



ECA POSITION ON THE PROPOSAL FOR REGULATION ON COMMON RULES FOR THE OPERATION OF AIR TRANSPORT SERVICES IN THE COMMUNITY

- Revision of the Third Package of Air Transport Services Liberalisation¹ -

Executive Summary:

In order to avoid "flags of convenience" and as a way to strengthen safety and effective oversight, ECA suggest that :

- The License authority shall be in all cases that of the place where the airline has the majority of its flights
- The wet leasing of foreign aircraft (with crew) should be authorised only if the request is well funded and limited to maximum 6 months. This authorisation may be renewed yearly in case of reciprocal agreements
- Authorities shall verify in all leasing agreements that the Community safety standards are respected. Special attention has to be given when authorising leasing agreements of aircraft registered in a state other than the state of the AOC.
- The scope of the Commission's competence shall be increased to suspend or revoke any waivers to the requirements of this Regulation.

This regulation is about the liberalisation of services. As recognised by Parliament in the so called "Bolkestein Directive", the liberalisation of services should not represent a threat for employment and/or working conditions. ECA urges the European Parliament to incorporate to this Regulation the same safeguards that have been approved in the context of the Bolkestein directive, notably:

- The applicability of the employment laws of the country of destination;
- The applicability of other social instruments such as the directive on the posting of workers

1. Introduction

ECA welcomes the Commission proposal on "*common rules for the operation of air transport services in the Community*" which reviews, consolidates and updates an important part of EU aviation law, known as the "3rd Package" of air transport liberalisation.

ECA considers this to be a good step towards a more coherent European air transport policy. However, ECA proposes to the Members of the European Parliament amendments to enhance safety in Europe and to address its implications for employment.

2. The Safety Dimension

The Commission states that there is a strong link between economic regulation and safety.²

¹ Regulations (EEC) No 2407/92, 2408/92 and 2409/92 - the "third package"

² See explanatory memorandum and Recitals 4 and 5

This is supported by the findings of a recent study carried out by the International Civil Aviation Organisation (ICAO): ‘*Safety and Security Aspects of Economic Liberalisation*’ (2005). It stresses the challenge of preserving safety in a liberalised market, concluding that – together with many positive results – liberalisation of air transport raises many safety concerns.

The growth in activity following the liberalisation of air transport services produce greater complexity of the market (i.e. outsourcing, code-sharing, franchising, leasing, moving crews, etc.), cross-border mergers, an increase in the pressure on the operators and a fragmentation of safety responsibilities of regulators. To avoid the negative implications of liberalisation on safety, ICAO calls for a clear allocation of safety responsibilities at all times and at all different levels. ECA fully supports this ICAO initiative.

The proposed revision of the 3rd Package, partly addresses these concerns. ECA welcomes especially the addition of safety-related provisions to the articles on the Operating License and on Wet Leasing.

However, to address more effectively the potential risks for safety, some adjustments are necessary.

2.1 Operating Licence & Safety

ECA welcomes the Commission’s proposal in article 4 to link the Authorities’ responsible for the economic and the safety oversight. This means that the same Authority shall be responsible for the issuance of an Operating License (OL) and an Air Operator Certificate (AOC). It establishes the principle that safety and economic oversight are linked to the Authority of the place where the airline actually operates.

ECA strongly supports this principle, aimed at reducing the risk of “flags of convenience” inside the EU, i.e. air carriers shopping around for the most “lenient” Authority to obtain its OL or AOC.

However, the proposed text is not clear enough and leaves room for interpretation. In particular, there is a lack of clarity as to what is considered as “operational activity” and when this activity is deemed to be “substantial”.

