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CHRIS HAYNES

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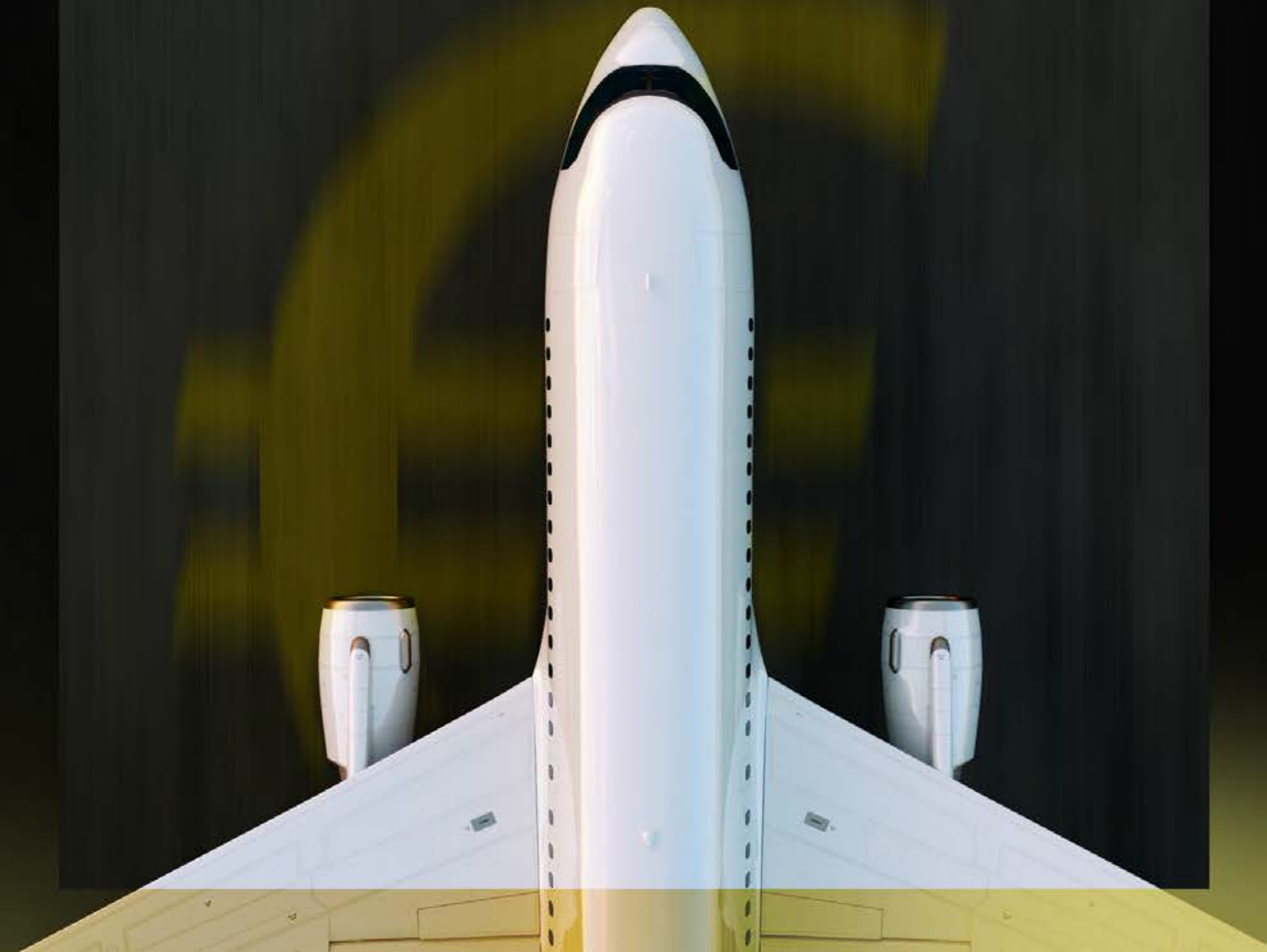
A SOLUTION TO THE LICENSING CHALLENGE FACING EU AVIATION REGULATORS



Collective Investment Schemes
A Solution to the Licensing Challenge Facing EU Aviation Regulators

Chris Haynes [1]

Introduction

Under EU Regulation 1008/2008 ('Regulation 1008'),[2] the licensing of EU airlines depends, in part, on their ability to demonstrate that they are owned and controlled by EU nationals and/or Member States. This test assumes that it is possible for an airline to identify the beneficial owners of its shares and, having done that, their nationality.

This article contends that the current regulatory approach to ascribing nationality to collective investment schemes is fundamentally flawed and should be changed.

This matters because the incorrect attribution of non-EU nationality to an investor may have negative consequences. The investor may have its shares disenfranchised, as with easyJet[3] and Wizz,[4] or an airline may be forced to impose buying limitations on non-EU investors, as with Ryanair[5] and International Airlines Group[6]. In theory, an airline operating licence could be revoked.

The issue is particularly acute in the context of collective investment schemes because, by their nature, they often have many disparate investors, making it hard to identify beneficial ownership. These schemes pool money from

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1. Chris Haynes is the founder of CMH Consulting Limited. He was General Counsel at International Airlines Group from 2011 to 2022. Chris.haynes@cmh-consulting.co.uk. With thanks for advice from Niamh McCarthy and Neeta Chityal

2. Regulation (EC) No. 1008/2008 of the European Parliament and Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ 2008 L 293, p. 3.

3. easyJet, 'EU Share Ownership', accessed 4 February 2025.

