/2008. Daarbij staat de 'ownership- en control test' centraal, die vereist dat luchtvaartmaatschappijen voor ten minste 50% in EU-handen zijn en onder daadwerkelijke zeggenschap van EU-partijen staan. Via oudere casestudies zoals KLM/Northwest en Swissair/Sabena wordt zichtbaar hoe bijvoorbeeld de eigendomstest op luchtvaartmaatschappijen in een geglobaliseerde sector wordt toegepast. Alhoewel dit grensoverschrijdende fusies en investeringen beperkt, beschermt het luchtvaartmaatschappijen tegelijk ook tegen buitenlandse overname.

Bij de beoordeling van daadwerkelijke zeggenschap gaat het niet alleen om formele meerderheidsaandelen, maar ook om de feitelijke invloed op strategische beslissingen. Factoren zoals de samenstelling van het bestuur, aandeelhoudersovereenkomsten, vetorechten en de verdeling van stemrechten spelen een doorslaggevende rol. Multinationale groepen zoals Air France-KLM, Lufthansa Group en IAG ontwikkelen

complexe aandeelhouders- en bestuursstructuren om formeel aan de criteria te voldoen en een bepaalde nationaliteit te behouden, terwijl de feitelijke governance internationaal verweven blijft. Daarmee wordt duidelijk dat luchtvaart als uitzondering fungeert ten opzichte van andere sectoren: de strikte en protectionistische criteria blijven de governance van luchtvaartmaatschappijen beïnvloeden.

3. Strategische autonomie voor EU-luchtvaartmaatschappijen veiligstellen: een beoordeling van de blootstelling aan buitenlandse investeringen in de luchtvaartssector
   Aviation and Space Journal, 3(2024), pp. 4-17

Dit artikel onderzoekt de wijze waarop de EU het concept van strategische autonomie zou kunnen toepassen op de luchtvaartsector en welke regionale en nationale belangen daarmee worden gediend. Centraal staat het gebruik van ownership- en controlregels als instrument om Europese luchtvaartmaatschappijen te beschermen tegen ongewenste buitenlandse invloed. Waar strategische autonomie aanvankelijk vooral werd geassocieerd met veiligheids- en defensieoverwegingen, is de reikwijdte inmiddels verbreed naar economische veerkracht en concurrentiekracht. Wanneer EU-luchtvaartmaatschappijen in meerderheid eigendom moeten zijn van, en daadwerkelijk onder zeggenschap moeten staan van, EU-partijen, wordt niet alleen de toegang tot openbaredienstverplichting gewaarborgd, maar ook de bescherming van de economische en strategische belangen van de Unie. Buitenlandse investeringen kunnen weliswaar groeikansen bieden, maar brengen ook risico's met zich mee, zoals de verschuiving van zeggenschap, en dus controle, naar buiten de EU wat kan leiden tot een verzwakking van de weerbaarheid in tijden van geopolitieke of economische instabiliteit.

Om deze risico's te ondervangen, bespreekt het artikel beschermingsmechanismen zoals de FDI-screeningsverordening, de Critical Entities Resilience Directive en nationale constructies rond strategische aandeelhouderschappen. Gezamenlijk laten deze bevindingen zien dat ownership- en control criteria zijn geëvolueerd van juridische randvoorwaarden naar instrumenten van industrieel en geopolitiek beleid. Zij dienen niet alleen ter bescherming van markttoegang, maar ook als hefboom om de strategische belangen van de Unie veilig te stellen. Daarmee sluit dit artikel direct aan bij de centrale vraag van dit proefschrift: governance van luchtvaartmaatschappijen is ook een vorm van geopolitieke machtsuitoefening.

