SUBSTANTIAL OWNERSHIP AND EFFECTIVE CONTROL OF INTERNATIONAL AIRLINES: THE NETHERLANDS

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1 Introduction

In June 2000, negotiations on a merger between the Dutch airline KLM and British Airways (BA) broke down. One of the reasons for the failure was KLM’s fear that the new corporate structure as proposed by BA would result in the loss of traffic rights under air services treaties concluded by the Netherlands. According to KLM’s CEO Leo van Wijk, BA wanted to ‘swallow up’ KLM. Also, the Dutch Minister of Transport had warned KLM that BA’s objectives would make KLM ‘an agent of its London head office’ and deprive the airline of its ‘Dutch identity’.

While in 1992 the Netherlands and the United States had already concluded an ‘open skies’ agreement, thereby granting each other a very liberal degree of traffic rights, the negotiations between the US and the UK on a similar agreement is in a state of deadlock. Commenting on the proposed merger between BA and KLM, US government officials made it clear that they would not allow KLM to maintain the unrestricted traffic rights to the United States which had been granted under the US-Netherlands ‘open skies’ agreement. It seems, however, that the main fear of the US government was not so much of KLM maintaining liberal traffic rights to and from the US, but rather of BA making use, through the backdoor of its partnership with KLM, of the liberal bilateral agreement between the Netherlands and the US. In that case BA would have more access to the American aviation market than US airlines have to the British market. This opposition on the part of the US to British Airways becoming a ‘free rider’ is understandable.

The failure of the merger attempt was a severe setback for KLM, as the airline has now been trying for many years to find a suitable European partner. Although KLM’s financial position is still healthy, it recognizes that in order to survive in the long term consolidation with one or more major European airlines is a condition sine qua non. The alliance between KLM and Northwest Airlines, though profitable, is

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   It is important to note that Mr. Van Wijk also admitted that the traffic rights issue was not the only stumbling block. The company’s strategy and corporate culture and conditions likely to be imposed by the European Commission (inter alia reduction of route frequencies) were equally important.
4. British Airways would then operate services on the leg London-points in the US v.v., as part of the so-called fifth freedom route between Amsterdam and those points in the US.
5. According to KLM’s Van Wijk, consolidation in the airline industry is not a display of power, but a matter of survival, NRC Handelsblad, 19-06-2001. Dierikx points out that much of KLM’s postwar history was characterized by a long quest to find the right strategic alliance for further growth. Marc Dierikx, ‘KLM: an airline outgrowing its flag’, in Hans-Liudger Dienel & Peter Lyth
restricted to the carriage of passengers between Europe and the US and thus lacks sufficient economy of scale. KLM therefore needs a European partner in order to offer a sufficiently dense route network.\textsuperscript{6}

Hence, KLM\textsuperscript{7} dilemna: a merger with BA would, from an economic viewpoint, be the best strategic step, but giving in to BA\textsuperscript{11} demands which almost equal a takeover and thus giving up its Dutch identity would mean that KLM could no longer benefit from the lucrative traffic rights acquired by the Netherlands.

In this article it will be discussed why the national identity of airlines is of legal importance in international air transport and how it is regulated in international, European and Dutch law. Next, the question will be answered whether the main Dutch airlines engaged in international air transport meet the nationality requirements. Finally, the Dutch government\textsuperscript{12} policy in this matter will be examined, followed by some concluding remarks.

2 \textbf{The exchange of air traffic rights between states}

The basic principle of international aviation is that every state has complete and exclusive sovereignty over the airspace above its territory. This rule of customary law was first codified in the Paris Convention of 1919\textsuperscript{8} and then reconfirmed in the Chicago Convention of 1944\textsuperscript{9}, which still provides the general framework for international air transport. The states parties to the Chicago Convention could have decided, while leaving the sovereignty principle unaffected, to grant each other full commercial traffic rights. However, such an agreement could not be reached. While the United States and a number of other nations advocated maximum freedom for the establishment of international air services, the Commonwealth and some other countries favoured an order in the air based on international co-ordination and regulation, rather than unrestricted freedom.\textsuperscript{10} The latter states were reluctant to subject their airlines, often the symbol of national prestige and a provider of substantial employment in the home country, to cross-border competition.

