

Ownership and Control of Airlines in Southeast Asia: Prospects for an ASEAN Community Carrier

By Alan Khee-Jin Tan



I. Overview

This policy paper discusses the prospects for an ASEAN Community Carrier and its benefits for the region. Given that air transportation and airlines play a crucial part in economic growth, it is critical for the foreign investment regime for airlines to be relaxed further. The paper recommends that ASEAN investors should have the opportunity to invest in other ASEAN member states' airlines to establish so-called Community Carriers. This will also increase foreign direct investment (FDI) into member states. The result will be greater benefits for the ASEAN air transportation system, allowing airlines to operate more efficiently and to meet growing demand from trade and tourism.

- I.1 Airlines are traditionally bound by strict ownership and control rules. States worldwide often consider their airlines to be strategic assets. Hence, they typically limit foreigners' ownership of their airlines to no more than a stipulated minority stake. The result is that in most states, airlines can be licensed for operation only if majority ownership and control reside in the nationals of that state. This restriction can be referred to as the "internal lock" under domestic law.
- I.2 In international aviation, an additional "external lock" exists. This is because states typically insert a national ownership clause into the bilateral air services agreements that they adopt with other states. Hence, the air services agreement between States A and B will ensure that the airlines designated by A and B to operate services between them must be "substantially owned and effectively controlled" by their respective nationals.
- I.3 The purpose of this provision is essentially protectionist – it ensures that the benefits in the market between A and B fall to the nationals of these states only, and not to those of third countries. Most states interpret "substantial ownership" to mean "majority ownership". This means that nationals must typically own more than 50% of the airline's shares. As for "effective control", states define this to mean that the actual control of the airline must reside with its own nationals. Thus, when the airline is controlled from overseas, such as when critical decisions regarding its operations are determined by the foreign minority owner, the "effective control" condition will be breached.
- I.4 While individual countries can choose to abolish the "internal lock" simply by amending their own laws, the "external lock" cannot be easily dismantled. For example, Australia allows foreigners to own and operate an airline in Australia under its domestic law, even to the maximum 100% ownership. However, this airline can only fly domestic routes. The moment it wishes to fly elsewhere, it would come up against the "external lock" found in Australia's bilateral air services agreements with other countries. This "external lock" is actually enforced by the other countries, which can bar the airline from operating to them if they determine that the ownership and control provisions have been breached.

- I.5 In recent years, a minority of states have begun liberalizing the ownership and control regime. One justification for doing this is to promote foreign direct investment to strengthen a local airline where domestic capital is lacking. This is particularly relevant for airlines of developing countries. Several states have thus amended their domestic laws to remove the “internal lock”. They have also sought to replace the “external lock” in their bilateral agreements with an alternative “principal place of business and incorporation and effective regulatory control” criterion.
- I.6 What this means is that State A’s airline no longer needs to be majority-owned by its own nationals. As long as the airline’s principal place of business remains in A, meaning that it is incorporated in and run out of A, it does not matter if the majority ownership of its shares lies elsewhere. In addition, the only effective control that A needs to exercise over the airline is a *regulatory* one. Thus, matters of safety and security remain regulated by A. However, the effective *economic* control of the airline may lie elsewhere, typically where the foreign majority ownership resides.
- I.7 If a state wishes to replace the ownership and control clauses, it will ideally have to do so for *each and every one* of its bilateral air services agreements with other states. This is a slow process, and may meet resistance from other states. As a result, the majority of air services agreements worldwide remain governed by the traditional “substantial ownership and effective control” clause.