4. Wizz, 'Disenfranchisement Q&A', accessed 4 February 2025.

5. RNS, 'Ryanair Allows Non-EU nationals to buy Ordinary shares', 7 March 2025.

6. RNS, 'IAG Limit on Non-EU Shareholding', International Cons Airlines Group, 11 February 2019.

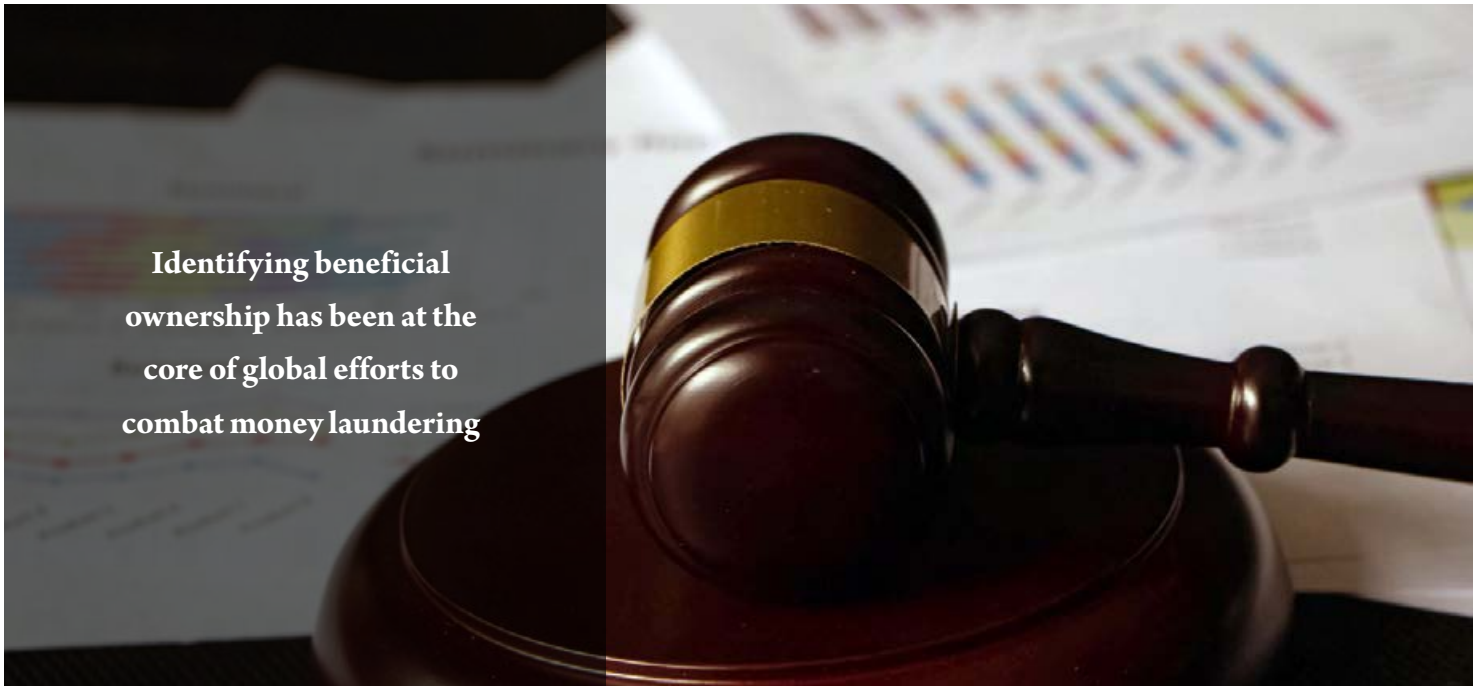
individuals and institutions to invest in different types of assets[7] and they include retail funds, such as pension and mutual funds, and private investment funds, such as hedge funds and private equity funds.[8]

Collective investment schemes managed by institutions like BlackRock, Amundi and HSBC Global are among the largest shareholders in listed EU airlines. They are a key source of share capital but poorly served by the current regulatory regime. At a time when EU airlines are facing major investment demands, including to deal with the energy transition, regulators and policymakers should be looking to remove regulatory uncertainty and facilitate investment by such important investors.

This article proposes a way to address this regulatory failure, leveraging specialist EU anti-money laundering laws to deliver a better outcome.

Identifying beneficial ownership has been at the core of global efforts to combat money laundering and laws have been specifically designed to deal with the challenge of identifying beneficial ownership in complex situations. It seems logical to apply this 'gold standard' legislation to the challenge of identifying the beneficial ownership of collective investment schemes.

This would require some regulatory flexibility, but it is believed that this is merited for portfolio investors in collective investment schemes. Portfolio investment is typically viewed as being less sensitive from a control perspective than foreign direct investment.[9]



7. Ramandeep Kaur Chhina and Alanna Markle, 'Defining and capturing information on the beneficial ownership of investment funds', *Open Ownership Policy Briefing*, March 2024, para. 1.

8. *Ibid.*, para. 2.

9. *See also* n.53 below.

Increased regulatory clarity and predictability would facilitate investment by collective investment schemes, and this would serve to strengthen the sector

A solution could be implemented with a clarification to existing regulatory guidance and without changing Regulation 1008.

This article does not seek to quantify the financial benefits associated with the proposed changes, but it is assumed that increased regulatory clarity and predictability would facilitate investment by collective investment schemes, and this would serve to strengthen the sector. EU trade policy specifically recognises that the creation of a predictable and transparent business environment will encourage investment.[10] If additional investment is encouraged, that should help to lower the industry's cost of capital.

The proposed changes would also reduce compliance costs for airlines and, for those airlines that currently impose voting or buying limitations on non-EU shareholders,[11] there might be an additional benefit as the proposed changes would facilitate the removal of those restrictions.

It is recognised that EU airlines operate in a complicated aero-political environment, frequently depending on air services agreements with third countries, and this is often cited as a reason to maintain the status quo. This article takes the position that the proposed changes would be entirely consistent with that aero-political environment.

Section 1 examines the existing EU law framework applicable to airlines, including its failure to deal satisfactorily with collective investment schemes. Section 2 explains why collective investment schemes merit special treatment and section 3 sets out a solution based on specialist EU money laundering legislation. Finally, section 4 seeks to rebut some of the aero-political shibboleths that are likely to hamper progress on this important issue for European aviation.

