

AIRCRAFT REGISTER : LEGAL GROUP RECOMMENDATIONS CONSULTATION DOCUMENT

The following are recommendations made by the legal group following various meetings with the Committee on the development of an aircraft register and following consultation on general principles with Minister Gatt. The following proposals are not in any particular order of priority.

For the purposes of these recommendations, “**aviation enterprises**” are deemed to mean any owner, manager, lessor, lessee, operator or financier unless specific reference is made to an owner, operator etc as the case may be.

1. Creation of an Aviation Authority & the re-organisation of the DCA

To create an authority, similar to the Malta Maritime Authority with divisions responsible for specific areas e.g. registration of aircraft and mortgages, supervision, safety, etc, and also to develop knowledge, specialisation, focus and promotion, co-ordination capacity for relevant ancillary industries such as aircraft maintenance, aircraft finance, aircraft leasing and mortgages, aircraft insurance and related topics. The idea is to widen the scope of the current structures so as to cover as many sectors of the aviation industry as possible. The DCA needs to maintain its autonomy in a manner which respects the regulatory functions. This would allow for a more efficient approach to marketing and other affiliated areas to widen the cluster of services which Malta can support.

Recommendation : to establish the Malta Aviation Authority and draft an Act creating and regulating same and defining its jurisdiction and functions leaving the DCA as an autonomous division. The DCA would also carry out its state functions relating to regulation and supervision and implementation of safety laws.

2. Mortgage Registration

As things stand today, the Civil Aviation Act (Chapter 232 of the Laws of Malta) cross refers to the mortgage, liens/privileges provisions of the Merchant Shipping Act, Chapter 234 of the Laws of Malta.

Besides being inefficient, aircraft mortgages/liens/privileges deserve separate and distinct legislation. Whilst these sections may have worked, more or less, with the mortgage and registry activities so far, the growth of the aircraft register with the clear aim of also attracting international banks and financial institutions to finance Maltese aircraft requires legislative changes to be made. Most of the sections may actually be identical or similar to those in the Merchant Shipping Act but fine-tuned and re-drafted to suit the aviation industry and financing.

The introduction of the mortgage sections into aviation law proper could be done in two ways, either drafting an Aircraft Registration and Mortgages Act whereby sections on registration, nationality and ownership together with sections of Privileges and Mortgages can form part of one Act based on the Air Navigation Order and the Merchant Shipping Act. Alternatively, the Privileges and Mortgages

provisions can be extracted from the MSA and inserted into the Air Navigation Order. Naturally, one has to reflect the provisions of international conventions which Malta may adopt as a result of this policy review.

Recommendation : to draft a new stand-alone law called the “Aircraft Registration & Mortgages Act” governing all aspects of aircraft registration, ownership, nationality and aircraft mortgage registration, in Malta and repealing the sections in existing legislation.

3. Registry Models

It may be desirable to have one single register for aircraft which has all the ownership and technical details relating to the aircraft as well as details of any third party rights of the aircraft or engines similar to the Ship’s Register. When analysing competing jurisdictions, three distinct models emerge:

- (i) the Bermuda model : a separate and distinct Aircraft Engines Mortgage Register over and above the existing Aircraft Mortgage Register and an Aircraft Register (total of 3 registers) or
- (ii) a separate engine mortgage register over and above the combined aircraft & mortgage register (total of two registers) or
- (iii) the Irish model with an aircraft register and two mortgage registries.

Ireland adopted the International Registry of Mobile Assets pursuant to the Cape Town Convention wherein security interests over aircraft, helicopters or engines may be registered in both International and domestic Registers (total of two national registers plus one international security register).

Ratification of the Cape Town Convention appears to have become a market standard for banks financing aviation activities and the European Union (through a Commission Proposal), as well the industry in general, seem to be heading in the direction of adopting the Convention.

