

Consultation Document

Amendments to the Aircraft Registration Act

5th December 2014

Public consultation being carried out by Transport Malta regarding amendments which are being proposed to the Aircraft Registration Act (Chapter 503 of the Laws of Malta) and ancillary laws with a view of updating further the relevant laws in order to ensure Malta's continued competitiveness in this industry.

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Aim

The aim of the proposed amendments is to update the Aircraft Registration Act (Chapter 503 of the Laws of Malta) (the “**Act**”) and relevant sections in other laws, such as the Code of Organisation and Civil Procedure (the “**COCP**”), with:

- (a) **Cosmetic changes:** throughout the past four years certain minor issues have been identified with the drafting of certain provisions of the Act. Amendments can therefore be carried out to avoid problems of interpretation and for there to be a better understanding of the Act, thus avoiding ambiguous interpretations thereto.

- (b) **Substantive changes:** throughout the past four years it has also become evident that further substantive changes also need to take place within the Act in order to ensure Malta’s competitiveness in this industry.

This consultation document will therefore commence by putting forward the “cosmetic changes” being proposed, and continue by discussing the “substantive changes” as well as “other changes” which are being proposed to the Act and to other laws ancillary thereto.

Section A: Cosmetic Changes

A1. Article 31(3): Preservation of Special Privileges or Reservation of Title of Aircraft on Accessories of Aircraft

Article 31(3) confirms that a seller reserving ownership rights on an aircraft can do so at any time prior to the registration of a mortgage. Nonetheless, this article does not cater for the possibility of a seller to reserve ownership rights on an aircraft post the registration of a mortgage, even if the mortgagee provides its consent.

Thus, it is proposed to amend Article 31(3) and include necessary wording in order to allow a seller to reserve ownership rights on the aircraft after the registration of a mortgage, but only with the consent of the mortgagee. This amendment has been included in Article 6(a) of the draft Bill.

In Article 31 of the principal Act the following amendments shall take place:

(a) In sub-article 3, immediately after the words “registration of a mortgage”, the words “or at any time after the registration of a mortgage but only with the consent of the mortgagee” shall be added;

A2. Article 31(5): Preservation of Special Privileges or Reservation of Title of Aircraft on Accessories of Aircraft

This article refers to the different types of registerable rights mentioned in Article 31(1), which include:

- (a) the creation of any separate privilege or charge on an aircraft or any part, appurtenance or accessory;
- (b) the reservation of ownership rights by a seller on an aircraft; and
- (c) any lease.

Article 31(5) mentions the different types of registerable rights under Article 31(1), however, omits reference to ‘privilege’ and therefore it is proposed to amend Article 31(5) in order to include the term ‘privilege’.

In Article 31 of the principal Act the following amendments shall take place:

(b) In sub-article 5, immediately after the words “The registration of such a”, the words “separate privilege,” shall be added.

A3. Article 41(7): Recognition of Foreign Mortgages and Foreign Security Interests

This sub-article confirms that even if the proper law of the conditional sale or a lease agreement is Maltese law, then the status and powers arising from sub-Articles 41(3) to 41(6) in relation to the relevant aircraft shall still apply. However, nothing is mentioned as to when the proper law of the conditional sale or lease agreement is foreign law.

It is therefore proposed to amend Article 41(7) in order to extend this provision to include reference to foreign law.

Sub-article 7 of Article 41 of the principal Act, shall be substituted by the following:

“A security interest created in relation to a conditional sale or a lease agreement, whether having Maltese law as its proper law or otherwise, and registered in accordance with the First Schedule, shall, for the purposes of Maltese law, grant to the owner and, or the lessor the status and powers in relation to the relevant aircraft as is envisaged in terms of subarticles (3) to (6).”

A4. Article 42(1)(d): Special Privileges on Aircraft

The special privilege arising out of Article 42(1)(d) refers to “expenses incurred for the repair, preservation of the aircraft to the extent of the service performed on and value added to the aircraft”.