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2. ASEAN’s Efforts to Liberalize Ownership and Control

2.1 Within the Association of Southeast Asian Nations (ASEAN), the ten member states have adopted multilateral air services agreements among them that now deal with what were previously bilaterally-governed arrangements. For passenger services, the two relevant agreements that are in force among all ten member states are the Multilateral Agreement on Air Services (MAAS) and the Multilateral Agreement for the Full Liberalization of Passenger Air Services (MAFLPAS).¹ Pursuant to these agreements, an airline designated by a member state like Malaysia enjoys unlimited international capacity between Malaysian points and all other ASEAN international points.² In addition, it enjoys the “fifth freedom” right to connect Malaysian points with other international points within ASEAN.³ However, no domestic routes within other member states are allowed for the Malaysian carrier (e.g. Kuala Lumpur - Jakarta – Bali or Jakarta - Bali). Neither are seventh freedom routes permitted (e.g. Malaysia Airlines stationing an aircraft in Singapore and operating stand-alone flights between Singapore and Jakarta). Table I. below lays out the market access rules in the form of the “freedoms of the air”.

Table I. Traffic Rights – The Freedoms of the Air

Liberalized by the ASEAN Agreements	
First Freedom	The right of State A’s designated carriers to overfly the airspace of State B
Second Freedom	The right of State A’s designated carriers to stop in State B for technical purposes only, e.g. refuelling
Third Freedom	The right of State A’s designated carriers to operate from State A to State B and to carry passengers, cargo and baggage for profit between A and B <i>Example: Thai Airways (TG) flight from Bangkok to Singapore</i>
Fourth Freedom	The corresponding right in the reverse direction from State B back to State A <i>Example: The TG flight returning from Singapore to Bangkok</i>
Fifth Freedom	The right to fly from A to B but with an additional right to make a stopover in State C to discharge and take on traffic for profit <i>Example: TG operation between Bangkok and Singapore but with a stopover in Kuala Lumpur in both directions to discharge and take on traffic. In effect, this market liberalization allows TG access into the Kuala Lumpur-Singapore route</i>
Sixth Freedom	A combination of the Fourth and Third Freedoms such that State A becomes the mid-point hub for two flight sectors <i>Example: TG operation between Singapore and Bangkok (Fourth Freedom) and Bangkok and Hanoi (Third Freedom). A passenger travelling between Singapore and Hanoi will thus have a transit stop in Bangkok and take two TG flights</i>

¹ There is a third agreement for cargo/freight operations, the Multilateral Agreement for the Full Liberalization of Air Freight Services (MAFLAFS). All three agreements were adopted in 2009 and are now in force in all ten member states.

² This is referred to as the “third” and “fourth” freedoms of aviation, e.g. Malaysia Airlines’ Kuala Lumpur – Phuket operation (third freedom) and the return flight Phuket– Kuala Lumpur operation (fourth freedom).

³ E.g. Malaysia Airlines’ Kuala Lumpur – Bangkok – Hanoi operation, with traffic pick-up rights for the Bangkok – Hanoi – Bangkok sectors as long as the aircraft begins and ends in its home base in Malaysia.

Not Yet Liberalized by the ASEAN Agreements	
Seventh Freedom	The right of State A's designated carriers to fly between States B and C, without the aircraft commencing or terminating its journey in State A <i>Example: TG stationing an aircraft in Singapore and flying it between Singapore and Jakarta</i>
Eighth Freedom (Consecutive Cabotage)	The right of State A's designated carriers to operate from State A to a point in State B, and then continue with traffic rights to another point in State B <i>Example: TG operation from Bangkok to Jakarta, and then continuing to Bali with traffic rights (i.e. being able to carry passengers) between Jakarta and Bali</i>
Ninth Freedom	The right of State A's designated carriers to operate between two domestic points in State B, without the aircraft commencing or terminating its journey in State A <i>Example: TG stationing an aircraft in Jakarta and flying it between Jakarta and Bali</i>

2.2 Apart from the above limited market access relaxations, the liberalisation of ownership and control rules has also been attempted. The ASEAN agreements now provide alternative ownership and control options for the purpose of flights within ASEAN. Thus, the member states have the right to designate any of their carriers to enjoy the relevant market access rights in Table I, provided these carriers fulfil the following ownership and control criteria:⁴