The International Registry is also solving many legal problems encountered in the past with replacement engine mortgages (which is also a problem in Malta) and thus, it is not recommended to set a separate engine register as anyone having a security or proprietary interest in engines will be able to go directly to the International Register under the Cape Town Convention.

Recommendation : to ratify the Cape Town Convention and the Aircraft Protocol.

To change the current system of having a separate aircraft and mortgage register to a combined register wherein all ownership, nationality, registration and mortgage details can be obtained from one and the same Register as in shipping. Though this is a purely cosmetic suggestion it facilitates searches by third parties and avoids lack of transparency in public searches which could be damaging to the jurisdiction.

4. Commercial & Corporate Aircraft

Competing jurisdictions such as Cayman Islands and the Isle of Man only promote the registration of business & corporate jets.

It is mainly in Malta's commercial interest to attract more business jets and private aircraft to its Register. Whilst being aware that Maltese aircraft operating as commercial aircraft would be subject to considerable international obligations being imposed on the DCA in terms of safety checks and airworthiness checks and controls to be performed worldwide. The business jet and private aircraft sector creates less pressure on the local infrastructure avoiding loss of focus and resources which are needed in the commercial sector.

Recommendation : to promote both commercial and private jets for Maltese registration.

5. Engine Issues

There has been much debate in legal circles including Malta on current law on ownership and security on ownership of engines. Many engine owners are welcoming the International Register pursuant to the Cape Town Convention as they may now register proprietary interest over their engines with the International Register thus securing their rights thereon notwithstanding that their engines are attached to a different airframe where different rules of accession may apply. Moreover, banks were not content with the inevitable special qualifications placed in the legal opinions of lawyers worldwide in this respect and with the general legal uncertainty which prevailed.

Recommendation: NOT to set up a separate Engine Register. We recommend the adoption of the Cape Town Convention and the Aircraft Protocol which will solve problems in this regard. Our civil law rules on accession may have to be reviewed to be consistent with the Cape Town Convention.

6. Registration of Aircraft at Pre-Delivery Stage

The introduction of legislation allowing for the registration of aircraft under construction or not yet in possession of an airworthiness certificate (similar to the maritime legislation for the registration of hulls) would be very advantageous to purchasers and operators as it allows them to address financing and ownership issues in a legally certain manner prior to delivery.

Recommendation : to allow for the registration of an aircraft at a stage prior to delivery, whether in the ownership of a seller, a buyer or an intermediary entity or a trust.

7. Fees

Whilst fees are charged by the DCA for the registration of aircraft, no fees are charged or levied for services rendered by the DCA in relation to mortgage registration, transfer and discharge, the provision of transcripts of registry, overtime charges etc.

Recommendation: to allow for the Minister to fix or introduce fees at any time so that fees may be introduced or changed by virtue of a mere Legal Notice. Fees, once established, should be fixed for foreseeable periods of time for the sake of certainty relating to fees, e.g. five years.

8. Ownership

The ownership of Maltese aircraft is currently limited to EEA (which includes Malta and all EU states, Iceland, Liechtenstein and Norway) and Swiss nationals but could also be permitted to nationals of all states as long as they satisfy requirements to be established such as due incorporation, goodstanding and that generally the Registrar (Director DCA) is satisfied that the foreign corporate entity exists, is suitably transparent and can and will ensure due observance of the laws of Malta. This would give Malta a competitive edge over competing jurisdictions which have nationality restrictions.

The advantage of not insisting on the nationality test is that when an aircraft is already owned by a foreign person, he will not be forced to transfer the aircraft to artificially created local company. When there exists a charter, contract, mortgage etc in relation to a foreign aircraft seeking registration in Malta the need to transfer the aircraft to a local company can become a very expensive and inconvenient requirement.

The rules and regulations establishing same may be modelled on the Merchant Shipping (Ships Eligible for Registration) Regulations of 2003 whereby non-Maltese entities were granted the right to own Maltese ships if they satisfied certain criteria including the appointment of a resident agent in Malta to act as channel of communication between the Registry and the International Owner. It is also important to point out that an international owner shall be deemed to have submitted to the jurisdiction of the Maltese courts for any action in connection with the aircraft while registered in Malta. This could effectively work as a model for the aviation sector.