1. Legal Requirements

The ownership and control test applicable to EU airlines is not a creature of EU law; instead, it has its root in public international law, as reflected in the complex web of bilateral air services agreements that were first developed according to the principles of the Convention on International Aviation of 1944 (the 'Chicago Convention').[12] It was introduced into EU

10. European Commission, 'Trade and Economic Security: Investment', accessed 4 February 2025.

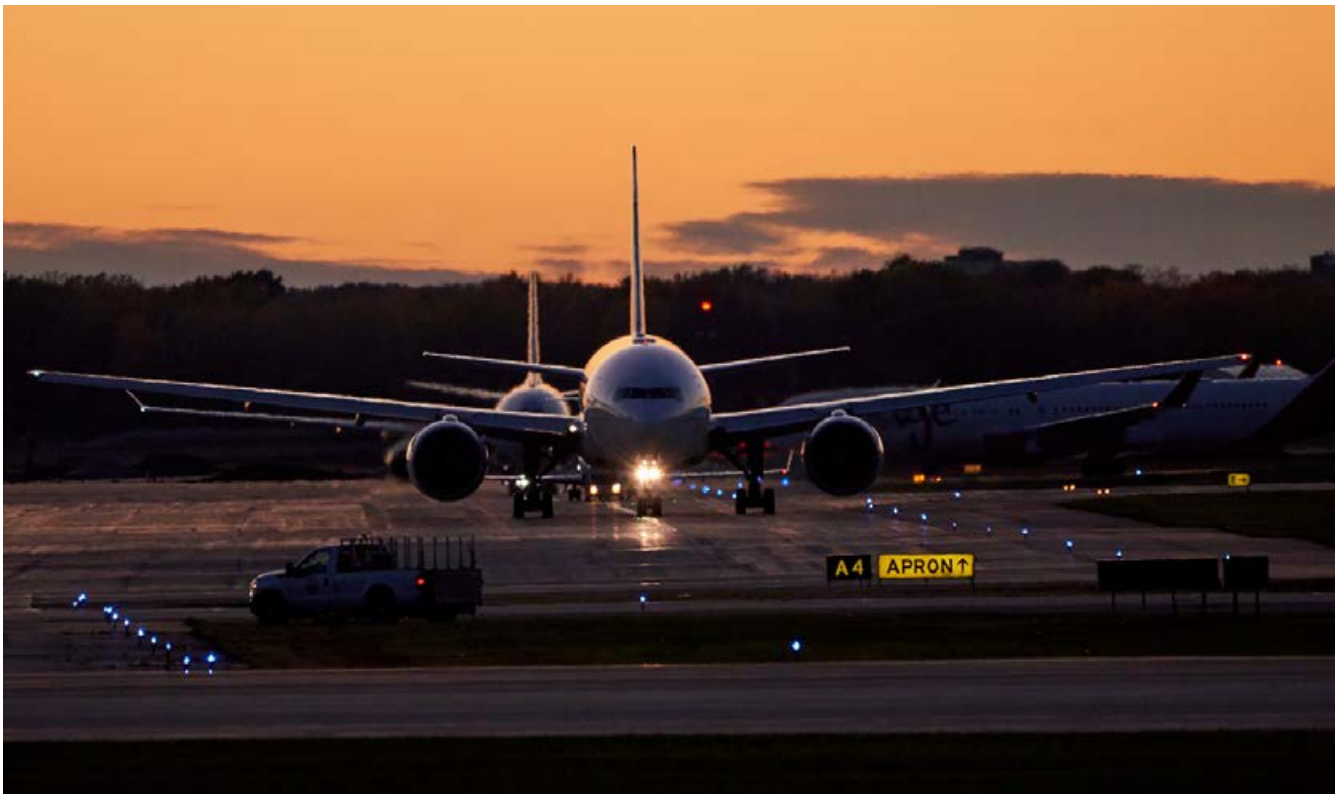
11. *See also* n.4 and n.5 above.

12. International Air Transport Association, 'Airline Liberalisation, Lessons from other industries on the impact of removing operational, ownership and control restrictions', *IATA Economics Briefing* 7, April 2007.

licensing rules as part of the Third Package in 1992,[13] when most major EU airlines, such as Air France,[14] KLM[15] and Iberia[16] were state owned and Lufthansa and British Airways[17] were the only EU airlines with a stock market listing.[18]

This is important context because this article is based on the contention that the current regulatory framework is outdated and has failed to keep pace with developments in global equity capital markets.

The requirements of Article 4(f) of Regulation 1008 appear simple. The relevant carrier must be able to show that, '*Member States or nationals of Member States own more than 50% of the undertaking and effectively control it …*'. The European Commission decision in Swissair/Sabena[19] is clear that the Commission considers this test to be satisfied if 50% plus one share of the capital of the carrier is held by Member States and/or nationals of Member States and this is tested by reference to equity share capital.



13. Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ 1992 L 240, p. 1.
14. Air France KLM Group, 'The Group', accessed 4 February 2025.
15. KLM, 'History of KLM', accessed 4 February 2025.
16. Iberia, 'Historical Timeline', accessed 4 February 2025.
17. British Airways, 'Explore our past', accessed 16 April 2025.
18. Lufthansa Group, 'The Lufthansa Share', accessed 4 February 2025.
19. 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), OJ 1995 L 239, p. 19.

Regulation 1008 is based on the premise that, per the Commission's Interpretative Guidelines ('Interpretative Guidelines'),[20] it is possible to identify, *'the nationality of the natural persons who own and/or effectively control the entities at the final level of the ownership and control line'*.[21] This applies to all shareholders, including collective investment schemes.

Inevitably, tracking the nationality of the beneficial owners of an airline's shares is challenging if high volumes of shares are traded every day. This is the case with most EU listed airlines. For example, on 30 January 2025 more than 2 million shares were traded in each of the five largest EU listed airlines, with the daily volumes for each of easyJet, Lufthansa and International Airlines Group exceeding 5 million shares.[22]

However, even in situations of high liquidity, listed airlines have access to statutory and by-law tools to help identify the beneficial owners of shares. As an illustration, the by-laws for International Airlines Group give it the right to require shareholders to provide, *'such information as the Company shall require relating to the beneficial ownership… in the shares… as lies within the knowledge of such shareholder'*.[23] The articles of Incorporation for Air France-KLM have similar provisions,[24] as do those for Ryanair,[25] easyJet[26] and Wizz.[27]

Identifying beneficial ownership is straightforward if shares are held by Member States, sovereign wealth funds, trade buyers or retail investors. It is far more difficult in the case of collective investment schemes and the regulatory framework fails to respond to that challenge.