Issues might arise in case of a discrepancy between the value of the service performed and the value added to the aircraft. In such case, therefore, it is unclear as to which amount should prevail and be the privileged amount.

It is therefore being proposed to amend this paragraph in order to specify that should there be a discrepancy between these two amounts then the highest value shall prevail.

In section (d) of sub-article (1) of Article 42 of the principal Act, after the words “to the extent of the service performed on and value added to the aircraft” the following words shall be added: “, whichever is the higher”.

N.B. Article 42 of the Aircraft Registration Act has been the subject of declarations made by Malta on acceding to the Cape Town Convention. Therefore if this amendment is to be introduced, Malta will need to amend its international declarations.

A5. Article 44(4): Ranking of Creditors

Article 44(4) lists the priority in which creditors will get paid if the fund available for creditors is insufficient.

Although it might seem obvious, it is being proposed to specify that the rest of the creditors will get paid after those specified in sub-article (4). Therefore unsecured creditors and the creditors under foreign laws which do not rank will get paid after those creditors specified in sub-article (4).

In Article 44 of the principal Act the following amendments shall take place:

- (a) In sub-article (c), immediately after the words “referred to in paragraphs (a) and (b)”, the word “and” shall be deleted;*
- (b) In sub-article (d), immediately after the words “rank among themselves according” the words “to the provisions of the Civil Code” shall be substituted by the words “to the provisions of the Civil Code; and”*
- (c) Immediately after sub-article (d), as amended, the following sub-article (e) shall be added:
“other competing creditors shall rank after the debts referred to in paragraphs (a), (b), (c) or (d)”.*

A6. Article 53: Conflict between two Parts of the Act

Article 53 confirms that if a creditor chooses to register a mortgage under Part IV and an international interest under Part VI and the First Schedule, then Part VI and the First Schedule shall prevail, to the extent that there is a conflict.

This clarification is also stated in Article 55 of the Act and thus there seems to be an element of repetition between Article 53 and Article 55. It is therefore being proposed for Article 53 to be deleted.

Article 53 of the principal act shall be deleted.

A7. Article 328 of the COCP: Payment into Court of Purchase Money

Article 328 of the COCP establishes the time period during which one is to deposit funds in Court following a judicial sale. The law currently states that funds should be deposited in court within a 24-hour period.

However, in circumstances where the value of the asset (which is the subject of the judicial sale) is substantial, it would be difficult to deposit a large sum of money in Court within such a short period of time (particularly since international bank transfers take at least two working days to take place).

This time period had already been extended for shipping vessels from a 24-hour period to seven days.

It is therefore being proposed to replicate the position adopted in shipping and extend the period for depositing funds in Court for the sale of aircraft, to seven days.

In Article 328 of the COCP, immediately after the words “or of ships,” there shall be inserted the words “or of aircraft,”

A8. Article 742E of the COCP: Jurisdiction in Rem against Aircraft

In Article 742E of the COCP, reference is made to “international interest”, however, this term is not defined in the COCP and is considered to be alien to the COCP.

It is therefore being proposed to cross-refer to the Aircraft Registration Act.

In paragraph (c) of sub-article (1) Article 742E of the COCP, the words “equivalent international interest” shall be substituted by the words “international interest registered in terms of the Aircraft Registration Act”.

A9. Article 865G of the COCP: Penalty in case of Malicious Demand for Warrant

Article 865G of the COCP establishes the penalty for the malicious demand of a warrant of arrest or precautionary warrant of arrest. Currently the penalty has been fixed at EUR 11,600, however, such an amount has been considered as being quite low given the values of aircraft and the revenues these may generate.

It is therefore being proposed to increase the value of the penalty to the value of daily lease payments which may be due, and which in no case shall be less than EUR 11,600.