- i. substantial ownership and effective control of that airline are vested in the Contracting Party designating the airline, nationals of that Contracting Party, or both; or
- ii. subject to acceptance by a Contracting Party receiving such application, the designated airline which is incorporated and has its principal place of business in the territory of the Contracting Party that designates the airline, is and remains substantially owned and effectively controlled by one or more ASEAN Member States and/or its nationals, and the Contracting Party designating the airline has and maintains effective regulatory control; or
- iii. subject to acceptance by a Contracting Party receiving such application, the designated airline is incorporated in and has its principal place of business in the territory of the Contracting Party that designates the airline in which the Contracting Party designating the airline, has and maintains effective regulatory control of that airline, provided that such arrangements will not be equivalent to allowing airline(s) or its subsidiaries access to traffic rights not otherwise available to that airline(s).

⁴ This is found in Article 3(2)(a) of MAAS, MAFLPAS and MAFLAAS.

- 2.3 Option (i) is the familiar “substantial ownership and effective control” formula that adds nothing new to what the bilateral agreements had earlier provided. On its part, Option (ii) retains the substantial ownership and effective control requirement but notably provides that this can be met by “one or more ASEAN Member States and/or its nationals”. This establishes the framework for an ASEAN “Community Carrier”, whereby an airline can be substantially owned and effectively controlled by ASEAN interests, taken cumulatively. Borrowed from the European Union’s own “Community Carrier” model, this option allows ASEAN carriers to attract capital infusions and management expertise from sources across ASEAN. By allowing them majority ownership and control, it provides more incentives for ASEAN investors to establish new airlines or recapitalize existing ones across the region, particularly in the less developed member states.
- 2.4 To illustrate, a carrier designated by Cambodia could have 20% of its shares owned by Thai interests, 20% by Malaysian interests, 11% by local Cambodian interests, with the remaining shares owned by investors of any nationality (including even non-ASEAN nationals). In fact, subject to Cambodian law allowing it, there need not even be any Cambodian interests as long as majority shareholding adds up to be in ASEAN hands. The carrier can thus be recognized to fly under the ASEAN agreements if it is incorporated in and has its principal place of business in Cambodia and is also effectively controlled by those ASEAN interests. In addition, it must come under the effective regulatory control of the Cambodian aeronautical authorities for safety, security and other technical matters.
- 2.5 The concept thus distinguishes between “effective economic control” and “effective regulatory control”. While the latter must remain with the designating state, effective economic control and majority ownership may reside with non-nationals as long as they are from the ASEAN family taken in the aggregate. In short, what the ASEAN agreements have done is to allow for substantial ownership and effective economic control to be spread out regionally among one or more member states and/or its nationals. This takes the liberalization process one step forward by recognizing community majority ownership and control.
- 2.6 However, this Option (ii) remains problematic because of the qualification in its opening words that a Contracting Party receiving the application of such a designated Community Carrier must accept or approve before the carrier can operate to that party (i.e. before it can exercise market access rights). This provision exists presumably because the state receiving the application may want to reject the carrier in order to protect its own airlines from competition. The result is that a carrier established using the community model will not possess the certainty of being able to operate unhindered into all ASEAN member states. Instead, it will have to approach each destination state separately to obtain the necessary permission, which can be denied at that state’s sole discretion. This is unlike the E.U.’s Community Carriers, which have the automatic legal right to fly to any point within the E.U. The lack of this right in ASEAN is a serious disincentive for any investor thinking of establishing a Community Carrier.
- 2.7 On its part, the third formula (Option (iii)) envisages that a carrier need not even have substantial ownership and effective economic control reposed within the region (nor by implication, its designating state). The only requirement is that it is incorporated in and has its principal place of business in the designating state. That state must also have and maintain effective regulatory control. Hence, this is the most liberal of the three options. It opens up the intriguing possibility that an airline in ASEAN could be wholly owned and economically controlled by foreigners, even from outside the region.
- 2.8 However, this possibility comes with two major qualifications. Like in Option (ii), each ASEAN state receiving such an airline’s application must approve its operations. This presents the same problems encountered by the Community Carrier. The other condition is that the arrangement will not be equivalent to allowing airlines or its subsidiaries access to traffic rights not otherwise available to them. This reflects a concern that foreign airlines from outside the 2.8