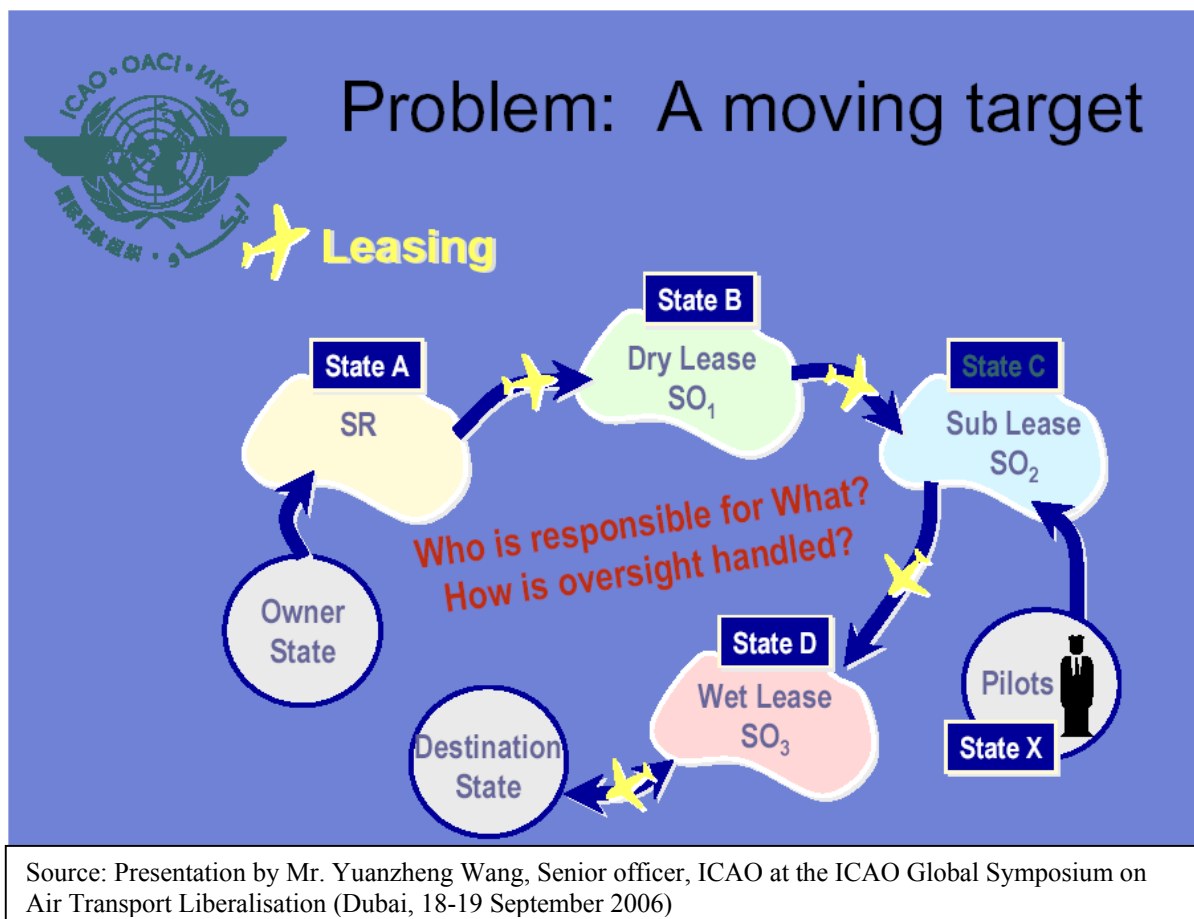
Therefore, ECA proposes to amend the text to tie the responsibilities on oversight to the place where an operator has the **largest** part of its **flights**.

<u>Commission Proposal</u> Art. 4	<u>ECA Proposal</u> Art. 4
An undertaking shall be granted an operating licence by the competent licensing authority provided that: a) its head office and, if any, registered office are located in the Community and it carries out the largest part of its operational activities in the Community;	An undertaking shall be granted an operating licence by the competent licensing authority provided that: a) its head office and, if any, registered office are located in the Community and it carries out the largest part of <u>its flights in or from</u> the Community;