Therefore, the Chicago Convention provides in art. 6 that: \textsuperscript{11}No scheduled international air service\textsuperscript{12} may be operated over or into the territory of a contracting

\begin{itemize}
\item \textsuperscript{6}‘In Europese luchtvaart is alliantiespel nog in volle gang’, Het Financieele Dagblad, 24-04-2001.
\item \textsuperscript{7}Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295, art. 1.
\item \textsuperscript{8}Convention Relating to the Regulation of Aerial Navigation, 13 October 1919, 11 LNTS 174, art. 1.
\item \textsuperscript{9}Marek Zylicz, \textit{International air transport law}, Dordrecht: Martinus Nijhoff, 1992, p. 73 ff.
\item \textsuperscript{11}The term scheduled international air service is not defined in the Chicago Convention itself.
\item According to a definition adopted by the Council of the International Civil Aviation Organization (ICAO) in 1952, a scheduled international air service is a series of flights that possesses all the following characteristics: 1. it passes through the airspace over the territory of more than one state;
\item 2. it is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such
\end{itemize}
State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.

By contrast, for non-scheduled (i.e., charter) services, which at that time were of minor importance, a rather liberal regime was agreed upon. It must be noted here that today the distinction between scheduled and non-scheduled services has blurred. Although there are still typical ad hoc flights (e.g., for business or humanitarian purposes) there is a growing number of what is now called scheduled charter services: Inclusive Tour, Advance Booking Charter and cargo charter flights.

Together with the Chicago Convention two other treaties were drafted, specifically dealing with scheduled air services. In the International Air Services Transit Agreement, states parties grant each other the privileges (also known as freedoms of the air) to fly across their territory without landing and to land for non-traffic purposes, the so-called transit or non-commercial rights. This treaty has attracted support from 118 states, a large majority of states participating in air

a manner that each flight is open to use by members of the public; and 3. it is operated, so as to serve traffic between the same two or more points, either: (a) according to a published timetable, or (b) with flights so regular or frequent that they constitute a recognizably systematic series.

The air services that do not meet that definition are to be considered non-scheduled services. Marek Zylicz, op. cit. note 9, at p. 79; Nicolas Mateesco Matte, Treatise on air-aeronautical law, Montreal: ICASI, 1981, pp. 161-166.

There is no separate definition of non-scheduled services. As stated in note 10, non-scheduled services are those services that do not meet the criteria of scheduled air services formulated in the ICAO resolution.

Chicago Convention, art. 5: ‘Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7, have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.’

Art. 7 exempts cabotage (traffic between points in one country) from the above mentioned traffic rights.

See also the Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe, 1956, 310 UNTS 229. There are 21 states parties to this treaty, including the Netherlands (see http://www.icao.int/icao/en/kb/EURom56.htm).


84 UNTS 389, art. I.
transport. In the second agreement, the International Air Transport Agreement, states parties exchange, in addition to the above mentioned transit rights, three commercial traffic rights:

- The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;
- The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;
- The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory. However, this treaty has been ratified by only 12 states. Hence, the worldwide exchange of commercial traffic rights through one multilateral instrument was a complete failure.

Instead of a multilateral agreement most countries preferred to conclude bilateral air services treaties based on reciprocity. These countries could thus remain in full control over the choice of their aviation partners and they could attune the provisions of each treaty (in particular the level of market access) to the specific market situation and trade relations between the two countries. This strategy has led to a patchwork of some 4,000 bilateral treaties, which used to vary from very restrictive to moderately liberal.

Since the early 1990s a trend towards liberalization can be discerned. The United States has now concluded 56 bilateral ‘open skies’ treaties, while the liberalization of air traffic has also been realized through regional agreements inter alia within the European Union and between Australia and New Zealand.