Collective Investment Schemes

Collective investment schemes can be regulated and unregulated and may comprise thousands of investors and multiple intermediaries[28]. They have some common features that make it hard to track beneficial ownership and, with it, nationality:

Co-mingled investors, managed and domiciled in different jurisdictions. Major institutional investors, such as BlackRock, source investment from around the world[29] and many of the funds in which those investments are placed are managed outside the EU.[30] Analysis published by the City of London suggests that 36% of all European assets are managed in the UK.[31] Collective investment schemes may be marketed to both EU and non-EU investors.[32]

20. 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, OJ 2017 C 191, p. 1.

21. *Ibid*., para. 22.

22. MarketScreener (accessed 3 February 2025): EasyJet plc, Ryanair Holdings plc, Lufthansa, Air France-KLM, International Consolidated Airlines Group S.A.

23. Corporate Bylaws of International Consolidated Airlines Group, S.A, Article 10.

24. Air France KLM Group Articles of Incorporation, Article 10.

25. Ryanair Holdings Plc Articles of Association, Article 41.

26. easyJet Plc Articles of Association, Article 39.

27. Wizz Air Holdings Plc Articles of Association, Articles 77-100.

28. *See also* n.7 above.

29. BlackRock, 'About us', accessed 4 February 2025.

30. The City of London, 'A global asset management powerhouse', accessed January 2025.

31. *Ibid*., p. 1.

32. Sidley, 'UK/EU investment Management Update (February 2024)', *Sidley Investment Funds Update*, 6 February 2024.

Complex fund structures. Collective investment schemes often have complex fund structures[33] that make it difficult to identify the ultimate beneficiary of those funds.[34] These difficulties are exacerbated because many of the funds themselves are listed.[35] Fund managers often invest in a particular airline through multiple funds, segmented to serve different client markets.[36]

Derivatives/synthetic instruments. Common fund structures often depend on the use of derivatives[37] which means that the beneficial owners of the listed airline's shares are not the investors in the fund itself but those in the investment bank which acts as the counterparty to the derivative.[38] They allow the investor to buy only the performance of the underlying investment without taking ownership of the company's stock.[39]

A statement from the Organisation for Economic Co-operation and Development is pertinent, *'Because ownership of interests in collective investment vehicles ("CIV") changes regularly, and such interests are frequently held through intermediaries, the CIV and its managers often do not themselves know the names… of the beneficial owners of interests.'*[40]

Collective investment schemes are a special case.

Regulatory Failings

In evaluating whether a regulatory regime is satisfactory it seems reasonable to consider whether it is clear, predictable and consistently applied.

It is difficult to judge the application of the rules, as EU airline licensing investigations are private, but there are other data points that indicate that the current regime is neither clear nor predictable.

The relevant section of the Interpretative Guidelines is brief, stating that, '*in the case of an airline's shares held by a nominee, trust, fund or any other institutional investors, the ownership requirement may be satisfied where the nominee or trustee or other registered owner is a Member State or a national of a Member State. Account should however be taken of all elements that may point to a different person being the owner from an economic point of view ie the final beneficiary of the rights referred to above.*'[41]

33. UK Financial Services Consumer Panel, 'Executive Summary: Collective Investment Schemes Costs and Charges', May 2014, p. 6.

34. *See also* n.7 above.

35. Financial Times, *Managed Funds Service*, 30 January 2025, pp. 30-31, http://www.markets.ft.com/data/funds/uk, accessed 3 April 2025.

36. Lufthansa Group 'Publication pursuant to section 26(1) WPHG', *Lufthansa Group Investor Relations*, 29 March 2017; Comision Nacional del Mecrado de Valores, No 2016084130 International Consolidated Airlines Group, S.A., 15 July 2016.

37. Kirsten Chang, 'Record ETF Launches: Derivatives Storm the Scene', *VetaFi*, 22 August 2024.

38. Societe Generale, 'Equity Derivatives – Investing in stocks without owning them', accessed 4 February 2025.

39. *See also* n.31 above.

40. Organisation for Economic Co-operation and Development, *Commentary on Article 29 OECD Model Tax convention*, 5 October 2019, para. 62.

41. Interpretative Guidelines, para. 44.

The Interpretative Guidelines make no attempt to address a situation where it is not realistic or possible to identify beneficial ownership at all (although this possibility is acknowledged in Member State guidance[42] and elsewhere in the Interpretative Guidelines).[43]

The ambiguity in the Interpretative Guidelines leaves scope for interpretation and inconsistency. This risk is increased because airlines 'self-assess' the nationality of their shareholders and national licensing authorities have regulatory oversight. In the author's experience, national licensing authorities rarely, if ever, interrogate an airline's share register for nationality purposes.

There is little published guidance at a national level, but it is instructive to note that the Irish Aviation Authority refers to the country, '*where the shares were sold*'[44] as a relevant factor in determining nationality, while the Agencia Estatal de Seguridad Aérea in Spain states that, '*a broad assumption will be made that the nominee shareholders will be citizens of the country where the fund manager is domiciled for tax purposes*'.[45] The logic for referring to these factors is unclear. It is self-evident that they may not be robust indicators of beneficial ownership.

The German Aviation Compliance Documentation Act (LuftNaSiG)[46] takes a different approach, determining nationality for legal persons and groups by reference to the registered office of the relevant investor. Again, this may bear no relationship to the underlying beneficial ownership position.

A report from Transparency International is revealing.[47] It states that Luxembourg is home to the largest number of investment funds in Europe and found that eighty one percent (81%) of the 16,777 funds did not declare any beneficial owner. When one considers that Luxembourg's population is only 0.1% of the EU total,[48] it illustrates that the attribution of nationality by reference to the domicile of a fund is unlikely to be an accurate reflection of the underlying beneficial ownership position.

Moreover, the overall structure of the global asset management sector is changing. US banks, such as JPMorgan Asset Management and Goldman Sachs Asset Management are increasingly important players in Europe, alongside firms like BlackRock and Vanguard.[49] Another indicator that tax domiciles, registered offices or similar are unlikely to be meaningful reference points in determining beneficial ownership and nationality.

42. Agencia Estatal de Seguridad Aérea, 'Criterios para la deteminacion de los conceptos "Propreidad y Control" en base al Reglamento EC 1008/2008', 20 June 2016.

