

INTERPRETATIVE CRITERIA on the implementation of the concept of establishment to airlines that request the designation or assignment of traffic rights prior to the operation of air services

(Last updated: 22 January 2024)

1. BACKGROUND AND PURPOSE

- 1.1. It is customary for air transport agreements to which the State is a party to subject the exercise of traffic rights by airlines to their prior appointment or assignment of the aforementioned rights. On numerous occasions, this designation or assignment of rights is conditioned to the establishment of the corresponding airline in Spain.
- 1.2. It is therefore appropriate to clarify the interpretation and implementation of the concept of establishment of an airline in Spain.

2. INTERPRETATION AND APPLICATION OF THE CONCEPT OF ESTABLISHMENT

2.1. Relevant regulations

- 2.1.1. Several of the bilateral agreements on air transport concluded between Spain and third States contain an article requiring the airline, as a condition for its designation, to be *“established in the territory of the Kingdom of Spain¹”*.
- 2.1.2. Although the mentioned precept does not contain a definition of the concept of establishment, there are other regulations and documents providing information to define its meaning. Indeed, Recital 10 of Regulation (EC) n.º 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries defines the concept of establishment as follows:

“Establishment on the territory of a Member State implies the effective and real exercise of air transport activity through stable arrangements; the legal form of such an establishment, whether a branch or a subsidiary with a legal personality, should not be the determining factor in this respect. When an undertaking is established on the territory of several Member States, as defined by the Treaty, it should ensure, in order to avoid any circumvention of national law, that each of the establishments fulfils the

1 There are agreements that have incorporated this clause since their conclusion, such as the Air Transport Agreement between the Kingdom of Spain and the Federal Democratic Republic of Ethiopia, done at Addis Ababa on 19 February 2013; and others that incorporate it after their amendment by the European Union, such as the Air Transport Agreement between the Government of Spain and the Government of Ukraine, done at Madrid on 7 October 1996, as amended by the Agreement between the European Community and Ukraine on certain aspects of air services, done at Kiev on 1 December 2005.

obligations which may, in accordance with Community law, be imposed by the national law applicable to its activities.”

The definition sections of some of the agreements concluded between the European Union and third countries² are stated on similar or identical terms.

- 2.1.3. The Council of the European Union also addressed the concept of establishment at its meeting on 5 December 2003. Its declaration, on the same date, states the following³:

“The benefit of the right of establishment, according to the case law of the European Court of Justice on the "Open Skies" judgements, is granted to Community carriers having, in one or more Member States, stable and permanent organizational structures; it is for the Member States to examine, in accordance with Community law, the nature of those structures.

The Member State is entitled to require, from Community carriers established on its territory, the respect of the appropriate national legislation, i.e., inter alia, the applicable air transport specific regulations, including those concerning safety and security, as well as fiscal and social law, in conformity with Community law and its principles, in particular the principles of nondiscrimination and proportionality.

The Member State is also entitled, under non-discriminatory conditions, to require from the Community carrier established the permanent presence on its territory of staff responsible for safety.

The Council takes note of the declaration of the Member States on cooperation in all fields relating to the safety of aircraft and their operation.”

- 2.1.4. It follows from the above that the establishment must: **(i)** involve the exercise of a genuine activity of air transport, through stable agreements; and **(ii)** comply with the obligations imposed by national legislation applicable to its activities.
- 2.1.5. Furthermore, it falls to each Member State to: **(i)** examine the nature of the establishment; **(ii)** require compliance with applicable national regulations, both in air transport, which includes safety, and in tax, social or other aspects; and **(iii)** require, if so desired, the permanent presence of personnel in charge of safety, including, of course, aircrews and personnel in charge of operations and maintenance.

2.2. Requirements whose compliance determines the existence of the establishment

- 2.2.1. In accordance with the foregoing, for the purposes of concluding the existence of an establishment in Spain, the Directorate General of Civil Aviation will require compliance with the following requirements:

² For instance, the definitions section contained in Annex IV to the Agreement between the European Community and Ukraine on certain aspects of air services, done at Kiev on 1 December 2005.

³ Council Document No. 15247/03 ADD 1.



- a) The existence of a **stable and permanent organizational structure** with its head office in Spain, duly registered in the Commercial Register if so required by Article 81 of the Regulation of the Commercial Register, approved by Royal Decree 1784/1996, of 19 July.

In order to show compliance with this requirement, the airline interested in establishing itself in Spain shall provide, when required by the mentioned Article 81 or equivalent, a certificate from the Commercial Register.

- b) The existence of, at least, **one effective company operating base in Spanish territory**, in which at least one aircraft and its corresponding crews are based⁴.

The term “operational base” shall be interpreted in accordance with the provisions of sections ORO.AOC.140, ORO.FTL.105.14) and ORO.FTL.200 of Annex III of Commission Regulation (EU) n. ° 965/2012, of 5 October 2012, laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) n. ° 216/2008 of the European Parliament and of the Council⁵.

To demonstrate compliance with this requirement, the airline interested in establishing itself in Spain must provide an Air Operator's Certificate and Operating License, and also include the description of the operating base in Spanish territory and the way the corresponding crews are organized in the establishment, described in the following point.

In addition, it is necessary that the crew are affiliated to the Spanish social security health system and enrolled in the company registered in Spain as mentioned in the previous point, paying social security contributions in Spain for the applicable concepts under the regulations in force.

- c) The existence of an **establishment manual** that sufficiently describes the organizational aspects, including the identities and responsibilities of its representatives and other personnel, as well as procedures developed, available human and material resources and contact information.

In order to show compliance with this requirement, the airline interested in establishing itself in Spain must provide a document entitled “Establishment Manual for Company XXX in Spanish territory”. Said Establishment Manual must contain the following sections:

⁴ It is not necessary for this base to be the company's main operational base.

⁵ As amended by Commission Regulation (EU) No 83/2014 of 29 January 2014, amending Commission Regulation (EU) n. ° 965/2012 of 5 October 2012, laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council.



1. Introduction. Purpose of the establishment in Spain. Route/s for which traffic rights are requested.
2. Regulatory framework.
3. Description and operation of the organization. Registered office in Spain.
4. Persons responsible for the organization, including air operations. Description of their responsibilities. Names and contact information.
5. Description of the company's effective operational base/s in Spanish territory and its/their operation. Available means and materials (office, rest rooms, etc.). Aircraft based there and composition of the corresponding crew, indicating their place of residence (city) and type of contract, as well as crew rotation. Means and materials available at the base.
6. Processes carried out.
7. Description of the company contracted to carry out aircraft maintenance.
8. Description of the ground handling service and other organizations involved.

2.2.2. Furthermore, for the purposes of considering that there is an establishment in Spain, this Directorate General will also require **continued compliance with national and European Union laws and regulations** of general or particular application.