



HFW

AEROSPACE

**AIRLINES OWNERSHIP AND
CONTROL RULES**

**OWNERSHIP AND CONTROL: PRACTICAL
IMPLICATIONS OF THE RULES**



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

OBJECTIVE OF THE OWNERSHIP & CONTROL CRITERIA

- Objectives of the criteria:
- ✓ Objective of **safeguarding the interests of the EU air transport industry**
- ✓ Make sure that non EU companies do not take full advantage, on an **unilateral basis**, of the Union's **liberalized internal air transport market**
- ✓ Ensure that the **benefits of traffic rights** in a liberalized market will be exploited and effectively used by the participating parties, and not directly or indirectly by third-countries carriers
- ✓ Take into account the **reciprocity** of the O&C criteria (Swissair/Sabena case: « *any evaluation [...] shall should also take into account the broader context in which that investment is taking place and, in particular, the Community's aviation relations with the third country* »)



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

INTRODUCTION

- **1992:** The first piece of EU legislation regarding airlines' licensing was **Regulation N°2407/92**
- **2008: Regulation N°1008/2008** on common **rules for the operation of air services in the Community**
- **2015: Communication from the Commission – Aviation Strategy for Europe:** the Commission proposes to publish interpretative guidelines on the application of Reg 1008/2008 with respect to the provisions on the ownership and control of EU airlines to bring more legal certainty for investors and airlines alike
- **2017: Interpretative guidelines – Rules on ownership and control of EU air carriers, Commission Notice dated 8 June 2017, (C(2017) 3711 final)**

INTRODUCTION

- **Article 1** provides that “*this regulation regulates the **licensing of Community air carriers**, the right of Community air carriers to **operate intra-Community air services** and the **pricing of intra-Community air services**”.*
- The Regulation establishes the concept of “**Community air carrier**” as the “*air carrier with a valid operating license granted by competent licensing authority*”. Once a carrier falls within the scope of EU carrier definition, **it can operate intra-EU air services** (passenger, cargo, mail without further authorization).
- **Ownership & control remains one of the conditions to be granted an operating licence:**
- **Article 4** Reg. 1008/2008: “*an undertaking shall be granted an operating license by the competent licensing authority of a Member State provided that: (...) (f) **Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it**, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party;*”
- **Third countries** and their nationals are **not eligible for majority owning or effectively controlling** EU carriers, unless the EU has agreed otherwise.

NATIONALITY (1)

- Only natural persons can have the nationality of an EU Member State
- In case of an undertaking the nationality requirement is relating to the natural persons who owns and/or effectively control the entities, at ultimate level
- In some cases, the nationality can create complex situations (persons having more than 1 nationality, etc.)
- The nationality assessment is to be done at national level ... but having due regard to EU law (Case Micheletti, C-369/90; Case Rottmann C-135/08)

NATIONALITY (2)

➤ **Case Rottmann C-135/08:**

- ✓ individual born in Austria and detaining the Austrian nationality
- ✓ Investigation opened against Mr Rottmann in Austria
- ✓ Mr Rottman moves in Germany and follows the naturalisation procedure in Germany without mentioning the prosecution pending in Austria
- ✓ By application of Austrian national law, Mr Rottmann lost his Austrian nationality as a result of the acquisition of the German nationality
- ✓ Austrian authorities inform the German authorities of the prosecution
- ✓ German authorities decide to revoke the naturalisation with retroactive effect, which proves to be valid under German law, even if it has the effect that Mr Rotmann would become stateless
- ✓ Question: is the German decision in line with EU law
- ✓ ANSWER: it is not contrary to EU law for a Member State to withdraw the nationality even if it creates a stateless situation, to the extent the proportionality principle is observed.

PROCEDURAL ASPECTS – WHO IS COMPETENT?

- **The national licensing authority** (and not the Commission)
 - On its own initiative via a close monitoring of the compliance (art. 8.2 (a) (b))
 - ✓ two years after a new operating licence has been granted
 - ✓ when a potential problem has been suspected
 - On its own initiative, in case of change in one or more elements affecting the legal situation of a carrier, « *in particular in case of a merger or takeover* » (art. 8.7)
 - Upon notification of an air carrier (art. 8.5)
 - ✓ in advance of any intended merger or acquisition
 - ✓ within 14 days of any change in the ownership of any single shareholding representing 10 % or more (including of the ultimate shareholding)

PROCEDURAL ASPECTS – WHO IS COMPETENT?