<p>b) [...]</p> <p>c) where the licence is applied for to the authority of a Member State, its head office and, if any, registered office are located in that Member State, it carries out a substantial part of its operational activities in that Member State and, where the AOC is issued by a national authority, the same Member State is responsible for the oversight of the AOC;</p>	<p>b) [...]</p> <p>c) where the licence is applied for to the authority of a Member State, its head office and, if any, registered office are located in that Member State, it carries out <u>a substantial</u> the largest part of its flights in or from that Member State. Where the AOC is issued by a national authority, the same Member State is responsible for the oversight of the AOC.</p>
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2.2. Leasing & Safety

Liberalisation of air transport services in Europe has produced an increase in the number of cross-border “wet leasing” (i.e. leasing an aircraft with crew). However, ICAO identified “leasing of aircraft (with or without crew)” in a liberalised market as a potential risk to safety (see image below). Complex leasing operations make it difficult to clearly identify and apportion the responsibilities of the different players – both from an economic and a safety point of view.



Practical experience has shown that the rules of EC Regulation 2407/92 – which limits the authorisation of wet-leasing of foreign aircraft – are often not correctly applied, with worrying examples of these provisions having been abused.

For example, ECA complained for *over two years* about an aircraft, with Egyptian registry and Ukrainian crews which was wet-leased in for “temporary reasons” to a Dutch company and operating in Belgium. ECA therefore strongly supports the Commission’s proposal to limit the maximum duration of leasing of non Community aircraft with or without crews to maximum 6 months. ECA does not see any imperative necessity for the renewal of this period.

However, ECA would like to open the possibility for Community airlines to make use of *recurring reciprocal wet-leasing arrangements* with non Community airlines.

The following amendments aim at providing clarification and more transparency, and to allow for *recurring reciprocal wet-leasing*.

<u>Commission proposal</u> Article 13 Leasing	<u>ECA Proposal</u> Article 13 Leasing
<p>2 In the case of short-term lease agreements to meet temporary needs of a Community air carrier, or otherwise in exceptional circumstances, the competent licensing authority may grant waivers to the requirement of registration provided for in Article 12(1).</p> <p>In any case no Community air carrier shall be granted a waiver in order to meet a temporary need or exceptional circumstance of more than six months in duration, although a waiver may be renewed once only for a second non-consecutive period of up to six months.</p>	<p>2 In the case of short-term lease agreements to meet temporary needs of a Community air carrier, or otherwise in exceptional circumstances, the competent licensing authority may grant waivers to the requirement of registration provided for in Article 12(1), <u>upon a reasoned request from the operator justifying the temporary need or the exceptional circumstance.</u></p> <p>In any case no Community air carrier shall be granted a waiver <u>of more than six months in duration</u> in order to meet a temporary need or exceptional circumstance. of more than six months in duration, although a waiver may be renewed once only for a second non-consecutive period of up to six months.</p> <p><u>Community air carriers may obtain a waiver to the requirements of Article 12 in the framework of reciprocal arrangements for leasing of aircraft with crew (wet-lease) with a carrier from a third Country for a maximum duration of 6 months in 12 consecutive months. The waiver may be requested and renewed on a yearly basis.</u></p>

	<p><u>The decision to grant a waiver to the requirements of Article 12(1) shall be notified to the European Commission and be available to interested parties.</u></p>
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The Commission proposes – in case of a *wet lease* (article 13.4) – that the competent licensing authority should determine (and declare in writing) that safety standards should be up to Community standard. However, no such provision is proposed in case of a “dry lease”, i.e. a leasing without crew, from a non-EU state. This could create a potential safety loop hole. The safety standards regarding the airworthiness of the aircraft shall be checked also; the aircraft will fly in European Skies!

