



**Universiteit
Leiden**
The Netherlands

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

Buissing, T.N.

Citation

Buissing, T. N. (2026, May 27). *Sustainable governance of aviation: changing tailwinds: from shareholding to stakeholders?*. Retrieved from <https://hdl.handle.net/1887/4304633>

Version: Publisher's Version

License: [Licence agreement concerning inclusion of doctoral thesis in the Institutional Repository of the University of Leiden](#)

Downloaded from: <https://hdl.handle.net/1887/4304633>

Note: To cite this publication please use the final published version (if applicable).

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).

B²

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

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

^{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

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.

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 shares 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.

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,

^{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.

^{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.

^{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

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

^{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.

^{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 Again* (2023), who labels in Chapter 8 these nationality requirements as an ‘anachronism 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*.

B²

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.

^{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.

^{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 companies*, amended by Directive, 2017/828 of 17 May 2017 *as regards the encouragement of long-term shareholder engagement*, 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.

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 depository receipts of shares, AF-KL maintains a 100%

^{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 Administratiekantoor 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 Lingus, 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

^{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-air-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, original 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.

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.