Deel C – Het Nastreven van Duurzaamheidsdoelstellingen

4. Het luchtvervoer in de EU en de strijd om de milieuagenda van de EU: een sprong in het diepe of kan een CBAM voor een gelijk speelveld zorgen?
   Air & Space Law 47(6), 2022, pp. 577-600

Dit artikel plaatst de luchtvaart in het bredere kader van de EU Green Deal en het Fit for 55-pakket, waarin maatregelen zoals de herziening van het EU ETS voor luchtvaart, de invoering van de ReFuelEU Aviation-verordening, de herziening van de Energiebelastingrichtlijn en het voorstel voor een Carbon Border Adjustment Mechanism (CBAM) centraal staan. Het artikel onderzoekt hoe deze beleidsinstrumenten, samen met maatschappelijke druk en regelgeving, de governance van luchtvaartmaatschappijen verbreden van een aandeelhouder- naar een stakeholderperspectief. Centraal staat de vraag of CBAM een oplossing kan bieden voor concurrentieverstoringen en carbon leakage. De analyse laat zien dat milieu- en klimaatdoelstellingen steeds nadrukkelijker bepalend zijn voor strategische keuzes in de sector.

De bijdrage is tweeledig: enerzijds wordt de complexiteit zichtbaar van het koppelen van luchtvaart aan handelsinstrumenten zoals CBAM, anderzijds toont het artikel hoe duurzaamheid nieuwe vormen van governance afdwingt door luchtvaartmaatschappijen te positioneren binnen internationale economische relaties. Daarmee illustreert het artikel de transformatie van corporate governance in de luchtvaart als weerspiegeling van bredere maatschappelijke verwachtingen en beleidsdoelstellingen.

5. De aanloop naar de Balanced Approach in Nederland: niet polderen voor een 'evenwichtige aanpak' maar procederen over krimp Schiphol
   Tijdschrift Vervoer & Recht 6(2023), pp. 198-207

Dit artikel onderzoekt de Nederlandse casus rond de voorgenomen krimp van Schiphol en de toepassing (of omzeiling) van de Balanced Approach. Waar het geluidsbeleid traditioneel werd vormgegeven via overleg en consensus, koos de regering in 2022 voor eenzijdige reductie van vliegbewegingen. Dat leidde tot juridische procedures waarin de centrale vraag was of internationale en Europese verplichtingen — met name de EU-Geluidsverordening — correct waren toegepast. De analyse belicht in het bijzonder de rechtszaken over de zogenoemde

experimenteerregeling, waarin de Nederlandse rechtbank en Hof zich uitspraken over de verhouding tussen nationale beleidsruimte en Europees recht.

In de bredere context van het proefschrift laat deze casus zien hoe luchtvaart governance zich niet langer uitsluitend in bestuurskamers of tussen aandeelhouders afspeelt, maar steeds nadrukkelijker verschuift naar het publieke domein en de rechtszaal. Staten en belanghebbende gebruiken dit instrument om de governance en koers van de sector beïnvloeden.

6. Het principe van een 'evenwichtige aanpak van vliegtuiglawaai' ter discussie gesteld: blijft de Nederlandse aanpak overeind of zal het principe zegevieren? *Air & Space Law 49(1), 2024, pp. 1-33*

Dit artikel bouwt voort op de Schiphol-casus en toetst de Nederlandse maatregelen aan de internationale en Europese regels inzake de Balanced Approach. De analyse laat zien dat de in 2022 aangekondigde capaciteitsreductie tot 440.000 vliegbewegingen vanaf het begin problematisch was, omdat het proces werd ingericht rond een vooraf gewenste uitkomst. Daarmee werd afbreuk gedaan aan fundamentele beginselen van het BA-principe, zoals proportionaliteit, consultatie en het uitgangspunt dat exploitatiebeperkingen slechts als laatste redmiddel mogen worden ingezet.