- **European Commission** still has the possibility to act on its own initiative but always in cooperation with the national licensing authority:
 - ✓ Upon request of the Commission: the competent licencing authority shall at least review the licence « *at the request of the Commission* » (art. 8.2 (c))
 - ✓ Art. 15.3.: upon request of the Commission, transfer of findings to the national licensing authority:

“If the Commission, on the basis of information obtained under Article 26(2), finds that the operating licence granted to a Community air carrier is not in compliance with the requirements of this Regulation it shall forward its findings to the competent licensing authority which shall send its comments to the Commission within 15 working days.

If the Commission, after examining the comments of the competent licensing authority, maintains that the operating licence is not compliant, or no comments have been received from the competent licensing authority it shall, in accordance with the procedure referred to in Article 25(2), take a decision to request the competent licensing authority to take the appropriate corrective measures or to suspend or revoke the operating licence.

The decision shall set a date by which the corrective measures or actions by the competent licensing authority shall be implemented. If the corrective measures or actions have not been implemented by that date the Community air carrier shall not be entitled to exercise its rights under paragraph 1. [...]”

TWO CUMULATIVE CONDITIONS FOR THE O&C CRITERIA

Two cumulative conditions must be fulfilled to grant an operating license:

- 1) **Ownership** in excess of 50% by a member state or their nationals.
- 2) **Effective control** by a Member State or their nationals.

The air carrier having the burden of proof (art. 8.1 of 1008/2008 and para; 20 of the Commission guidelines)



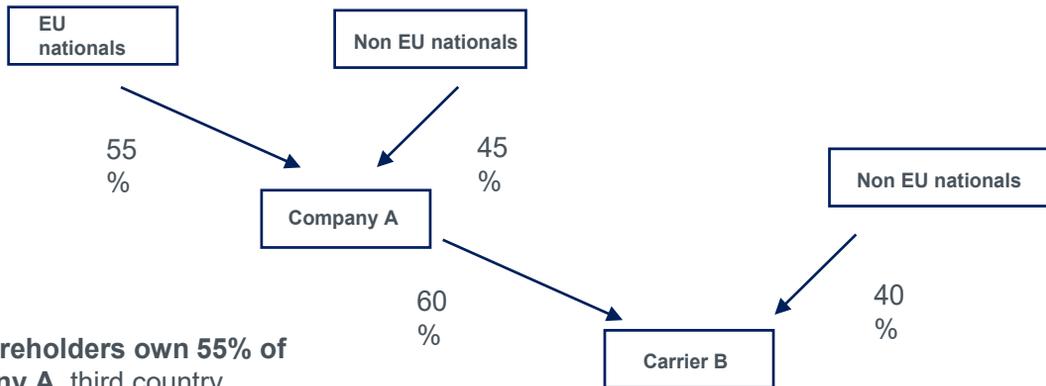
THE OWNERSHIP CONDITION

OWNERSHIP CONDITION

- The **ownership** requirement is complied with if **at least 50% plus one share of the capital** of the undertaking concerned is owned by Member States and/or nationals of Member States.
- **Capital** shall be understood as the **equity capital** of an undertaking. The question whether a particular type of capital qualifies as **equity capital** can only be answered on a case-by-case analysis.
- Sabena/Swissair decision: **if the capital does not confer the two following rights, it shall be disregarded in determining the ownership of company:**
 - The **right to participate in decisions** affecting the operations of the undertaking;
 - The **right to obtain a share of the residual profits** or, in the event of liquidation, in the **residual assets** of the undertaking after all other obligations have been met (the shares reflect the risks and rewards of normal business).

OWNERSHIP CONDITION – CASUS (1)

PROBLEM IN OWNERSHIP AND CONTROL CAN ARISE FROM THE COMPANY STRUCTURE:



EU shareholders own 55% of company A, third country shareholders own 45% of company A.