Although it is states that exchange air traffic rights, they are usually not the entities which actually operate air transport services. In fact, states negotiate rights on behalf of and for the benefit of their airlines. Therefore, each state designates one or more of its national airlines (depending on the provisions of the agreement allowing either single, multiple or even free designation), which may use those traffic rights. Now, the question is how the link between state and airline(s) is defined.

3 The link between states and airlines

3.1 Multilateral treaties

The Netherlands is a party to the Chicago Convention, the International Air Services Transit Agreement and the International Air Transport Agreement.

17. 171 UNTS 387, art. I.
18. Idem note 16.

See on the philosophy of open skies, Brian Havel, op. cit. note 14.
Article 5 of the Chicago Convention, dealing with non-scheduled flights, stipulates that the contracting states grant traffic rights to all aircraft of the other contracting states. According to article 17 of the said Convention, aircraft have the nationality of the state in which they are registered. Dual registration is prohibited by article 18. As a consequence, an aircraft which is registered in one of the contracting states may enjoy the privileges listed in article 5 irrespective of the nationality of its airline.22

As described in the previous section, article 6 of the Chicago Convention makes the operation of scheduled international air services subject to special authorization. The subsequent multilateral Transit and Transport agreements both contain an identical provision: 'Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State (1).23 Hence, for the exchange of scheduled air services the nationality of the airline is relevant, irrespective of the nationality of its aircraft.24

What is the justification for this ‘substantial ownership and effective control’ requirement? According to Van Fenema it is economic protectionism (the external aspect) on the one hand, and national pride or even xenophobia (‘I do not want my airline to be owned by foreigners’, the internal aspect) on the other.25 Moreover, as Gertler and Dierikx point out, national security considerations have played an important role.26

The Transit and Transport agreements are silent as to the criteria for determining substantial ownership and effective control. Reviewing the application in practice, an IATA study has revealed that most countries have given specific percentages of either maximum foreign ownership or of minimal national ownership, the latter ranging from more than 50% to more than 76%. Thus, the word ‘substantial’ has been interpreted as at least more than 50%.27 According to Haanappel, the debate seldom centres on this question, because common opinion is

23 International Air Services Transit Agreement, 1944, art. I - section 5; International Air Transport Agreement, 1944, art. I - section 6.
24 Curiously, however, the nationality of the aircraft remains relevant for the determination of the routes covered by the International Air Transport Agreement, see art. 1(f) section 1.3-1.5.
to the effect that substantial ownership is merely a preliminary condition, with effective control being the predominant condition. Whereas substantial ownership can be rather easily ascertained by looking at national legislation, effective control is a \textit{de facto} condition that must be judged according to the precise facts of every case.\footnote{28} Van Fenema describes effective control as the power, direct or indirect, actual or legal, to set policy and direct or manage the execution thereof.\footnote{29}

In conclusion, whereas for non-scheduled air services it is required under article 5 of the Chicago Convention that the \textit{aircraft} has the nationality (\textit{i.e.} is registered) in one of the states parties, the Transit and Transport agreements require for scheduled air services that the \textit{airline} is substantially owned and effectively controlled by one of the contracting states. The fact that for non-scheduled air transport no limitations apply as to the substantial ownership and effective control of the operating company\footnote{30} is even more puzzling now than it ever was, as Gertler already put it twenty years ago, since these services are often hardly distinguishable from scheduled services.\footnote{31}

\section*{3.2 Bilateral treaties}

Because, as explained above, the worldwide exchange of traffic rights for scheduled air services has not been successful, the Netherlands has concluded some 140 bilateral treaties with countries which are not party to the International Air Transport Agreement.