Courts will therefore be given discretion to establish the penalty for the malicious demand for the warrant and the courts in taking such a decision should take in consideration the potential daily lease payments which the aircraft may attract, should this be leased.

In Article 865G of the COCP, the words “eleven thousand and six hundred euro” shall be substituted by “the commercial value of lease payments which the aircraft may attract, notwithstanding that the aircraft may not have been subject to lease payments, and depending on the type, value and operation of the aircraft, and which in no case shall be less than eleven thousand and six hundred euro”.

A10. Schedule A to the COCP: Tariffs

The law does not state what Court fees will be applicable for Court approval of sales.

It is therefore being proposed for the position currently being adopted by the judiciary to be adopted legislatively, meaning that the registry fee will be calculated (1%) on the sale value of the asset being sold.

In Tariff D of Schedule A of the COCP, immediately after paragraph 12, the following paragraph 13 shall be added:

“Fees for the approval by the Court of sales in accordance with Sub-Title V of Title VII of Part I of Book Second: there shall be paid a registry fee, calculated on the sale value of the asset being sold.....1%”.

Section B: Substantive Changes

B1. Article 5(3): Registrants of Aircraft to be Operators of Aircraft

Article 5(3) of the Act caters for a situation the holder of a temporary title can retain the aircraft on the register for the duration of the temporary title.

The main issue which has been identified here relates to what happens with the registration of the aircraft on there being a change of circumstance (e.g. on enforcement/ termination of temporary title), with the entity in possession of the aircraft not qualifying as a registrant under the Act.

It is therefore being proposed to introduce a grace period within which the lessor/ mortgagee of the aircraft can “salvage” his position without the aircraft being deleted from the Register, such as by finding another qualifying lessee within a time limit, and by catering for the possibility of there being return trips of the aircraft to a lessor/ bank following the change in circumstance.

Article 13 and 14 of the Act already grant leeway where the mortgagee / holder of a security interest is not a qualified person. These Articles might however need further amendment in order to also allow there being return trips to the mortgagees / holders of security interests following the change in circumstance.

It is also noted that Articles 13 and 14 only cater for a situation where the mortgagee or the holder of a security interest is not a qualified person. There could be a situation whereby the lessee terminates the lease abruptly and the Registrar is left with a situation whereby the aircraft should be deleted from the Registry, since the temporary title would have been terminated.

It is therefore also being proposed to amend the law in order to insert a ‘grace period’/ ‘discretionary power’ to the Registrar, in order to allow enough flexibility and time to liaise with the persons involved (in particular the lessor / owner of the aircraft) and to decide on the way forward, such as, whether the aircraft will be de-registered from the National Aircraft Register in Malta or whether a new lessee will be identified to become the registrant of the aircraft.

Any amendments here should however continue to respect any rights of holders of IDERAs, and the Registrar should nevertheless continue to give his support to the holders of IDERAs (within the powers granted by such IDERAs).

B2. Distinction between “International Interests”, “Mortgages” and “Security Interests”

The Act distinguishes between “International Interests”, “Mortgages” and “Security Interests”. Certain provisions of the Act refer to some but not all types of such interests. Three amendments are therefore being proposed, as follows:

- **Article 11(1)(d) of the Act** – this sub-article refers to the obligation of a registrant to inform the Director General of any event amounting to the enforcement of a mortgage or security interest which will have the effect of transferring the title or possession, control, or operation of the aircraft to a person other than the registrant. It is being proposed for reference to be made also to international interests.

In paragraph (d) of sub-article (1) of Article 11 of the principal Act, immediately after the words “registered mortgage” the words “, international interest,” shall be added.

- **Article 13(1)(b) and Article 13(1)(c) of the Act** – whilst Article 13(1)(b) and Article 13(1)(c) allow the Director General to cancel the registration of an aircraft when there is no compliance with Article 6 of the Aircraft Registration Act, the proviso to each of these sub-articles creates an exemption when such person is a registered mortgagee or the holder of a security interest in light of such person exercising his rights under such mortgage or security interest. It is being proposed for the exemption to be extended also to when a person has an international interest over an aircraft.