Het artikel bespreekt niet alleen de juridische houdbaarheid van de Nederlandse BA in het licht van ICAO en EU-recht, maar ook de bredere implicaties voor de EU interne luchtvaartmarkt en internationale verplichtingen, met name in relatie tot de EU–VS en EU–Canada luchtvaartakkoorden. De casus benadrukt dat milieubeleid (geluid) diep verweven is met vragen van markttoegang, concurrentie en internationale luchtvaartrelaties, en illustreert hoe governance in de luchtvaart zich steeds meer afspeelt op het snijvlak van nationaal beleid, Europees recht en internationale verplichtingen.

Deel D – Synthese en conclusies

Gezamenlijk tonen de zes artikelen hoe luchtvaartgovernance zich ontwikkelt van een model waarin eigenaar- en aandeelhouderschap centraal staan, naar een breder raamwerk waarin belanghebbende, duurzaamheid en geopolitiek bepalend zijn. De klassieke nationaliteitscriteria blijven een belangrijk ankerpunt, maar blijken steeds meer te functioneren als instrument van staatsinvloed en strategische bescherming. Tegelijkertijd breidt governance zich uit naar nieuwe arena's, met de rechter als opvallende speler in klimaatgerelateerde geschillen.

Daarmee wordt zichtbaar dat governance van luchtvaartmaatschappijen niet langer uitsluitend een kwestie is van aandeelhoudersbelangen of traditionele staatscontrole, maar het resultaat van een complex samenspel van juridische regels, geopolitieke belangen, economische strategieën en maatschappelijke verwachtingen. Nationaliteitscriteria blijven een hoeksteen van governance en functioneren als strategisch instrument, ondanks globalisering. Maatschappelijke druk, regelgeving en rechtszaken verbreden governance van aandeelhouders naar een veelheid aan actoren, terwijl klimaat- en milieuprocedures laten zien dat besluitvorming niet langer exclusief in bestuurskamers plaatsvindt, maar ook in rechtbanken. Staten gebruiken governance-instrumenten bovendien om hun luchtvaartmaatschappijen te beschermen tegen buitenlandse invloeden én om beleidsdoelen zoals duurzaamheid te sturen.

Het klassieke beeld van de nationale luchtvaartmaatschappij heeft daarmee plaatsgemaakt voor een complex veld van actoren en belangen, waarin de vraag "wie bestuurt de luchtvaartmaatschappij?" telkens opnieuw onderhandelbaar blijkt. Het proefschrift draagt zo bij aan zowel de wetenschappelijke literatuur als het beleidsdebat. Het laat zien dat luchtvaartgovernance niet statisch is, maar voortdurend wordt hervormd door externe druk: van aandeelhouders, staten, belanghebbenden en de samenleving als geheel. Daarmee biedt het onderzoek waardevolle inzichten voor de toekomst van de luchtvaart in Europa en daarbuiten.

Curriculum Vitae

Niall Buissing was born on 14 February 1993 in Rotterdam, the Netherlands. He obtained a Bachelor's degree in International Business Law and an LL.M. in European Law from Leiden University. After completing his studies in 2016, he returned to the university in 2018 as Academic Coordinator of the International Institute of Air and Space Law (IIASL), where he was responsible for the coordination of educational activities. During his time at the institute, he contributed to the restructuring of the Advanced LL.M. curriculum, the modernisation of the Blended Learning programme, and the transition to online education during the Covid-19 pandemic. As Director of the International Air Law Moot Court Competition, he organised several editions of the competition, including its first fully online edition.

Niall began his doctoral research as a staff member of the institute under the supervision of his promoter, Professor Dr. P.M.J. Mendes de Leon. Following his departure from the university in 2022, he continued his research on an external basis, combining it with professional practice as founder and managing director of Lexavia Aviation Consultants. Through the firm, he advises public authorities, international institutions, and market actors on legal, regulatory, and governance issues in aviation, with a particular focus on economic regulation, market access, environmental and sustainability policy and infrastructure.

In addition to his consultancy activities, he publishes in academic and professional journals and regularly speaks at international conferences. He serves as Managing Editor of the *Air and Space Law* journal and as Secretary to the Board of the Dutch Transport Law Association.