The existing legislation concerning re-domiciliation of companies into Malta is also attractive and ensures that there is continuity if a non-Maltese wishes company re-domiciles to Malta.

A feature of Maltese law is that any legal person can be permitted to have segregated cells which may introduce further advantages when used in this sector.

Recommendation : to remove nationality and Form requirements and to extend the feature of segregated cell companies for aviation enterprises.

9. Fiscal Laws

Aviation enterprises will be subject to current law in so far as tax on income, VAT, duty on documents and transfers and others fiscal laws which may be applicable to the relevant area of activity. These laws will apply in the same manner as they apply to similar operators in other sectors, be they transport, leasing, finance, insurance or otherwise.

10. Warrant of Detention of Aircraft

Act XIV of 2006 introduced sections concerning the new warrant of detention of aircraft as well as an executive detention warrant which sections never came into force and were subsequently deleted by Act VII of 2007.

Recommendation : to introduce legislation in the Code of Organisation and Civil Procedure (COCP) to deal specifically with the detention of aircraft. This should be done in the form of a fresh proposal as the previous draft sections gave rise to quite a few concerns particularly in respect of Mortgagee and Lien holders' rights as well as the minimum amount required for the claim to be able to utilise the warrant of detention which was deemed to be too high.

11. Cape Town Convention Ratification

Major Banks are in favour of the adoption of the Cape Town Convention by states and it looks like they intend to make it an actual **market standard** to obtain financing from serious banks involved in aircraft finance. This means either that anyone obtaining financing will either enjoy many more advantageous benefits and conditions if his aircraft is registered in a state which is a party to the Cape Town Convention or even that it may become an absolute requisite to obtain financing at all.

The EU is taking this route through a recent amended Commission proposal to the Council to adopt the Cape Town Convention for and on behalf of all members states (except Denmark) but to safeguard the supremacy and application of EU law in terms of jurisdictional matters and insolvency issues. With the EU pointing towards adopting the Cape Town Convention, Malta will have to also go down this route and this matches Malta's position and our recommendation in any case.

Having said this, our feeling is that there is still a little cloud of uncertainty over Cape Town & some parties are not clear on many issues arising thereunder.

Dual registration of mortgages over aircraft will still be possible however we believe that if the Cape Town Convention proves to be efficient and successful, in the long run most banks will secure their interests in the International Registry and stop there. There is no harm however in having a good mortgage register ourselves that can provide the option of 'dual' registration to financiers.

Finally, whilst being true that adopting the Cape Town Convention we may lose work related to mortgages in Malta and Maltese mortgages MAY decrease in number if financiers opt to register in the International Registry exclusively there is the stronger counter-argument that if we do not adopt the Cape Town Convention, we will not get the aircraft to be registered in Malta in the first place!

Recommendation: to support the EU's position for the adoption of the Cape Town Convention and the Aircraft Protocol which will give Malta more exposure and publicity. Particular attention should be given to safeguarding Malta's unsecured liens such as landing & parking fees, registry fees etc to rank higher than the International registry mortgage in terms of Art. 39 of the Protocol. We should also see what position other countries take so as not to have too many liens ranking before a mortgage which would discourage a mortgagee from financing Maltese aircraft. The EU Commission has

recommended a common stance for all member states so this would have to be given due consideration by the EU Officers within the Ministry. The Eurocontrol Act should also be kept in view.

12. Regulatory Status of Aircraft Finance Leasing Entities

As the law stands today, the Banking Act and the Financial Institutions Act oblige finance leasing entities to obtain a licence before they commence operation. This implies regulatory capital requirements and related maintenance obligations. In competing jurisdictions such as Ireland, there are exemptions in place for such finance leasing entities in view of the fact that these leasing companies are usually set up as SPV's and are very project oriented, often being simple aircraft projects.