A sample survey of these bilateral treaties shows that they all contain a similar provision (although the exact phrasing can be slightly different) to the effect that each contracting party reserves the right to revoke or suspend the operating authorization granted to the designated airline(s) of the other contracting party where it is not satisfied that the substantial ownership and effective control of that airline are vested in the contracting party designating that airline or its nationals. This is in fact a copy of the provision included in the Transit and Transport agreements\footnote{32} as well as in bilateral treaties concluded by other pairs of countries.

The proviso in the Dutch bilateral treaties is regardless of the date of conclusion of the treaty (from 1946\footnote{33} until today\footnote{34}) or the degree of liberalization. Thus, the condition is also part of the liberal ‘open skies’ treaty with the United States.\footnote{35}

\begin{itemize}
\item \footnote{28} P.P.C. Haanappel, ‘Airline ownership and control, and some related matters’, \textit{Air & Space Law}, Vol. XXVI, no. 2, 2001, pp. 90-103, at p. 94.
\item \footnote{29} H. Peter van Fenema, \textit{op. cit.} note 27, at p. 29.
\item \footnote{32} See note 23.
\item \footnote{33} \textit{E.g.} Air services agreement with the United Kingdom, 13 August 1946, \textit{Staatsblad} (Dutch Bulletin of Acts and Decrees) 1947, no. H 77.
\item \footnote{34} \textit{E.g.} Air services agreement with the Russian Federation, 1 October 1997, \textit{Tractatenblad} (Dutch Bulletin of Treaties) 1998, no. 3.
\item \footnote{35} \textit{Tractatenblad} 1992, no. 177, art. 4.
\end{itemize}
A remarkable feature of the treaty with the US is that it applies to both
scheduled and charter services. Whereas other bilateral treaties refer for
the definition of ‘air service’ to article 96 of the Chicago Convention (‘“Air service”
means any scheduled air service performed by aircraft for the public transport of
passengers, mail or cargo’), the 1992 exchange of notes between the United States
and the Netherlands amending the original bilateral treaty defines the term ‘air
service’ itself, reading: ‘The term “air service” means scheduled air service or charter
air service or both, as the context requires, performed by aircraft for the public
transport of passengers, cargo or mail, separately or in combination, for
compensation’.36

Since the ownership and control provision in the treaty37 is a generic require-
ment, it implicitly applies to both scheduled and non-scheduled services. This is
peculiar in view of the conclusion in section 3.1. that for non-scheduled services no
limitations apply as to the ownership and control of the airline. Perhaps in practice it
makes no difference, because the designated airlines under the bilateral treaty will
probably also be engaged in scheduled air services, but nonetheless a negative
precedent may thus have been set.

3.3 European law

In 1992, the liberalization of the internal market of the European Community was
finalized with the adoption of three Regulations dealing respectively with licences38,
routes39 and fares40. The first Regulation contains uniform requirements for the
granting and maintenance of operating licences by member states in relation to air
carriers established in the Community.41 Community air carriers, i.e. carriers with an
operating licence granted by a member state, are subsequently permitted to exercise
traffic rights for both scheduled and non-scheduled services on all routes within the
Community.42

Among other conditions, in order to be granted an operating licence by a
member state the air carrier’s principal place of business and, if any, its registered
office must be located in that member state.43 In addition, the carrier must be owned
and continue to be owned directly or through majority ownership by member states
and/or nationals of member states and it must at all times be effectively controlled by
such states or such nationals.44

36. Art. 1(a).
37. See note 35.
39. Council Regulation 2408/92 of 23 July 1992 on Access for Community Air Carriers to Intra-
41. Council Regulation 2407/92, art. 1.1.
42. Council Regulation 2408/92, art. 3.1. in conjunction with art. 2(b).
43. Council Regulation 2407/92, art. 4.1(a).
44. Ibidem, art. 4.2.
Two remarks must be made here:

Firstly, the effect of the Regulation is that for EC carriers national ownership and control is no longer required, but on a wider Community scale: the so-called “community of interest” carrier. At first sight this provision clears the way for mergers between Community air carriers. However, this is only relevant in so far as they operate intra-Community routes only. For airlines, which operate scheduled flights on both routes within and outside the EC, this option is worthless for they still have to comply with the ownership and control requirements of international treaties.