ECA proposes to impose the same obligation to determine the safety standards in case of a “dry lease”

<u>Commission proposal</u> Article 13 Leasing	<u>ECA Proposal</u> Article 13 Leasing
<p>4. The competent licensing authority shall not approve agreements leasing aircraft with crew to an air carrier to which it has granted an operating licence unless that authority has determined and declared in writing to the air carrier in question that safety standards equivalent to those imposed under Article 9 in the relevant Community law are met.</p>	<p>4 The competent licensing authority shall not approve agreements leasing aircraft with <u>or without</u> crew to an air carrier to which it has granted an operating licence unless that authority has determined and declared in writing to the air carrier in question that <u>all</u> safety standards equivalent to those imposed in the relevant Community law are met.</p>

ICAO identifies the lack of safety oversight by the state of registration in a liberalised aviation environment as a potential risk to safety. The fragmentation of responsibilities is a threat to safety, to the protection of consumers and to the protection of employees.

To address this situation it is necessary to clarify and make it explicit that, when the ‘state of registration’ is different than the state of the operator (AOC), the competent authority authorising a leasing agreement shall also look into the safety standards of the country where the aircraft is registered.

ECA therefore proposes to require that, when granting a waiver to the requirement of article 12(1), the competent authority oversees the compliance with Community standards of the ‘state of registration’ if that state is different to the state of the AOC. .

<u>Commission proposal</u> Article 13 Leasing	<u>ECA Proposal</u> Article 13 Leasing
	5. (new) <u>The competent licensing authority shall not approve agreements leasing aircraft with or without crew to an air carrier when the aircraft concerned is not under the oversight of the authority competent for overseeing the air carriers' operating license. The competent licensing authority can only approve such arrangements if it has determined and declared in writing to the air carrier in question that all safety standards equivalent to those imposed in the relevant Community law are met.</u>

2.3 Temporary Licenses

Article 9 of the proposal allows the competent licensing authority to grant temporary licenses to operators in financial difficulties. This license is subject to a number of conditions. However, the previously existing reference to safety not being at risk has been deleted in the Commission's proposal.

ECA recommends that compliance with the safety regulations should continue to be one of the explicit conditions to be required for granting the temporary licence. This also reflects the Commission's recital 5, where the link between the financial health of a company and safety is put in evidence.

<u>Commission's Proposal</u> Article 9 Suspension and revocation of an operating licence	<u>ECA Proposal</u> Article 9 Suspension and revocation of an operating licence
1. The competent licensing authority shall suspend or revoke the . operating licence if it is no longer satisfied that the Community air carrier can meet its actual and potential obligations for a 12-month period. The competent licensing authority may grant a temporary licence, not exceeding 12 months, pending financial reorganisation of the Community air carrier provided that this temporary	1. The competent licensing authority shall suspend or revoke the operating licence if it is no longer satisfied that the Community air carrier can meet its actual and potential obligations for a 12-month period. The competent licensing authority may grant a temporary licence, not exceeding 12 months, pending financial reorganisation of the Community air carrier provided safety is not at risk , that

licence reflects any changes to the AOC and that there [...]	this temporary licence reflects any changes to the AOC and that there [...]
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2.4. Examination by the Commission

According to the current text, the European Commission can only intervene to suspend or revoke an Operating License. ECA suggests that the Commission shall also be competent to suspend or revoke a waiver to the requirements of the Regulation. This will ensure a harmonised application of this Regulation throughout Europe.

<u>Commission Proposal</u> Article 14 Examination by the Commission	<u>ECA Proposal</u> Article 14 Examination by the Commission
1. The Commission acting in accordance with the procedure referred to in Article 25(2) at the request of a Member State, or on its own initiative, shall examine compliance with the requirements of this Chapter and take a decision to suspend or revoke an operating licence if necessary.	1. The Commission acting in accordance with the procedure referred to in Article 25(2) at the request of a Member State, or on its own initiative, shall examine compliance with the requirements of this Chapter and take a decision to suspend or revoke an operating licence or <u>a waiver to the requirements of this chapter</u> if necessary.

3. The Social Dimension of Air Services Liberalisation

3.1. The “Bolkestein approach” to Air Services

In the debate and legislative process on the so-called “Bolkestein” Services Directive concerning the *free provision of services in the Community*, the European Parliament has insisted successfully that the liberalisation of services should not represent a threat for employment and/or working conditions. As the Commission proposal currently stands, this is not reflected in the 3rd Package of air transport services liberalisation.