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- 2.9 Another factor that is not explicitly spelled out by the ASEAN agreements is the need to change the “internal lock”. Thus, the establishment of a carrier under Options (ii) and (iii) necessarily assumes that the state designating the airline (Cambodia, in our example above) allows for non-national majority ownership under its domestic law. Yet another problem is that these alternative options - even if approved - are good for flights within ASEAN only. Even if all ASEAN states were to freely recognize them, such airlines cannot fly to destinations outside ASEAN such as India and Australia because they would fail the “substantial ownership and effective control” requirement.
- 2.10 Arising from the above uncertainties, it is unsurprising that no Community Carrier has ever been established in ASEAN even though the relevant agreements have been accepted by all ten member states. In fact, there have been several cross-border “joint venture” investments in ASEAN airlines in recent years, but all of them involve simple minority stakes by the investing foreign party. Hence, the traditional “substantial ownership and effective control” model (i.e. Option (i)) remains the default option. Table II below lists the joint venture airlines with foreign stakes in the region. It can be seen that every one of them adheres to the traditional model.

Table II. Joint Venture Airlines with Foreign Stakes in ASEAN

Airlines	Local Ownership	Foreign Ownership
<u>Cambodia</u> Cambodia Angkor Air	51% - Cambodian Government	49% - Vietnam Airlines (Vietnam)
<u>Indonesia</u> Indonesia AirAsia Indonesia AirAsia X	51% - PT Fersindo Nusperkasa 51% - PT Kirana Anugerah Perkasa	49% - AirAsia Group (Malaysia) 49% - AirAsia Group (Malaysia)
<u>Malaysia</u> Batik Air Malaysia (formerly Malindo Air)	46% - Sky One Investors Sdn Bhd 5% - National Aerospace and Defence Industries (NADI)	49% - Lion Air Group (Indonesia)
<u>Philippines</u> Philippines AirAsia	60% - various individuals	40% - AirAsia Group (Malaysia)
<u>Singapore</u> Jetstar Asia	51% - Westbrook Investments	49% - Qantas Group (Australia)
<u>Thailand</u> Thai AirAsia Thai AirAsia X Thai Lion Air Thai Vietjet NokScoot	55% - Asia Aviation Public Listed Co. 51% - Thai individuals 51% - Thai travel-related companies 51% - Thai investment groups 51% - Nok Air	45% - AirAsia Group (Malaysia) 49% - AirAsia Group (Malaysia) 49% - Lion Group (Indonesia) 49% - Vietjet Air (Vietnam) 49% - Scoot (Singapore)
<u>Vietnam</u> Jetstar Pacific	70% - Vietnam Airlines	30% - Qantas Group (Australia)