Company A owns 60% of carrier B, third country shareholders own 40% of carrier B.

OWNERSHIP CONDITION – CASUS (2)

- In theory, company B is owned by company A so by EU shareholders.
- In reality, EU shareholders only own 55% of 60% of carrier B.
- **EU shareholders only own 33%** of the total share of carrier B.
- Do we consider that EU shareholders own “*more than 50% of the undertaking*”?
- The present example may be deemed compliant to article 4(f) as long as EU shareholders have the right to participate in decisions affecting the operations of the undertaking BUT to the extent all shares carry the same voting rights, no specific arrangement, etc.
- For pecuniary rights: could be compliant if the profits follow the diluted shares



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

OWNERSHIP CONDITION – PUBLICLY QUOTED UNDERTAKINGS

- Problem in ownership and control can arise in **publicly quoted undertakings** and **institutional investments**
- For companies that are publicly quoted on the stock market or owned by investment institutions, **shareholders may vary from day to day** and there may be **several stages of ownership**
- However, the company shall be able to prove at any given point that the majority of its shares are owned by EU shareholders, remembering that:
 - Burden of proof lies on the carrier
 - Mandatory to notify the national licensing authority when change of ownership of a shareholder representing 10 % or more
- The competent licensing authority needs to **verify that EU shareholders own 50% plus one share**



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

OWNERSHIP CONDITION – TRUST

- It is not this simple when shares are held by a **nominee**, a **trust** or any **other institutional investors** because the **rights attached to the shares might profit to another beneficiary**.
- Could raise **practical issues**, especially in countries that do not recognize the trust (Belgium)
 - Belgian law only regulates the trust from a private international law point of view (which national law applies to what)
 - Belgian law (while not recognizing the trust) provides that only Belgian law can apply to the rights over an aircraft
 - A mix of nationality in a trust structure (between EU and Non EU) might not be recognized for a trust owing aircraft registered in Belgium

OWNERSHIP CONDITION – OTHER
HYPOTHESIS

- Some situations require an in-depth analysis by the competent licensing authorities:
 - **Existence of different classes of shares** with different values and characteristics exist (with or without voting rights, shares with veto rights attached, etc.);
 - **Existence of warrants or options** that risk rendering ineffective the equity capital attributes of a class of shares;
 - Existence of **institutional investors** where the final beneficial owner cannot be readily identified.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

EFFECTIVE CONTROL CONDITION

EFFECTIVE CONTROL CONDITION

- Article 2(9) of the Regulation defines the notion of **effective control** as “*a relationship constituted by **rights, contracts or any other means** which, either separately or jointly and having regard to the considerations of facts or law involved, confer the possibility of directly or indirectly **exercising a decisive influence on an undertaking**, in particular by:*
 - (a) *the right to use all or part of the assets of an undertaking;*
 - (b) *rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.*”
- The competent licensing authority (thus at national level) assesses whether the EU Member States and/or their nationals have a **more decisive influence over the management of the undertaking than the third country shareholders**.

EFFECTIVE CONTROL CONDITION

- The assessment is performed on a case-by-case basis, in accordance with two criteria:

1) **Corporate governance**

The authority analyses the decision-making process of the undertaking and evaluates how EU Member States and their nationals are represented.

The existence of a veto right benefiting to a third country shareholder can reveal a lack of effective control by the EU shareholder(s).

2) **Shareholders' rights**

An assessment of the shareholders' rights is necessary because extensive rights held by third country shareholders could lead to a situation where such third country shareholders effectively control the undertaking rather than the EU shareholders.

EFFECTIVE CONTROL CONDITION –
CORPORATE GOVERNANCE

- The corporate governance encompasses **procedures through which the undertaking adopts its decisions** relevant for the conduct of its business.
- The corporate governance must be analysed both legally and factually in order to :
 - **Identify the decision making bodies of the undertaking**, their competences and their composition, relevant rules regarding the nomination, election, remuneration and dismissal etc...
 - Evaluate **how Member States and/or their nationals are represented in the decision-making bodies** and how their rights available in this context allow them to determine strategic decisions.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

EFFECTIVE CONTROL CONDITION – CORPORATE GOVERNANCE

- **Practical question relating to the position of the CEO**
- The nationality of the CEO can play a role in determining the effective control of an air carrier.
- This impact will however highly depend on the role and powers of the CEO, which will have to be determined on a case-by-case basis:
 - ✓ Who appoints the CEO?
 - ✓ Who can dismiss the CEO?
 - ✓ What are the rights and duties of the CEO in accordance with the by-laws?
 - ✓ Does national company law provides for a priority of the board of directors?