Secondly, it must be noted that the requirement of Community ownership and control applies to scheduled and non-scheduled services alike. As far as non-scheduled services are concerned this deviates from article 5 of the Chicago Convention, which contains no requirement as to the nationality of the airline at all.

3.4 Dutch law

Article 16 of the Dutch Aviation Act (Luchtvaartwet) contains the general requirement that, unless otherwise stipulated by international agreement, air transport within, to or from the Netherlands or with the Netherlands as an intermediate stop may only be performed by airlines, which have been granted a licence for that purpose by the Minister of Transport (minister van Verkeer en Waterstaat).

The licences for foreign airlines, i.e. airlines to be designated by foreign countries, are granted by the Netherlands through multilateral and bilateral treaties plus the European Community legislation discussed above.

For airlines applying for a licence from the Netherlands, i.e. airlines which want to operate under the Dutch flag, the situation is as follows.

Three licences are needed:

1. The operating licence, based on certain conditions mainly regarding the economic position and operational capabilities of the airline. The operating licence for airlines performing regular commercial flights with power-driven aircraft is regulated in art. 16a, which refers to the EC licensing Regulation.

2. The Aircraft Operator Certificate, granted if certain technical safety requirements are met. The AOC is governed by art. 104 of the Civil Aviation Supervision Regulations (Regeling Toezicht Luchtvaart).

45. Under Regulation 2408/92 (art. 3.1. in conjunction with art. 2(b)) traffic rights on routes within the EC, for either scheduled or non-scheduled services, may only be exercised by Community air carriers, i.e. air carriers with a valid operating licence granted by a member state in accordance with Council Regulation 2407/92.

46. See section 3.1.

47. See note 38. The operating licences for the three main Dutch airlines are published in the Staatscourant 1995, no. 106 (KLM) and Staatscourant 1995, no. 48 (Martinair and Transavia).

48. Decision of 22 January 1959, Staatsblad 1959, no. 67; lately amended by Staatsblad 2001,
3. The route licence, which contains the permission to operate specific routes. Since intra-EC routes are already covered by the EC route access Regulation, route licences granted by the Dutch authorities deal with routes to and from points outside the EC only. These separate route licences are based on the exchange of traffic rights in multilateral and bilateral treaties.

While, as explained in the previous section, the EC licensing Regulation allows financial participation in Dutch airlines by other EC airlines, the route licences granted by the Dutch government for scheduled flights to and from non-EC countries are stricter in this respect in order to comply with the terms of the multilateral and bilateral treaties. To that end, the route licences granted to the three Dutch airlines engaged in international scheduled flights, all contain an identical provision: ‘The effective operation of scheduled flights shall take place in accordance with the applicable international agreements, which have been concluded by the Netherlands, and the conditions imposed by these international agreements’. Moreover, these route licences stipulate that ‘in case of air-political problems, or when a specific bilateral or multilateral aviation relation so requires, the Minister (of Transport) may impose additional requirements or restrictions upon the operation of scheduled flights’.

Surprisingly, the latest route licence for one of the airlines contains a more specific provision in this respect: ‘For the operation of routes, which are not covered by EC Regulation 2408/92, it is required that the ownership and effective control of Martinair Holland N.V. remains in Dutch hands’. Apparently, the Dutch authorities deemed it necessary to avoid any misunderstanding by including an explicit warning to the airline that a change to foreign ownership and effective control would result in the withdrawal of the route licence.

Permission for the operation of non-scheduled services is required on the basis of the Decision on Non-Scheduled Air Transport (Besluit ongeregeld luchtvervoer). This Decision contains no requirements as to the ownership and control of airlines engaged in non-scheduled transport.

With respect to cabotage, the carriage between two points in the same country, it must be noted first of all that in view of the geographical size of the Netherlands, its domestic aviation market is of limited commercial value for foreign airlines.