In Article 13 of the principal Act, the following amendments shall take place:

- (a) *In paragraph (b) of sub-article (1), immediately after the words “registered mortgage” the words “, the holder of an international interest,” shall be added;*
- (b) *In paragraph (c) of sub-article (1), immediately after the words “registered mortgagee” the words “, the holder of an international interest,” shall be added.*

- **Article 30(6) of the Act** – this Article states that when a prohibitory notice is filed the Director General will not thereafter record any security interest in the National Aircraft Register. It is being proposed to specify that neither mortgages may be recorded in the National Aircraft Register on there having been a prohibitory notice filed.

In sub-article (6) of Article 30 of the principal Act, the following amendments shall take place:

(a) Immediately after the words “shall not thereafter record any”, the words “mortgage or any” shall be added;

B3. Article 26(4): Types of Charges on Aircraft

Article 26(4) of the Act specifies that if an engine attached to an airframe is not also owned by the airframe owner, then each owner shall retain ownership of that thing and any security over the airframe shall not extend to the engine if the owners of the engine and airframe are different.

The main issue identified here is whether the distinction between the airframe and the engine should also extend to other distinguishable parts of the airframe.

Article 31 of the Act is generally the only section which refers to parts, appurtenances and accessories of an aircraft. Article 25 of the Act however specifies that appurtenances and other parts also fall within the definition of ‘aircraft’ for the purposes of Part IV of the ARA (Mortgages on Aircraft).

Therefore accession rights may apply to parts, appurtenances, or accessories of aircraft as per the Civil Code. However these:

- can still be the subject of individual rights in terms of Article 31 of the Act, with such rights being registrable, and also gaining priority if being registered prior to a mortgage;
- do not affect mortgages which would have already been registered (i.e. do not have the strength which privileges over aircraft have).

It is proposed to amend Article 26(4) in order to clarify that notwithstanding the accession rules under the Civil Code, engines and separate items on or in an aircraft may themselves be subject to special privileges in accordance with the provisions of the Civil Code.

In Article 26 of the principal Act, immediately after the words “provisions of the First Schedule,” the words “and notwithstanding article 566 / 573 of the Civil Code,” shall be added.

B4. Leases under the Aircraft Registration Act

Though the Act refers to “leases”, with these granting various rights, particularly in light of the First Schedule to the Act, potential problems remain if Courts were to start analysing aircraft leases in terms of the Maltese law on lease, whilst ignoring the remedies granted in terms of the First Schedule to the Act.

The idea is therefore being put forward to establish a separate regime for aircraft (and similar assets) leases, which would give similar rights to those found in the First Schedule. This would mean that aircraft leases entered into under the laws of Malta, even if not registered in accordance with the First Schedule of the Act, will be subject to similar rights and remedies as found in the First Schedule to the Act. Any such regime will therefore specify that any such leases are to be considered in light of the special leasing regime established thereunder, whilst specifically excluding reference to the Civil Code (Chapter 16 of the laws of Malta).

This should therefore eliminate any doubts in Maltese law as to how aircraft leases are to be treated and what rights and remedies emanate therefrom.

B5. Helicopters

While helicopters may be registered by the Civil Aviation Directorate (the “CAD”) in the National Aircraft Register, the Act does not cater for specific provisions dealing with helicopters.

In order to enhance the Maltese legislative framework and clarify the way in which helicopters may be treated under the Act, an assessment of the legislative provisions of competing jurisdictions is being undertaken in order to identify whether certain amendments are required in order to distinguish helicopters from other aircraft.

Should any beneficial treatment be identified for treating helicopters differently from other aircraft, new amendments will be inserted within the Bill in order to cater for such beneficial treatment and ensure that the Maltese legislative framework remains competitive on this front.