CORPORATE GOVERNANCE – VETO RIGHT (1)

- Veto rights can have a decisive influence in function of:
 - (i) who holds the veto right (the EU or the third country shareholder); and
 - (ii) the nature of the rights concerned.
- The existence of a **veto right benefiting to a third country shareholder can reveal a lack of effective control by the EU shareholder.**
- The ability to veto a decision does not necessarily mean that the effective control lies with this shareholder. An investigation should be conducted to **verify whether the veto rights affect only certain decisions of limited importance or rather the main strategic decisions.**

CORPORATE GOVERNANCE – VETO RIGHT (2)

- Veto rights may **impact EU effective control** when they have a **decisive influence over strategic business decisions**.
 - Veto to the appointment of senior management, adoption of budget, business plan, major investment, market specific rights...
- They **do not impact EU effective control** when they are **necessary and proportionate to protect minority investments** of third country shareholders or only affect **decisions of limited importance**.
 - Amendments to articles of association, increase or reduction of capital, distribution of dividends, cessation of business, substantial change of business, decision on merger, demerger or liquidation.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

EFFECTIVE CONTROL CONDITION – CORPORATE GOVERNANCE

- **Other important elements** are relevant to assess the effective control of an undertaking by EU shareholders:
 - **Some decisions are likely to block the conduct of the airline's business** such as: asset acquisitions, acquisitions, investments, extension or acceptance of financial instruments (guarantees, loans), contracts, business transactions with persons affiliated to the airline of one of its shareholders.
 - **Rights of non EU shareholders to nominate persons for high level positions:** if the persons occupying key position have links with third country shareholders, even if these persons are EU nationals.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

DILUTION OF THE SHAREHOLDING

- **Rights given to third country shareholders** may impact the EU effective control condition. Attention must be given to the shareholders structure, attendance of shareholders meetings, voting patterns etc...
- Where **shareholding is widely spread** and a **non EU shareholder is one of the largest**, he may be in position to exert control over 50%.
- Where the **non EU shareholders' share is larger than 30%**, a general rule in-depth assessment is needed.
- When the shareholding is widely spread, a **lower percentage may be sufficient** to trigger an in-depth assessment.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

FOCUS ON RISKY CLAUSES

- Therefore, some **examples of shareholders' rights** that generally deserve closer scrutiny are:
 - Right of a non-EU shareholder to **veto a transfer of shares**. This usually happens after an investment made by a non-EU shareholder. There is a period where a transfer of shares by either party is not permitted without the agreement of the newly arrived shareholder.
 - **Pre-emption rights**: an existing shareholder is given the first option in case the other shareholder wants to sell its shares.
 - Right of the third country shareholder to **sell its shares**: minority shareholders frequently negotiate a put option to sell its shares back.
 - Right to **purchase additional shares**: call options or conversion options enable the third country shareholder to buy more shares.

FINANCIAL LINKS BETWEEN THE AIRLINE
AND THE NON EU SHAREHOLDER

- The **financial contribution of a third country shareholder** may result in the **absence of effective control by EU shareholders**.
- **An assessment must be made** to verify if the contribution made by the third country shareholder created a financial dependence of the airline towards him:
 - It must be determined whether the third country shareholder contributed to the financing of the undertaking in proportion to its shareholding.
 - Comparison of the modes of financing of third country shareholders with the modes of financing of EU shareholders.