The Services Directive has incorporated a number of important principles that cannot be ignored in the case of air transport services, such as the rejection of the principle of “country of origin”, the possibility for national provisions relating to public policy, public health and the respect of local employment and working conditions.

In contrast to the Services Directive, the Liberalisation of air transport services in 1992 was not accompanied by any social provisions to prevent ‘social dumping’. ECA notes that the operation of bases in Member States other than country of origin – made possible by the “3rd Package” – has created problems as to the determination of the applicable laws to crews on the employment and in the safety area and the oversight of these laws.

ECA therefore considers that the 3rd Package should have – just as the Directive on Services – a sustainable approach to economic regulation, taking into account other general interest objectives, including the need to comply with local labour law.

ECA proposes to align the Commission proposal to the principles of the Services Directive, by introducing the references to the respect and applicability of EU and local provisions on employment law³.

<u>Commission Proposal</u>	<u>ECA Proposal</u>
<u>Recitals</u>	<u>New recitals</u>
	<p><u>(New recital) Given the growing importance of air carriers with operational bases in several Member States, it is important to note that the provisions of this Regulation do not affect the application of local terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect Member States' social security legislation.</u></p> <p><u>(New recital) This Regulation should not affect the application of local terms and conditions of employment which, pursuant to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, apply to workers posted to provide a service in the territory of another Member State.</u></p> <p><u>(New recital) This Regulation does not affect labour law, that is any legal or contractual provision concerning</u></p>

³ The following proposals are based on Recitals 14, 86 and Article 1.6 of the Proposal for a Directive on Services in the internal Market (EP-PE_TC2-COD(2004)0001).

	<p><u>employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.</u></p>
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New paragraph to article 15 (Based on article 16.3 of the proposed Directive on the Provision of Services in the internal Market)⁴

<p><u>Commission Proposal</u> Article 15 Provision of intra-Community air services</p>	<p>ECA Proposal Article 15 Provision of intra-Community air services</p>
	<p><u>(4) (New) The Member State to which an air carrier moves part of its operation shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.</u></p>

3.2. Nomination of Bases

To ensure an oversight of the compliance with national employment regulations, every operator shall communicate to the competent authority issuing the OL the location of the bases where it employs staff. If an operator opens a base in a Member State other than the one issuing its Operating License and intends to post or employ crews or other mobile staff there, it shall declare that it has taken note of the social laws in force in that Member State. The insertion of this condition would enhance the transparency in the labour relationships between air operators and their mobile staff.

ECA therefore proposes to include the list of the bases and a declaration of knowledge of the laws applicable to the bases in the Annex of information needed to obtain and maintain an Operating License.

⁴ EP-PE_TC2-COD(2004)0001).

<u>Commission Proposal Annex I,</u>	<u>ECA Proposal Annex I,</u>
<p>1. Information to be provided by a first-time applicant from a financial fitness point of view [...]</p> <p>[...]</p> <p>2. Information to be provided for assessment of the continuing financial fitness of existing licence holders planning a change in their structures or in their activities with a significant bearing on their finances [...]</p>	<p>1. Information to be provided by a first-time applicant from a financial fitness point of view [...]</p> <p>1.9 [New] <u>The location of bases.</u> <u>If the operator intends to employ or post mobile crew in one or several bases that are located outside the Member State delivering the OL, the operator shall declare to have taken note of the terms and conditions of employment applicable on the Member States of the base/s.</u></p> <p>[...]</p> <p>2. Information to be provided for assessment of the continuing financial fitness of existing licence holders planning a change in their structures or in their activities with a significant bearing on their finances</p> <p>2.7 [New] <u>The opening or closing of bases.</u> <u>If the operator intends to employ or post mobile crew in one or several bases that are located outside the Member State delivering the OL, the operator shall declare to have taken notice of the terms and conditions of employment applicable on the Member States of the base/s.</u></p>

23 Nov. 2006