3. Recommendations for Full Realisation of the ASEAN Community Carrier

- 3.1 If the ASEAN states maintain the status quo and resist the liberalising potential of the ASEAN Community Carrier, the region will have to continue relying on the traditional “substantial ownership and effective control” requirement. This presents two clear shortcomings. First, ASEAN nationals can only establish an airline in another member state if they are prepared to accept minority shareholding and control using the traditional model. Second, ASEAN airlines cannot take over each other and merge across borders to become more competitive the way E.U. airlines like Air France-KLM and Lufthansa-Swiss have done. In other words, pan-ASEAN airlines are not possible with the current rules. Hence, carriers like AirAsia, Lion Air and VietJet will have to continue establishing minority-owned subsidiaries using the joint venture model with all its limitations.
- 3.2 To address the problems facing the ASEAN Community Carrier, the member states must first amend their laws – the “internal lock” - to allow other ASEAN nationals to hold a majority stake in their airlines. This can be a difficult political task. There are member states like the Philippines that have even more restrictive policies in that foreigners’ investments are limited to 40% of equity. Moving forward, it may be possible to persuade ASEAN member states that the Community Carrier model need only be recognized for ASEAN nationals, and not the world at large. Like in the E.U., the model is meant to favour fellow member states’ nationals only.
- 3.3 It is likely that only some member states will permit the establishment of Community Carriers within their own borders. If so, the solution could be an “opt-out” regime that allows member states to continue applying the national ownership and control rule to their own carriers. However, member states should recognize the Community Carriers set up in and designated by *other* member states. For instance, the Philippines may continue to apply national ownership and control requirements for its own carriers but should recognize a Community Carrier designated by Thailand for purposes of operating in the Philippines.
- 3.4 In addition, the ASEAN member states must move to delete the phrase “subject to acceptance by a Contracting Party receiving such application” in the relevant ASEAN agreements. Thus, the individual states’ discretion to deny access rights to other member states’ Community Carriers must be removed. This will require an amendment to the current ASEAN agreements.

3.5 The next challenge is to ensure that a Community Carrier, even if successfully established and recognized within ASEAN, can fly to other countries outside the region. After all, it is unlikely that an ASEAN Community Carrier will be content to fly within the region only. As stated above, this carrier will face the “substantial ownership and effective control” restriction found in its designating state’s bilateral agreements with other non-ASEAN states. In this regard, the E.U. faced the same problem when it pursued its Community Carrier concept. If Austrian Airlines, having been bought over by Germany’s Lufthansa, wanted to continue flying to Singapore as an E.U. Community Carrier, it would have to get Singapore to revisit its bilateral air services agreement with Austria. The European Commission’s solution was to approach individual states like Singapore to adopt a so-called “horizontal agreement” that automatically replaces the national ownership and control clauses in the relevant bilateral air services agreements with a community equivalent. Thus, Singapore now recognises any E.U. airline as a Community Carrier that can be designated by any E.U. member state to fly from any E.U. point to Singapore.

3.6 Eventually, this solution will have to be attempted in some form or the other by the ASEAN member states as well. Unlike the E.U., ASEAN does not have an organ like the European Commission that can coordinate individual member states’ positions to negotiate effectively as a bloc. What the ASEAN states do is to negotiate as ten separate states, not as a bloc. They have done this with the People’s Republic of China and achieved an ASEAN-China Air Transport Agreement in 2010. This Agreement replaced the individual national ownership and control clauses with the three options (including the Community Carrier model) discussed above. This means that China will recognise ASEAN Community Carriers for purposes of flights to and from China. Going forward, this will be the template used when the ASEAN member states negotiate with other states or blocs such as the E.U., Japan and India.

4. Shorter-Term Solutions

4.1 There could be shorter-term solutions that can be pursued while awaiting the long-term changes required.

Seeking Consent from Individual Member States?

4.2 While awaiting the amendments to the ASEAN agreements, any new Community Carrier established in a member state (say, Malaysia) can approach individual ASEAN member states to obtain consent for operations to their points. Airlines with extensive regional operations like the AirAsia, VietJet and Lion Air Groups might consider establishing Community Carriers in this manner and asking the individual destination states (to which they already fly) to affirm their consent to community ownership. Even if such consent were given, it should be remembered that it can be revoked at any time.

4.3 This Community Carrier will still come up against several problems. Using our example of a Malaysian-designated Community Carrier, first, it will not be able to fly to a point outside of ASEAN and China (say, to Japan) unless it is designated as a Malaysian carrier with Malaysian-majority ownership and effective control, as required by the Malaysia-Japan bilateral agreement. Second, it would not be able to fly from other ASEAN points like Bangkok and Jakarta to Japan because these would be “seventh freedom” rights that it would not possess as a Malaysian-designated airline. Third, it would not even be able to fly an intra-ASEAN route like Manila-Singapore or a domestic route like Jakarta-Bali because the ASEAN agreements do not yet recognize seventh freedom and domestic eighth and ninth freedom rights!