43. Interpretative Guidelines, para. 30.

44. Irish Aviation Authority, 'Guidance note on ownership and control criteria applicable to applicants/holders of an Operating Licence under regulation (EC) No 1008/2008 on common rules for the application of air services in the Community', accessed 5 February 2025.

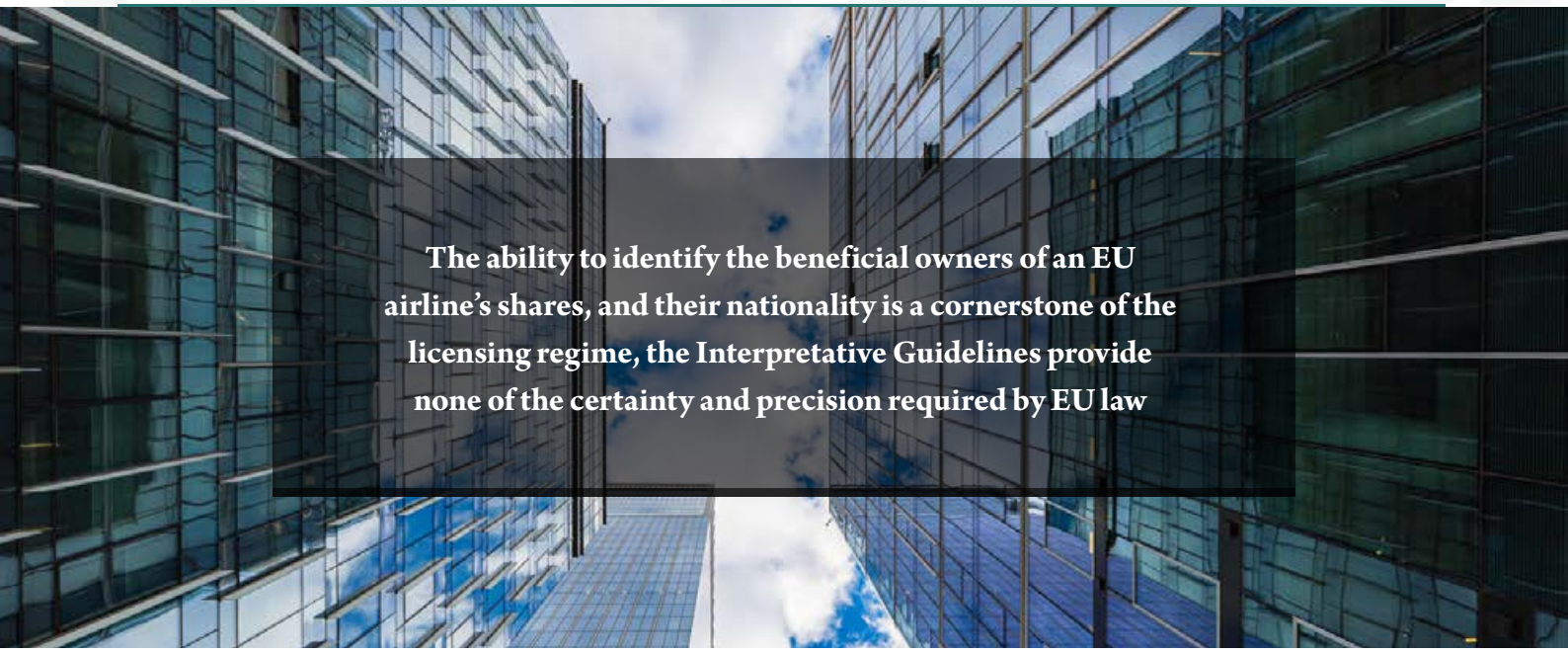
45. *See also* n. 41, p. 6.

46. German Aviation Compliance Documentation Act (LuftNaSiG).

47. Transparency International, 'Not so open Lux: Authorities in the dark over Luxembourg private investment fund beneficiaries', 8 February 2021.

48. Eurostat, 'Demography of Europe – 2024 edition', accessed 5 February 2025.

49. Financial Times 'A relentless march', 17 December 2024, https://www.ft.com/content/bc1b6eaf-dd5f-4e63-b4dc-90a30e9bec58, accessed 3 April 2024.



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The ability to identify the beneficial owners of an EU airline's shares, and their nationality, is a cornerstone of the licensing regime[50] but for a key investor group (collective investment schemes), the Interpretative Guidelines provide none of the certainty and precision required by EU law.

A more robust and predictable framework is required.

2. Do Collective Investment Schemes Merit Special Treatment?

The regulatory changes proposed in this article could result in some non-EU sourced portfolio investments being categorised as EU (and vice versa) and so it is important to consider whether collective investment schemes, as portfolio investors, are an investor class that merits any 'special treatment'.

This paper argues that some regulatory flexibility is appropriate having regard to EU trade and investment policy and EU aviation policy objectives.

EU Trade Policy

EU trade policy is clear that inward investment into the EU is positive: *'By contributing to economic growth [and] job creation, foreign investment tends to benefit host countries as well as home countries.'*[51] It goes on to distinguish between Foreign Direct Investment ('FDI') where an investor sets up or buys a company (or a controlling share in a company) in another country and portfolio investment, where an investor buys shares in, or debt of, a foreign company without controlling that company.[52]

50. *See also*, n.19 above.

51. *See also* n.10 above.

52. *Ibid*., para. 2.

Portfolio investment is considered less sensitive than FDI because it is not seen as providing access to the single market. FDI is within the EU's sole competence,[53] while portfolio investment is a shared competence with the Member States. The EU's FDI Screening Regulation,[54] which is intended to protect the most sensitive national security interests, does not apply to portfolio investments.

The fact that EU law recognises a distinction between portfolio investors and FDI investors, and the basis for that distinction, is of critical importance. This paper does not advocate that the rules for FDI investors should be changed in any way and, for portfolio investors, only to the extent that the current regulatory approach needs to be adapted to deal with its failure to satisfactorily address collective investment schemes.

Aviation Policy

Two aspects of EU aviation policy are relevant to the proposals in this article:

Market access: the policy objectives articulated in the Swissair case were focused on market access: '*they are primarily designed to ensure that...companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the community's liberalised air transport market.*'[55]

Adapting the regulatory approach for collective investment schemes would not create an incremental risk that a third country investor could '*unilaterally take advantage of the single market*'. Portfolio investors do not typically look to exercise control and the regulatory regime applicable to FDI investors, such as sovereign wealth funds and third country airlines, would be unchanged.