IMPACT OF COMMERCIAL COOPERATION (1)

- *The ownership and control criteria might be endangered where the third-country carrier is empowered under the terms of the cooperation to substitute, on a substantial basis, its own decisions to those of the competent corporate bodies of its community partner.*
- Commercial cooperation may consist in an **operational cooperation** between two carriers by **code-sharing or joint venture**.
 - In the context of a **joint venture**, the following points shall be thoroughly analysed in order to make sure the third country airline does not take effective control in the EU one:
 - If the EU airline is dependent on the joint venture with the third country shareholder, the latter will gain effective control.
 - It must be verified whether dependence can lead to the EU airline being forced to follow strategic decisions of the third country shareholder.
 - The joint venture may contain specific decision making processes on how to take decisions.
 - If the joint venture is a condition for investment, there must be a detailed assessment.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

IMPACT OF COMMERCIAL COOPERATION (2)

- Code-sharing between airlines is frequent but less likely to have effects regarding the ownership and control rule. Code-sharing usually does not allow the third party airline to acquire effective control in the EU airline.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

CASE SWISSAIR/SABENA (1)

- Acquisition by Swissair (Switzerland) and the Belgian State of joint control over Sabena (Belgium), by way of a joint venture.
- Shareholders' and Master agreement signed between the Belgian State and Swissair on 4 May 1995.
- Transfer by the Belgian State of **49.5% of Sabena's shares to Swissair.**
- The remaining **50.5% of Sabena's shares are held by the Belgian State** and by Belgian institutional investors.
- Institutional investors will act through a single special purpose vehicle established in Belgium under majority ownership and effective control of Belgian nationals.

CASE SWISSAIR/SABENA (2)

- The European Commission came to the conclusion that **Sabena is majority owned and effectively controlled by Belgian nationals**
- **The merger was therefore granted** based on (1):
 - **Majority owned:**
 - only 49.5% of the voting shares are held by Swissair
 - the special participation certificates were not taken into account: do not carry voting rights nor entitle their holder to any share in the residual assets in case of liquidation
 - Warrants enabling Swissair to purchase additional share are not taken into account: special clause in the agreement to condition the warrant to a change of legislation

CASE SWISSAIR/SABENA (3)

- **The merger was therefore granted based on (2):**
 - **Effective control:** Sabena is effectively controlled by its Belgian shareholders
 - The **voting arrangements** between the Belgian shareholders prevent Swissair from taking advantage of the existence of several shareholders on the Belgian side
 - The **corporate governance** ensures that the interests of the Belgian shareholders will always prevail in decisions taken by the board of directors
 - **Veto rights** of Swissair in general meetings only reflect a normal degree of minority shareholder protection



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

CASE QATAR AIRWAYS/ALISARDA/MERIDIANA (1)

- Acquisition by Qatar Airways and Alisarda S.p.A. of **joint control over Meridiana Fly S.p.A.**
- **Setting up of a holding company** (HoldCo) to which Alisarda will contribute the entire outstanding share of capital.
- **On closing, acquisition by Qatar of a shareholding of 49 % in HoldCo**, whereas **Alisarda will retain a majority shareholding of 51 %.**
- HoldCo's board of directors will :
 - majority of the board will be elected by Alisarda.
 - Chairman elected among directors appointed by Alisarda
 - decide at simple majority, with exception of reserved matters which are subject to a veto right by Qatar at board / shareholders level.

CASE QATAR AIRWAYS/ALISARDA/MERIDIANA (2)

- Commission concludes that Qatar and Alisarda have a joint control and refer to the consolidate jurisdictional notice:
 - the Commission recalls that, regarding the EU air transport licensing provisions, pursuant to paragraph 23 of the Jurisdictional Notice, "*the concept of control under the Merger Regulation may be different from that applied in specific areas of Community and national legislation concerning, for example, prudential rules, taxation, air transport or the media. The interpretation of 'control' in other areas is therefore not necessarily decisive for the concept of control under the Merger Regulation.*"
 - Therefore, a **joint control** of an EU air carrier by a EU and a non EU company **does not necessarily mean that the criteria of the ownership and control of Reg. 1008/2008 would not be satisfied.**
- The Commission **did not oppose the merger**

OTHER EXAMPLES OF MERGER OPERATIONS WITHOUT OWNERSHIP & CONTROL ISSUE

- **Alitalia/Etihad** (case M.7333 – 14 November 2014)
 - Acquisition by Alitalia and Etihad of the joint control, by way of purchase of shares, of New Alitalia, a newly incorporated joint venture which will receive Alitalia's aviation business as a going concern.