The right of cabotage, both scheduled and non-scheduled, between points in the Netherlands is granted to EC carriers pursuant to EC Regulation 2408/92. All other multilateral and bilateral air services treaties, to which the Netherlands is a party, exclude cabotage from the exchange of traffic rights.

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50. See note 39.
51. The legal basis of the route licences is art. 16(b) of the Aviation Act; see the licences mentioned in note 52.
53. Staatscourant 2000, no. 213
55. See note 42 and accompanying text.
4 Dutch airlines

There are three Dutch airlines engaged in international scheduled air transport: KLM, Martinair and Transavia.

4.1 KLM

KLM, founded in 1919, is the oldest airline in continuous operation. Its head office is located in Amstelveen, close to both Amsterdam, the capital of the Netherlands, and to Schiphol airport.

KLM is the primary Dutch airline, as it has been granted a so-called open licence by the Minister of Transport, which means that KLM may operate any route stipulated in the international air service agreements, concluded by the Netherlands.  

Soon after its establishment in 1919, the founders of the airline had to admit that their initial financial calculations had been incorrect and they turned to the Dutch government for financial assistance. The following years, due to increasing losses, it became clear that the long-term future of the airline depended on additional government funds and the airline was transformed from a private company into a semi-state enterprise. In 1929, the Dutch state acquired the majority of the shares.

Within the framework of the government’s general privatization policy it was decided in 1986 to decrease the state’s ownership to a minority shareholding. Over the following years, the interest of the state in KLM’s share capital was gradually further reduced to nearly 14.1%. Prior to the abandonment of the majority shareholding by the Dutch state, KLM and the state agreed to a safety net to preserve the requirements of substantial ownership and effective control. For that purpose an option agreement was concluded. Pursuant to the terms of this agreement, KLM has granted the state of the Netherlands the right to acquire such a number of B-preference shares, with a par value of EUR 2.00, as is necessary to provide the state with a majority interest of 50.1% upon the exercise of the option, irrespective of the total issued capital at any given moment. The state may exercise the option ‘if and when it would be necessary and reasonable that KLM, under either one or more international agreements, either one or more licences, issued by whatever country, would have limiting or aggravating conditions imposed in the operation of scheduled flights as a result of the situation that a predominant share or rather the majority of the KLM capital is not demonstrably in Dutch hands; or in the case that it is necessary to prevent one person or company or a group of persons or companies from obtaining such a share in KLM that an undesirable power is amassed in the General Meeting of Shareholders’.

The Board of Managing Directors has four members, all Dutch. The Supervisory Board consists of eight members, six of them having Dutch

56. Nota Vergunningenbeleid, 1994, p. 10; the licence is published in the Staatscourant 1995, no. 166.

57. Marc Dieriks, op. cit. note 5, pp. 127-128.

Until recently one of the members of the Supervisory Board was appointed by the Dutch state. According to the Dutch Finance Minister, there was no reason to maintain this governmental representative, as the financial participation of the state in KLM is only to secure foreign traffic rights for the airline. Since aviation is not a public state activity, KLM is not regarded by the government as a company, which should be politically controlled by the state.  

During the negotiations on a merger with British Airways, KLM proposed a legal structure in order to bypass the nationality barrier: BA would take over KLM economically, but KLM would continue as an operating company, which would legally (not economically) be in 51% Dutch ownership. In addition, the Supervisory Board would be mainly Dutch. In the end, this was not acceptable to BA and consequently the negotiations were broken off.

4.2 Martinair

Martinair, founded in 1958, has grown over the years from a charter to a multinational scheduled airline and cargo carrier. KLM has had a financial interest in Martinair almost from the start. Today KLM and Royal Nedlloyd\(^\text{62}\) each hold a 50% interest in Martinair. Plans for a complete takeover by KLM were cancelled a few years ago, when it became clear that the European Commission had serious objections against the proposed consolidation.