Strategic autonomy: alongside market access, there is a broader strategic interest that needs to be protected ie that EU airlines should not be acquired by third country airlines or sovereign wealth funds from, for example, the US, Middle East or China.

Again, it is not considered that this possibility would be increased in any way by the proposals in this article. The promulgation of a more consistent and transparent regulatory framework should reduce the risk and, in any event, there are established EU laws providing for regulatory oversight and intervention if investors seek to take control of an entity.

Having regard to EU trade policy and the underlying aviation policy objectives associated with the ownership and control rules, it seems reasonable to conclude that portfolio investment is a 'low risk' category of investment that merits special treatment. It brings the benefits of investment without seeking control.[56]

53. Opinion 2/15 of the Court of Justice of 16 May 2017, *EU-Singapore Free trade Agreement* (EU:C:2017:376).

54. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 791, p. 1.

55. *See also*, n.18 above.

56. *See also* n.10 above.

3. Do Anti-Money Laundering Laws Offer a Solution?

The ability to effectively identify beneficial ownership is at the core of the EU's Anti money-laundering Framework (derived from Directive 2015/849/EU[57] ('EU AML Directive') and soon to encompass Regulation 2024/1624[58]) ('EU AML Framework') and it follows a wider international approach promulgated by the Financial Action Task Force, established by the G7 countries to lead global action to tackle money laundering.[59]

It is a specialist EU framework that sets out, '*beneficial ownership transparency requirements for legal entities, express trusts and similar legal arrangements*'.[60]

The EU AML Framework targets criminal activity that is more serious from a public policy perspective than the licensing issues in Regulation 1008, but the underlying challenges associated with identifying beneficial ownership are the same. It is the legislative 'gold standard' in determining beneficial ownership and the optimal reference point.

It imposes obligations on legal entities in the EU to hold adequate, accurate and up-to-date beneficial ownership information and, as relevant, to provide it to relevant statutory registries.[61] Financial institutions in the EU are obliged to carry out extensive customer due diligence checks.[62]

The EU AML Framework defines a beneficial owner as being any natural person who ultimately owns or controls a legal entity or an express trust or similar legal arrangement. Ultimate ownership and control is defined as the holding of a 25% or more ownership interest[63] (this threshold has been recommended by the Financial Action Task Force as an appropriate level to test the beneficial ownership of entities with disparate owners (such as collective investment schemes)).[64]

57. Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ 2015 L 141, p. 73 ('EU AML Directive') .

58. Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ 2024 L 251, p. 1.

59. Financial Action Task Force, 'Our Topics', accessed 5 February 2025.

60. *See also*, n. 56 above.

61. EU AML Directive, recital 17.

62. EU AML Directive, Article 13.

63. EU AML Directive, Article 3.

64. Financial Action Task Force, 'Guidance on Beneficial Ownership of Legal Persons', March 2023.

It recognises that, even with extensive due diligence, it may not be possible practically to identify the beneficial owner of a legal entity[65] and that, in relation to collective investment schemes specifically, it is unnecessary to identify those who hold less than 25% of the relevant undertaking.[66] In practice, this means that the beneficial owners of collective investment schemes (in an economic sense) are rarely identified.

If, having exhausted all possible means, and provided there are no grounds for suspicion, no person can be identified with a 25% or more ownership interest, the EU AML Framework provides that a natural person who has the ability to define or influence investment policy, controls the activities through other means or, as a final option, holds the position of senior managing official(s) should be identified and verified to satisfy the beneficial owner test.[67]

A senior managing official ('SMO') means the natural persons who are the executive members of the management body, as well as the natural persons who exercise executive functions within a legal entity and are responsible, and accountable to the management body, for the day-to-day management of the entity.[68]

This article argues that there is a read-across to the Interpretative Guidelines here; if the specialist EU AML provides for circumstances where it is impossible to identify a beneficial owner of a collective investment scheme and/or that the steps that would be required to be taken to achieve this are unnecessary for holdings that fall below 25% having regard to the underlying public policy issues,[69] the Interpretative Guidelines should do the same. It would seem disproportionate and irrational to take a more stringent stance in the context of the EU's airline licensing regime.

Likewise, if the EU AML Framework considers that the identification of the SMO is an alternative to verifying ultimate beneficial ownership,[70] it seems reasonable for the Interpretative Guidelines to do the same. There is a tension here, because an SMO has no ownership interest in the underlying asset but, for more material shareholdings, the ability to exert influence/control is important. The SMO concept is well-understood and more logical than reference points such as registered office or domicile (which may not have any nexus with EU nationals).

What are the Proposed Changes?

It is proposed that the Interpretative Guidelines should state that the nationality of collective investment schemes should be determined as follows:

'For the purposes of Article 4(f) of Regulation 1008, the EU AML Framework shall be used to determine the beneficial owners of collective investment schemes.

65. EU AML Directive, recital 13

66. *See also*, n. 56 above.

67. EU AML Directive, recital 13.

68. European Banking Authority, Single Rule Book, accessed 4 February 2025.

69. EU AML Directive, recital 13.

70. *Ibid.*, recital 13.

Where shares in an EU carrier are held by a collective investment scheme that is open to investment by EU nationals, but where the fund is not able, or required, pursuant to the EU AML Framework, to identify a beneficial owner with a 25% or more ownership interest, they shall be treated as EU for ownership and control purposes.

If the shares constitute a material shareholding (5% or more), they shall only be treated as EU for ownership and control purposes if all, or a majority, of the fund's Senior Managing Officials are EU nationals.

If it is possible to identify a beneficial owner with a 25% or more ownership interest in the relevant collective investment scheme then, regardless of the size of the shareholding, the nationality of that ultimate beneficial owner shall be used for ownership and control purposes.'

This proposal seeks to protect the integrity of the ownership and control aspects of Regulation 1008 while allowing some flexibility in the Interpretative Guidelines to recognise the fact that the underlying requirements of Regulation 1008 itself may not be capable of being satisfied for collective investment schemes.