B6. Article 865A of the COCP: Arrest of Aircraft/ Engines

Article 865A of the COCP establishes the warrant of arrest of aircraft and there is also a specific definition of “aircraft”. The issue which has been identified here is that where an aircraft is arrested, there might be different owners of engines of the said aircraft.

Therefore, there needs to be a remedy whereby the owner of the engines may apply to the courts in order to have the engines released from such arrest expeditiously.

It is therefore being proposed to insert provisions in the COCP to ensure that the Court adjudicating on the arrest of aircraft can release third party engines of its own motion, and

that third party engine owners can act as intervenors in an ongoing case in order to ask for the immediate release of the said engines.

Furthermore, as currently drafted Article 865A of the COCP does not contemplate the possibility of the arrest of engines which are either:

- (a) owned by the same owner and not in use (i.e. not temporarily); and
- (b) engines owned by separate owners.

It is therefore being proposed to include the possibility of seizing engines separately even when these are owned by the same owner of the aircraft and not in use, as well as engines which are owned by owners separately to the owners of the aircraft.

In Article 865A of the COCP:

- (a) *Sub-articles (2) and (3) shall be renumbered as (3) and (4) respectively;*
- (b) *Immediately after sub-article (1), the following sub-article (2) shall be added:*
 - “(a) A precautionary warrant of arrest may be issued on an aircraft engine to secure a debt or claim, whether in personam or in rem which could be frustrated by the departure of the said aircraft engine, and no other warrant may be issued against an aircraft engine unless it is a warrant of arrest.*
 - (b) A precautionary warrant of arrest on an aircraft engine may be granted notwithstanding that the said aircraft engine:*
 - (i) is not attached to an aircraft; or*
 - (ii) that the aircraft engine is attached to an aircraft which has a different owner from the engine.*
 - (c) The provisions of warrant of arrest of aircraft, whether precautionary or executive shall mutatis mutandis apply to the warrant of arrest of an aircraft engine.”*
- (c) *Immediately after sub-article (4), as re-numbered, the following sub-article (5) shall be added:*
 - “(a) Any court dealing with a warrant of arrest of aircraft, shall also be the proper court to deal with orders for the protection of the rights of the owner of the engine which does not belong to the owner of the aircraft in terms of sub-article (4).*
 - (b) The owner of an engine which does not belong to the owner of the aircraft in terms of sub-article (4) shall be entitled to make submissions and requests to the court dealing with a warrant of arrest of aircraft, in order to protect its rights and interests.*
 - (c) Any court dealing with submissions or requests by the owner of an engine in terms of this sub-article shall deal with and determine these requests speedily and expeditiously and in no instance in more than twenty-four hours from when any such submission or request would have been made.”*
- (d) *Immediately after sub-article (5), the following sub-article (6) shall be added:*

“(a) Any court dealing with a warrant of arrest of an aircraft engine, shall also be the proper court to deal with orders for the protection of the rights of the owner of the aircraft which does not belong to the owner of the aircraft engine.

(b) The owner of an aircraft which does not belong to the owner of the aircraft engine shall be entitled to make submissions and requests to the court dealing with a warrant of arrest of an aircraft engine, in order to protect its rights and interests, provided that the Court shall not consider the inability of the aircraft to operate to be a good and sufficient ground for prohibiting the warrant of arrest of an aircraft engine, if the aircraft could nevertheless operate with a substitute aircraft engine.

(c) Any court dealing with submissions or requests by the owner of the aircraft in terms of this sub-article shall deal with and determine these requests speedily and expeditiously and in no instance in more than twenty-four hours from when any such submission or request would have been made.”

B7. Article 865E of the COCP: Warrant not below certain values

Article 865E establishes monetary thresholds for which one can arrest an aircraft (e.g. one million euro for aircraft being used for public air transport of passengers or goods). The issue which has been identified here is that there are currently no explanations of what the “monetary value” refers to: i.e. does this refer to interest and *sorte*, or only the principal amount?