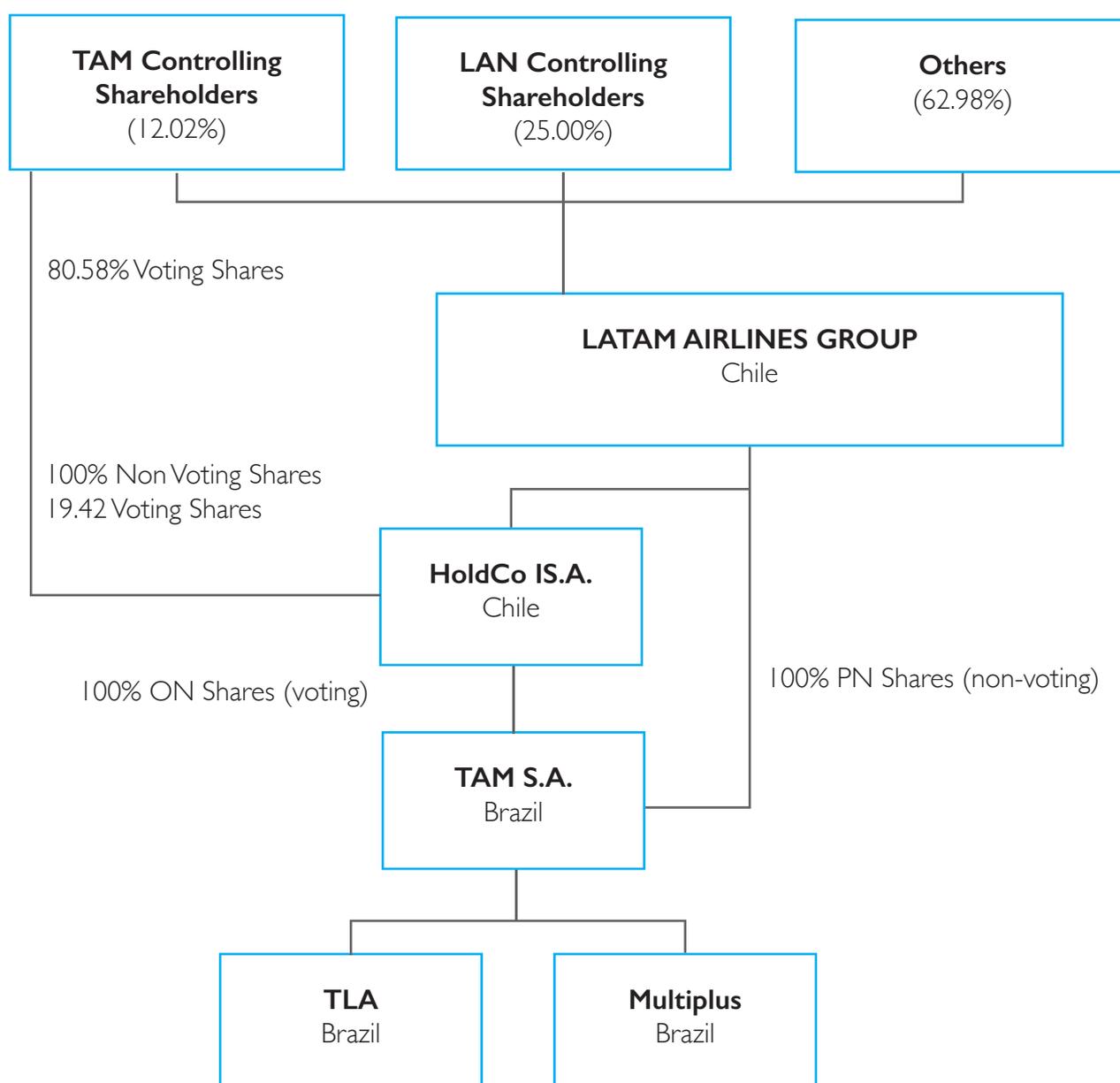
4.4 As exemplified by the E.U., it is clear that the Community Carrier idea must go hand-in-hand with unlimited market access rights. Such unlimited rights are not yet recognized in ASEAN. In short, our ASEAN Community Carrier - even if successfully established and recognized - will only be good for flights within ASEAN that start and end in its designating state. This will severely compromise its potential. What this means is that the ASEAN member states must continue to seek further liberalisation of market access rights, particularly the seventh freedom right that would truly open up ASEAN skies.