The linkage to the specialist EU AML Framework would provide the regulatory clarity and consistency lacking today. It would enable airlines to pass some of their compliance burden to institutional investors because most should have established 'know your client' due diligence processes in place.[71]

Importantly, the flexibility suggested would be moderated for material shareholdings (5% or more) which are inherently more relevant from a control perspective.

A few points of explanation:

Why Change the Interpretative Guidelines?

This paper proposes a change to the Interpretative Guidelines, rather than Regulation 1008 itself for reasons of consistency. This approach follows the existing practice of the Commission in dealing with detailed questions about the interpretation of Regulation 1008 (for example, how to determine effective control).[72]

Why 5%?

This reflects the initial disclosure threshold in the EU Transparency Directive[73] (an indication that the right to exercise votes beneath this level is not considered material in the context of a listed company). This is stricter than the 10% threshold for notifying ownership changes under Regulation 1008[74] or used by the US Department of Transportation.[75]

71. EU AML Directive, Chapter II.

72. Interpretative Guidelines, Section 6.

73. Directive 2004/109/EC of the European Parliament and of the Council 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 and amending Directive 2001/34/EC, OJ 2004 L 390, p. 38 ('Transparency Directive').

74. Regulation 1008/2008, Article 8(5).

75. United States Government Accountability Office, 'Information on DOT's Oversight of and Stakeholders' Perspectives on Foreign Ownership', 25 June 2019.

The Takeover Directive is a useful reference point because it is a specialist piece of legislation designed to address the sort of complex equity and derivative instruments used in today's financial markets.[76] It imposes a bright line test and is familiar to market participants and regulators alike.

Its disclosure requirements are triggered by holding voting rights (or financial instruments that give a right to acquire voting rights),[77] not economic rights, and apply if a vote holder acts in concert with a third party.[78] The last point is important additional protection as it would prevent investors seeking to sidestep the 5% threshold through co-operation with other parties.

Why Apply an SMO Regime to Material Shareholdings?

Clearly, this is a synthetic link to nationality and may bear no relationship to ownership; it is an imperfect proxy. However, material shareholdings are important from a control perspective and so it seems logical to use a control-related anchor to provide additional safeguards in relation to those shareholdings.

Taking this approach would also support the contention that the proposed changes should be irrelevant for the purposes of applicable air services agreements.

The SMO is a well-understood concept and more relevant to the underlying policy objectives than other potential reference points, such as registered office or domicile (which do not necessarily have any nexus with an EU natural person or control).

Control considerations are less relevant to smaller shareholdings because they carry fewer votes and so this article takes the approach that this additional safeguard is not necessary for non-material shareholdings. If the underlying policy objective is to improve the regulatory framework, at the same time as encouraging investment into EU airlines by collective investment schemes, that seems a reasonable distinction.

Summary

Ascribing nationality in this way would require regulatory flexibility but this is inevitable in circumstances where it is not possible or realistic to identify a beneficial owner of a collective investment scheme.

This is intended to be a balanced approach and an improvement on the position that exists today. It is considered more reasonable than other possible options, such as disregarding the relevant shares entirely for ownership and control purposes or ascribing EU or non-EU nationality to all of them.

76. *See also* n.45-49 above.

77. EU Transparency Directive, Chapter III.

78. EU Transparency Directive, Article 10(a).

4. Likely Challenges

History shows that certain stakeholders will resist change. They are likely to focus on three possible risks:

(i) non-EU investors could take control of an EU airline

(ii) EU airlines might cease to be majority-owned by EU investors

(iii) route rights under air services agreements might be jeopardised.

This paper takes the position that these are not material risks or, to the extent that they are relevant, the risk would be no greater than exists today.

Non-EU Investors Could Take Control of an EU Airline

The proposed change would not increase this risk. It would provide some flexibility for collective investment schemes with non-material shareholdings only (who, as portfolio investors, do not typically seek control) but subject to additional safeguards for more material shareholdings.

Arguably, the regulatory approach to more material shareholdings would be stricter than that which applies today.

In any event, there are strong specialist EU laws that avoid a risk of creeping control, including the EU Transparency Directive (see above),[79] the EU Takeover Directive,[80] which includes requirements for an offeror to engage with relevant supervisory authorities,[81] the EU Merger Control Regulation[82] which provides that a concentration with a Community dimension must be notified to the Commission in advance of implementation[83] and may not be implemented until it has been declared compatible with the common market [84] and the EU FDI Screening Regulation[85] which establishes a framework for the screening of foreign direct investments, including transport.[86]

These laws provide a wider statutory framework supporting the aims of Regulation 1008. The proposed change would have no impact on that wider framework.

79. EU Transparency Directive, Article 9.

80. Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ 2004 L 142, p. 12.

81. *Ibid*., Article 6.

82. Council Regulation (EU) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24, p. 1.

83. *Ibid*., Article 4.

84. *Ibid*., Article 7.

85. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ 2019 L 791, p. 1.

86. Jean-Maxime Blutel, Dr. Dylan Geraets and Sarah Wilks, 'Reform of the EU Foreign Direct Investment Screening Regulation – How might M&A Transactions be Impacted?' *Mayer Brown*, 26 March 2024.

EU Airlines Might Cease to be Majority-Owned by EU Investors

Intuitively, it might appear that the proposed change could bring a risk that more than 50% of an EU airline might be owned by non-EU nationals. For example, if collective investment schemes for whom it is not possible to identify beneficial owners are ultimately comprised of largely non-EU investors.

There is a logical inconsistency in this argument. If it is not possible or practical to identify a beneficial owner for a collective investment scheme, it effectively falls outside the regulatory regime because it is not capable of categorisation for nationality purposes.

Moreover, it is a risk that exists today.