Martinair’s head office is at Schiphol airport. The three members of the Board of Managing Directors and the five members of the Board of Supervisory Directors are all Dutch.\(^\text{63}\)

4.3 Transavia

Transavia airlines was established in 1966. Transavia is an 80% subsidiary of KLM, but operates as an independent airline. With a market share of more than 40%, Transavia airlines is the biggest Dutch ‘holiday carrier’ in and around the

60. Minutes of a meeting between the Parliamentary Committees for Finances and Economic Affairs and the Minister of Finance, 10 April 2001, *Kamerstuk* 22064, no. 6. The latest overview of state representatives in various companies\(^\text{6}\) supervisory boards indicates that as of 2001 there is no longer any such representative on KLM’s Supervisory Board; Governmental paper on the state’s participation policy, *Kamerstuk* 28165, no. 2, p. 21.
62. Royal Nedlloyd N.V. is an international logistics services provider based in Rotterdam, the Netherlands. Royal Nedlloyd’s core activity is container logistics through the network of global shipping links of P&O Nedlloyd. As part of its restructuring, Nedlloyd intends to divest its share in Martinair, thus concentrating exclusively on container logistics. See [http://www.nedlloyd.com/html/profile.html](http://www.nedlloyd.com/html/profile.html).
63. *Annual Report 2000*, p. 47. See also the information on its website [http://www.martinair.nl](http://www.martinair.nl).
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Mediterranean region.

Transavia’s head office is at Schiphol airport. All four members of the Board of Management and all five members of the Supervisory Board are Dutch nationals.\textsuperscript{54}

\textsuperscript{54}Annual Report 2000/2001, p. 15. See also the information on its website http://www.transavia.nl.
4.4 Conclusion

The above analysis of the shareholding of KLM, Martinair and Transavia shows that in each airline more than 50% of the shares lie in the hands of the Dutch state or its nationals.

Furthermore, all members of the boards of directors of the three airlines are nationals of the Netherlands. In addition, all members of the supervisory boards of Martinair and Transavia and a large majority of the members of the supervisory board of KLM have Dutch nationality.

It can therefore be concluded that KLM, Martinair and Transavia are all three substantially owned and effectively controlled by the Dutch state and/or Dutch nationals.

Moreover, through its option agreement with KLM, the Dutch state can block any shift toward foreign majority ownership of both KLM itself and, through the aforementioned shareholding of KLM in Martinair and Transavia, indirectly of the latter two airlines as well.

5 The Dutch government’s policy

The Netherlands, being a small state dependent on international trade, has always been a proponent of free trade. As a corollary, the Dutch government maintains liberal policies toward foreign direct investment. The only Dutch sectors exempted from the application of the OECD Code of Liberalisation of Capital Movements are air transport, maritime transport and banking and financial services. Apart from these exceptions, foreign firms are able to invest in any sector of the economy and are entitled under the law to equal treatment with domestic firms.

With respect to airlines, the Dutch government is in favour of a relaxation of the ownership rules. Together with other member states of the EC it has therefore asked the European Commission to develop initiatives to that effect and to raise these within ICAO. In addition, the Netherlands promotes the realization of a so-called Transatlantic Common Aviation Area, an ‘open skies’ agreement between the EC as a whole and the US. It is expected that under such an agreement the US would allow airlines of EC member states to be substantially owned and effectively controlled by nationals of the EC. This would give the Community ownership and control provision in the EC licensing Regulation full effect. According to the Dutch Minister of Transport it would be interesting for KLM and for European aviation in general to come to a European ownership and control. Mergers between European airlines would enhance their competitive competition vis-à-vis the United States and would, according to the Minister, thus prevent the US from dictating the


67. Idem.

68. See note 44.
Already in 1991, in its explanatory memorandum attached to the proposals for the three Regulations finalizing the internal European aviation market, the European Commission stated that: ‘It is, however, clear that the ownership limitations may hinder a normal business development in the interests of Community air carriers. It is, therefore, desirable to introduce a possibility to conclude more liberal agreements with third countries on a mutually beneficial basis, without prejudice to international commitments.’ However, despite continued requests by the European Commission during the last decade, at the time of writing there is still no agreement in the EC Council of Transport Ministers to give the Commission a mandate to negotiate the exchange of traffic rights on behalf of the EC with third countries. The Netherlands is among the member states in favour of such a mandate.