A Holding Company Structure?

4.5 Another realistic option for now might be to establish a holding company structure that continues to retain local majority ownership and control in the individual subsidiaries. The legal mechanism that can be employed here is the division between voting and non-voting shares, with only voting shares exercising control. One example is the ‘merger’ of the Chilean airline, LAN, with the Brazilian airline, TAM, to create LATAM in 2012. Since Brazil had a limit of 20% for foreign ownership, the LATAM ownership and control structure was scrupulously crafted to ensure that LAN had no more than 20% of voting

shares in HoldCo. I.S.A., the holding company that in turn had 100% voting shares in TAM. Meanwhile, LATAM had 100% non-voting shares in TAM, which would enable LATAM to collect the economic dividends of its investment without exercising effective control. See Table III. below.

Table III. Ownership and Control Structure of LATAM Airlines



Source: U.S. Securities and Exchange Commission, Filing by LATAM Airlines Group S.A., 29 April 2016, online at https://www.sec.gov/Archives/edgar/data/1047716/000161577416005147/s103060_20f.htm

- 4.6 Similar holding company structures employing voting and non-voting shares can be found in the Colombian airline Avianca's holdings in subsidiary airlines in Peru, El Salvador and Costa Rica. In the E.U., the takeover of KLM Royal Dutch Airlines by Air France also employed similar mechanisms that preserved control of KLM with Dutch nationals.
- 4.7 A corresponding mechanism could be attempted in ASEAN. For instance, a holding company in Thailand could have 100% non-voting shares in its Malaysian and Indonesian airline subsidiaries, while retaining only 49.9% of voting shares in each. However, it should be noted that the political and commercial environments in South America and the European Union are much more permissive for foreign ownership and control in airlines. The same atmosphere is not found in Asia (including ASEAN), and it will be more difficult to convince governments and airlines in ASEAN to approve similar schemes.

5. Conclusion

5.1 Considering the benefits of a Community Carrier in terms of stimulating trade, travel and tourism, ASEAN and its member states are encouraged to actively pursue the necessary steps in order to overcome current hurdles and allow for a true ASEAN Community Carrier to develop.

5.2 To realise the vision of the ASEAN Community Carrier, the member states must pursue the following actions:

- i. Amend their domestic laws to allow for other ASEAN nationals to have majority ownership and effective control of their airlines;
- ii. Amend the ASEAN agreements to remove the phrase “subject to acceptance by a Contracting Party receiving such application”. In the meantime, the individual states can be approached to affirm their consent to community ownership. In addition, a member state can opt to retain national ownership and control for its own airlines, but must allow Community Carriers designated by other member states to have full access to its points;
- iii. Amend the air services agreements with non-ASEAN states to recognize an ASEAN Community Carrier (as has been done with China);
- iv. Seek further liberalisation of market access rights, particularly the seventh freedom right that would allow Community Carriers to connect international points in ASEAN outside of its designating state.

5.3 It is envisioned that a holding company structure that differentiates between voting and non-voting shares may be a viable solution to overcome the prevailing “internal” and “external” locks on ownership and control in ASEAN.

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