- **Easyjet/Air Berlin** (case M.8672 – 12 December 2017)
 - Acquisition by easyJet of parts of Air Berlin's operations at Berlin Tegel airport, including the following assets and rights: slots, parking stands, customer bookings...

- **Lufthansa/Air Berlin** (case M.8633 – 21 December 2017)
 - Transfer of rights and assets from Air Berlin to LGW (German regional airline, wet lessor, subsidiary of Air Berlin) and subsequent acquisition by Lufthansa of the sole control of LGW by way of purchase of all shares from Air Berlin.

CONCLUSION OF MERGER ON THE O&C PRINCIPLE

- **A merger case does is not in itself sufficient to conclude on the absence of issue of the O&C criteria**
- **However, by virtue of the role of the Commission, a merger case that did not lead to a request of the national licensing authority to assess the case is an element of importance**
- **While the notion of control in merger cases and in O&C cases are not identical, the absence of O&C procedure in the presence of a merger case is important**



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

IMPACT OF BREXIT ON OWNERSHIP AND CONTROL



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

BREXIT TIMELINE

- **23 June 2016:** the British citizens voted to leave the European Union.
- **21 March 2019:** Brexit was postponed. It was initially expected on March 29, 2019 but it will take place on April 12, 2019.
- **5 April 2019:** Theresa May formally asked to carry over Brexit to 30 June 2019. She has committed to resign from her position if the Parliament approves the deal she has offered.
- **10 April 2019:** The European Council will decide whether the EU grants the extension or not.
- **12 April 2019:** Brexit without a deal in case the Council refuses the extension.
- **23 May 2019:** European elections to be held by the UK if Brexit has not occurred yet.
- **30 June 2019:** Brexit with/without a deal in case the Council grants the extension.



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

BREXIT – IN CASE OF A DEAL

- Will **Regulation N°1008/2008** still apply to the United Kingdom's air carriers after they withdraw from the European Union? Will the British air carriers still **be bound by the ownership and control rule**?
- **In case of a deal:**
 - Articles 126 and 127 of the EU Withdrawal Agreement (version of 25 November 2018) provides that **Union law should remain applicable to and in the United Kingdom during the transition period**, meaning until 31 December 2020
 - **EU aviation law**, including current **Regulation 1008/2008**, will then **continue to apply to UK air carriers until 31 December 2020**



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

BREXIT – IN CASE OF A NO DEAL

- In case of a **no deal Brexit**:
 - **Regulation (EU) 2019/502 on common rules ensuring basic air connectivity** with regard to the withdrawal of the UK from the Union was adopted on March 25, 2019
 - Published in OJEU on March 27, 2019 and **entered into force on 28 March 2019**



OWNERSHIP AND CONTROL LEGAL FRAMEWORK

BREXIT – IN CASE OF A NO DEAL REG. ENSURING BASIC AIR CONNECTIVITY

- **For UK air carriers** (licence delivered by UK CAA), this can raise traffic rights and cooperation issue, requirement to obtain authorization for leasing, etc.
 - ❑ Articles 4, 5 & 6 of the Reg. ensuring basic air connectivity

- **For community air carriers** detaining a licence granted by a Member State other than UK, this is an issue of ownership and control
 - ❑ Article 7 of the Reg. ensuring basic air connectivity

BREXIT – IN CASE OF A NO DEAL
REG. ENSURING BASIC AIR CONNECTIVITY

- Air operating licenses will **remain valid for 6 months IF...**
- Air carrier **presents a remedial plan** to its licensing authority within 2 weeks of the entry into force of the Regulation (11 April 2019)
 - Plan to set out the measures to achieve full compliance with the ownership and control rule after 6 months
 - The plan is assessed over the next 2 months
 - If the assessment reveals that compliance is unlikely, national authority **MAY revoke the licence**
 - If the assessment reveals that compliance is likely, the licensing authority will monitor the plan
 - If there is no plan after 2 weeks, the national authority **SHALL revoke the licence** after having given the air carrier the opportunity to make its views known



THANK YOU FOR YOUR ATTENTION

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