6 Concluding remarks

It is evident that the present ownership and control restrictions in aviation treaties impede the long-term restructuring of the sector, restrict adequate financing, and thereby adversely affect the efficiency of airline services. A complete abolition of the nationality requirement, however, is impossible since that requirement is the core of the present system of bilateral treaties established in the 1940s. States are thus locked up in a system created by themselves.

The best solution would be to conclude a worldwide ‘open skies’ agreement, for when all airlines have equal market access to all countries, the nationality of the airline would become irrelevant. Unfortunately, there is no present prospect of achieving such a global liberalization. The Annex on Air Transport Services to the General Agreement on Trade in Services of 1995 explicitly excludes traffic rights from its scope and it is highly unlikely that traffic rights will be an issue during the next international trade round to be held under the auspices of the WTO. At the same time, airlines such as KLM cannot afford to sit and wait. As set out in the introduction, although KLM is still in good condition, some form of consolidation with one or more other airlines is a prerequisite for long-term survival.

In order to overcome this stalemate, a two-track strategy should be pursued:

69. Minutes of a meeting between the Minister of Transport and the Parliamentary Committees on Transport and European affairs, 11 October 2001, Kamerstuk 21501-09, no., 137.
71. Idem note 66.
72. See the OECD report The future of international air transport policy. Responding to global change, 1997, passim.
73. Art. 2(a).
74. In the meantime, KLM and BA have resumed talks on forms of cooperation other than a full merger: interchange of aircraft, flight frequency, code-sharing and common purchasing. According to a KLM spokesman, BA is still the most logical partner. ‘KLM en BA tot elkaar veroordeeld’, Het Financieele Dagblad, 12-06-2001; ‘BA en KLM weer in gesprek over alliantie’, Het Financieele Dagblad, 22-10-2001; ‘KLM weer serieus met BA in gesprek’, Het Financieele Dagblad, 27-10-2001.
Firstly, the EC Council should give the Commission as soon as possible a mandate to start negotiations with the United States on a Transatlantic Common Aviation Area. Then the countries of the European Community will be regarded by the US as one entity, which would enable European airlines to attract foreign capital or even merge into multinational airlines. Once the US has accepted this, it is unlikely that other countries with smaller aviation markets will be obstructive to such European consolidation.

Such an agreement between the EC and US could function as a trend-setter or even be enlarged itself. In the words of European Transport Commissioner Loyola de Palacio: 'The agreement should ultimately have no geographical limitation, but initially the EU and the US, as the largest aviation markets in the world, should lead the development. Progressively the agreement would get a broader coverage and ultimately it could be the basis for moving to a new multilateral worldwide regime.'

Secondly, as long as there is no worldwide liberalization of air services, some link between the airline and the country or countries involved is required in order to prevent the phenomenon of 'free riders', i.e. airlines benefiting from free market access to a foreign country while being protected through limited market access in their home country.

Therefore, a criterion based on the principle place of business and/or permanent residence of the airline should be substituted for the present ownership and control clause. The European Commission should pursue such a broadening of the nationality concept both in bilateral negotiations and within ICAO.

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75. Speech at the IATA World Transport Summit 'Globalisation - The way forward', Madrid, 27 - 29 May 2001. The full text of the speech can be found in the EU's press releases database RAPID http://europa.eu.int/rapid/start/epi/guesten.ksh

76. See e.g. the recommendation by ICAO’s Air Transport Regulation Panel, approved by the Council in 1997 for the guidance of states, http://www.icao.org/icao/en/atb/ecp/ownership.htm