In light of the current Court practice it is therefore being proposed to clarify that the amount of €1m refers only to the “principal amount” (i.e. *sorte*) and not the principal amount and interest.

In Article 865E of the COCP, immediately after the words “or any other claim whatsoever amounting”, the words “, in its principal amount,” shall be added.

B8. VAT Guidelines re aircraft leasing

The VAT department has issued guidelines re the VAT implications on finance leasing of aircraft.

Comments are being sought as to the use being made of these guidelines and whether practical benefits have been obtained in practice, or otherwise. Suggestions for amendments to the formulae being used may also be considered.

B9. Depreciation of Helicopters and Helicopter Engines

In terms of Maltese law aircraft can be depreciated over a 6-year period, whilst engines may be depreciated over a 4-year period.

These calculations are not appropriate, however, for helicopters since these are generally depreciated according to the use made of the said helicopters (i.e. depending on flight-time).

Comments are being sought as to how the current depreciation laws are affecting helicopters. Suggestions for amendments to such rules will therefore also be considered.

B10. Financial Institutions Act

Various international lenders enter into financial leases with Maltese operators. These may therefore require a financial institutions' licence in terms of the Financial Institutions Act if these enter into regular and habitual financial leases with Maltese entities.

For the purposes of Maltese law there is usually no presence of such persons in Malta, and they will typically neither be the registrants of the aircraft in Malta. Therefore the owner/ lessor of such aircraft will usually just ask for his interests (as owner/ lessor) to be annotated on the National Aircraft Register.

The owner/ lessor may however be the mortgagor of such aircraft, if a mortgage is required to be given over the aircraft. The requirement of a financial institutions' licence is hindering lessors from being much more active in Malta, since they do not want to be seen as regularly and habitually granting financial leases to Maltese entities in light of the requirements of the Financial Institutions Act. Financial lessors may already be subject to regulatory requirements in their home country.

It is therefore proposed, on the basis of what has been done in other EU States, for an amendment to be inserted in the Financial Institutions Act to carve out the requirement of licencing in relation to a lessor, under a financial lease, of an aircraft which is being leased to an "operator" (as defined in the ARA), and the said aircraft will be registered on the National Aircraft Register.

Section C: Other Issues

C1. Cape Town Discounts

Malta's application for review by the Organisation for Economic Co-Operation and Development (OECD) in order to be able to qualify for Cape Town Discounts is being finalised.

C2. Civil Aviation Directorate – Fees

The CAD does not charge any fees for registration of mortgages and issuance of transcripts. Should the CAD start charging fees, this should boost the budget of the CAD, allowing the CAD to increase its resources.

C3. Details of Owners and Engines on the Certificate of Registration

Article 4(2)(b) of the Act states that ownership rights of aircraft and engines will be recorded by the Director General *“if requested to do so by the registrant or by any other person who, with the consent of the registrant, demonstrates an interest in such information being entered in the National Aircraft Register”*.

On the other hand, however the CAD is required by ICAO to insert such details on the certificate of registry, and this information will therefore be required by the CAD.

It is therefore being proposed to shift Article 4(2)(b)(i) to Article 4(2)(a) of the Act.

C4. Insolvency of Maltese Companies owning Aircraft

In shipping there are specific provisions in the Merchant Shipping (Shipping Organisations – Private Companies) Regulations which limit the rights of a liquidator should a shipping company become insolvent, in order to protect the rights of any registered mortgagee.

It is therefore being proposed to apply similar protection to aircraft mortgagees and to holders of international interests over aircraft, whereby liquidators of companies owning aircraft would be subject to similar limitations as currently found in shipping.

Comments are therefore being sought on this proposal, together with suggestions as to whether such amendments would be better suited in the Act or in the Companies Act (Chapter 386 of the Laws of Malta).