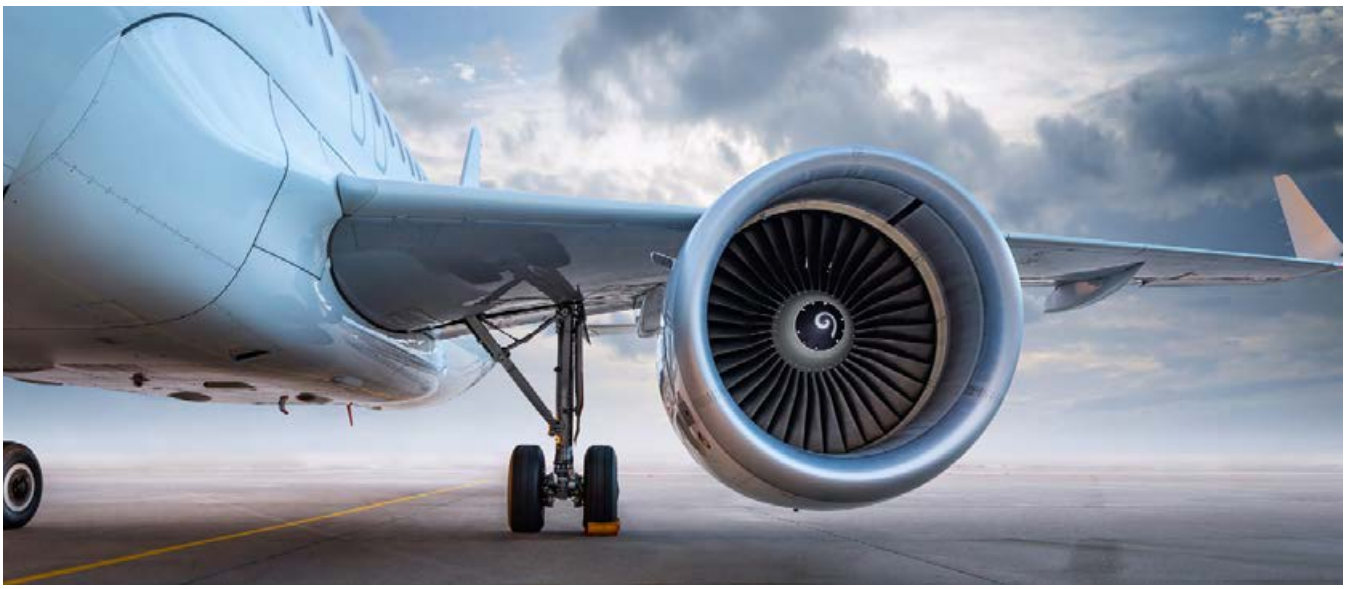
Potential Jeopardy to Route Rights

A key consideration in making any change to Regulation 1008 or the Interpretative Guidelines is whether it could have a detrimental impact on EU airlines' rights to operate under applicable air services agreements.

Ultimately, this is an aero-political question for EC DG Move and individual Member States, but this article contends that this should not be a risk where those rights depend on EU majority ownership and effective control.

Firstly, it is not proposed that Regulation 1008 itself would change and so the key point is whether the changes to the Interpretative Guidelines would weaken the effectiveness of the current regulatory regime.

In assessing this question, it is important to recognise existing regulatory inadequacies. It is a false premise to suggest that the Interpretative Guidelines provide meaningful guidance about determining the ultimate beneficial owners of collective investment funds. They do not. There is no certainty today that EU's listed airlines have an accurate picture about the ultimate beneficial owners of their shares.



The proposed changes would provide limited flexibility to collective investment schemes with non-material shareholdings but a stricter regime for those with material shareholdings. Retail, sovereign wealth fund or trade investors would see no change.

This would provide a logical and coherent approach to determining beneficial ownership, consistent with EU and wider international best practice,[87] and a level of regulatory clarity and predictability lacking today. It would be a material improvement. It would not be perfect but that is a function of the challenge of identifying the ultimate beneficial owners of collective investment schemes that can be made up of thousands of disparate investors.[88]

Similarly, it is not considered that the proposed changes would have any impact on listed EU airlines' ability to comply with the effective control test.

A shareholder is normally considered to acquire control of a listed company when (alone or in concert with others) it acquires 30% or more of the share capital or voting rights of a company.[89] On that basis, no individual shareholder (or group acting in concert) controls any of the major EU listed airlines today.[90]

The Commission's merger control guidance is also a relevant reference point: *'in general, a common interest as financial investors (or creditors) of a company in a return on investment does not constitute a commonality of interests leading to the exercise of de facto joint control.'*[91]

As discussed, the Transparency Directive, Takeover Directive, Merger Regulation and FDI Screening Regulation would all serve to ensure that a change in the control of a listed airline will be obvious to regulators, and it is not considered that the proposed changes would make that possibility any more or less likely.

Logically, changes in an airline's share register that do not amount to a change of control should not create issues under air services agreements. Indeed, the introduction of an express link to the Senior Managing Official regime for more material shareholdings held by collective investment schemes should strengthen compliance with the control requirements in air services agreements. It would create a clear and direct link between those shareholdings and EU nationals, as decision-makers, lacking at present.

Collective investment schemes are key institutional shareholders in most EU listed airlines and the capital that they bring to the EU airline sector should be welcomed. Currently, they are poorly served by the EU's ownership and control regime

87. *See also* n. 63 above.

88. *See also* n. 7 above.

89. European Securities and Markets Authority, 'Public Statement: Information on shareholder cooperation and acting in concert under the Takeover Bids Directive', 20 June 2014.

90. *See also* n. 21 above.

91. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008 C 95, p. 1.

The 'gold standard' approach to identifying beneficial ownership set out in EU anti-money laundering laws offers a sensible way forward

Conclusion

The modernisation of the ownership and control provisions in Regulation 1008 is a controversial topic and this article has sought to avoid that, often sterile, debate.

Instead, it focuses on a narrow, but important, aspect of the current regime that is clearly flawed; how the Interpretative Guidelines deal with the challenge of identifying the beneficial ownership, and nationality, of collective investment schemes.

Collective investment schemes are key institutional shareholders in most EU listed airlines and the capital that they bring to the EU airline sector should be welcomed. Currently, they are poorly served by the EU's ownership and control regime.

This article has sought to set out a rational and objective way to address the special challenge of collective investment schemes. It requires some regulatory flexibility but that is unavoidable.

This paper's conclusion is that the 'gold standard' approach to identifying beneficial ownership set out in EU anti-money laundering laws offers a sensible way forward. It could be implemented through a revision to the Interpretative Guidelines.

Regulation 1008 itself would be unchanged.

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