Recommendation: to consider the introduction of an exemption or a simplification / fast-tracking from obtaining such licences, as an incentive for aircraft finance leasing companies, so as to be in line with other leading aviation jurisdictions. These intermediary finance companies require flexibility in operation and should not be subject to extra costs which is substantially not necessary and should be freed from the delay authorisation will necessarily imply. These transactions are very time-sensitive and can even require an intermediary company within 24 hours for a transaction to occur. Of course, if a customer requires an authorised entity, then the law should not exclude the possibility through a bureaucratic interpretation that if an institution is exempt then it cannot obtain authorisation. Malta needs to provide for all options and scenarios. This recommendation is subject to MFSA's view on the issue.

13. Malta Enterprise Act

Incentives, benefits and grants may be created under the Act, and thus may make Malta more attractive as an aircraft enterprise jurisdiction.

Recommendation : to consider introducing fiscal and other incentives under the Malta Enterprise Act subject to State Aid rules.

14.1 Employee Mobility

It is critical to the growth of the sector that we welcome experts in the various aviation industries and that they be permitted to enter and work in Malta. On this basis, it is important that the policy of the Government in relation to employee mobility and the operations of aircraft activities are facilitated by achieving speed in issuance of permits or exemptions from permits.

Recommendation : to identify what an aviation enterprise employee is and exempt such person from bureaucratic procedures for him/her to work for aviation enterprises (as they may be defined). Failing such a blanket exemption, one could opt for an automatic right to work on the issue of a certificate issued by the aviation enterprise which is filed with the relevant department or file same with the

aviation authority which will then apply communication guidelines with the department concerned. On the basis of certificates issued by the DCA, it should be possible for employees of approved aviation enterprises to be permitted to work in Malta by deemed approval.

14.2 Other Employee Issues

Recommendation : It is important to ensure that there are no unexpected and discriminatory treatment for crew working on aircraft in international traffic from the perspective of National Insurance and similar legislation with particular reference to companies which broker employment (as labour supply agencies would need a licence to do this)."

15. Fractional Operators

The effects of lack of sensitivity to the differences between the business jet sector, the commercial sector and the private jet sector in the aviation laws of many countries results in ambiguity in the safety and regulatory approach to business jets which has a deleterious effect on the activity as a whole. Of particular ambiguity is the operation involving fractional ownership and all operations connected with it in that the ordinary rules applicable to commercial aircraft apply without the necessary sensitivity to the factual reality of a fractionally owned and operated business jet.

Recommendation : to promote the development of safety and technical rules within the EU and EASA (and then implement them in Maltese law) which are more sensitive to business jets, and in particular those which are fractionally owned and operated. In the meantime Malta should seek to apply the current rules to business jets in a certain and foreseeable manner where there is appropriate discretion on the part of the DCA when aircraft of this type come to Malta

16. Energy Issues

Recommendation : Carbon emissions, fuel consumption, noise pollution or their control need to be studied to see what impacts emerge in relation to this industry and address them appropriately.

17. Recordation of Legal Ownership

As the Maltese Register is an Operator Register, ownership can be registered in the name of a lessee under a lease agreement and the name of the legal owner, whether Maltese or foreign, is not recorded in the Certificate of Registry or in the Register. The absence of such recordation may be seen as a deficiency by some legal owners who may wish to have their interest in the aircraft recorded particularly where that same owner would have granted a mortgage over the aircraft.

Recommendation : to provide the option for a legal owner to have his interest recorded in the Register or in the Certificate of Registry, however not to impose the presentation of mandatory

documents as a condition for registration in order to allow for the current flexibility to remain unaltered. If the legal owner wishes to have his interest recorded, this should be possible.

18. Public Consultation

Recommendation : to recommend public Consultation so as to increase the level of quality of the project. We are aware of on-going efforts by Finance Malta which complement this exercise and all efforts which would enhance this project should be welcomed.