

Air Transport Licensing Authority

Note on compliance with the requirement of having the principal place of business in Hong Kong

Background

Pursuant to Article 134(2) of the Basic Law, the Air Transport Licensing Authority (“ATLA”) may issue licences to airlines incorporated in and having their principal place of business (“PPB”) in Hong Kong. In addition, to be eligible for the licence, the applicant has to provide the required information to the satisfaction of ATLA that the applicant has complied with the relevant requirements of the Air Transport (Licensing of Air Services) Regulations (Cap. 448A) (“the Regulations”).

2. This note sets out the procedures for notifying ATLA with regard to compliance with the requirement of having the PPB in Hong Kong (“the PPB requirement”). This should be read in conjunction with the ATLA Procedural Guide¹.

Power of ATLA

3. ATLA, which is an independent statutory body established under the Regulations, is responsible for considering licence applications to operate scheduled air services between Hong Kong and any point in the world. Regulation 6(5) of the Regulations empowers ATLA to require the applicant to provide any information that ATLA considers necessary for determining the application.

4. In exercising its power to grant air transport licences, ATLA is entitled to take such necessary actions if deemed fit in order to satisfy itself that the applicants fulfil all licensing requirements before granting the licences.

¹ It is available at: http://www.thb.gov.hk/eng/boards/transport/air/atla_procedural_guide.pdf

PPB criteria

5. The ATLA's decision with regard to the application for licence by Jetstar Hong Kong Airways Limited handed down on 25 June 2015 has, among other things, stipulated the relevant factors and considerations that ATLA will take into account in determining whether an applicant or a licence holder complies with the PPB requirement. A summary of the applicable test and relevant factors for checking PPB (as set out in paragraphs 208 to 214 of the ATLA's decision) is at **Annex 1**. For details of the PPB criteria, please refer to the full written decision². Should there be any discrepancies between this note and the full written decision, the full written decision shall prevail.

New application

6. Applicant wishing to apply for a licence to operate scheduled air services is required to submit written submission with evidence to ATLA in substantiating its compliance with the PPB requirement by reference to the stipulated PPB criteria (**Annex 1**). In the course of assessing the written submission, ATLA may request further information from the applicant. ATLA may approve the application only if ATLA is satisfied that the applicant meets all relevant licensing requirements (including the PPB requirement).

Existing licence holder

7. Having the PPB in Hong Kong is an ongoing requirement for the grant of air transport licence and it is the primary responsibility of existing licence holders to ensure that the PPB requirement is met at all times. In this regard, the incumbent licence holders are required to provide ATLA with the following returns:

- (a) Annual declaration of compliance with PPB requirement (to be submitted by end June every year);

² The full written decision is available at:
[http://www.thb.gov.hk/eng/boards/transport/air/Full%20written%20decision%20\(Eng\)%2025062015.pdf](http://www.thb.gov.hk/eng/boards/transport/air/Full%20written%20decision%20(Eng)%2025062015.pdf)

- (b) Confirmation on continuous compliance with PPB requirement (to be submitted upon application for licence variation/renewal);
- (c) Notification of change in mode of operations/control that may affect compliance with PPB requirement (to be filed within 14 days of change); and
- (d) Notification of circumstances which may render it unable to comply with the PPB requirement (to be filed forthwith).

8. The prescribed form for the above declaration/ confirmation/ notification is at **Annex 2**.

Enquiry

9. For enquiry about this note, please contact the ATLA Secretariat at 21/F, East Wing, Central Government Offices, Tamar.

ATLA Secretariat
June 2017

Applicable test and relevant factors for checking PPB

1. As far as the grant of ATLA licence is concerned, the applicable test in deciding whether an airline is able to satisfy the requirement that its principal place of business is in Hong Kong are set out below:
 - (a) In determining whether the principal place of business of an applicant is in Hong Kong, the answer is not confined to where the day-to-day operations are conducted.
 - (b) The day-to-day activities of the airline may be carried out in Hong Kong but to satisfy the PPB criteria, its activities must not be subject to the control of senior management, shareholders or related parties located elsewhere.
 - (c) The airline has to have independent control and management in Hong Kong, free from directions or decisions made elsewhere.
 - (d) The nerve centre has to be in Hong Kong. By nerve centre, ATLA looks at where and by whom the decisions regarding the key operations of an airline are made. Decisions are not those of the day-to-day operations only but also those which are relevant and crucial to the business of the airline.
 - (e) The core business of an airline is the carriage of passengers and goods for reward and the decisions as to where the airline can fly (i.e. route and networking) and how much it can charge for the services rendered (i.e. pricing) are two important factors, among others, under ATLA's consideration. Decisions pertaining to these matters have to be independently controlled and managed in Hong Kong.
 - (f) The mode of operation of a passenger airline may take different forms which vary from a full service carrier ("FSC") in one case to a low-cost carrier ("LCC") to the other. Even for the

case of LCC, an airline may operate air services under its own brand, a licensed brand or other contractual arrangement with varying degree of dependency and control which the airline and the contracting parties may be subjected to. In other words, whether an airline is operating under FSC or LCC is but a business decision and is irrelevant to the consideration of its compliance with PPB requirement. The root of the question goes to how the airline's business is independently controlled and managed in Hong Kong.

2. The operation of an airline contains other important matters, features and characteristics that are vital to its business and upon which the test of independent control and management would have to be applied.
3. The relevant factors that would be applicable generally to all companies that would be required to satisfy the PPB requirement include:
 - (a) voting rights at the shareholders' meeting;
 - (b) voting rights of the board of directors;
 - (c) place of these meetings;
 - (d) the powers of the senior management staff, e.g. Chairman of the Board or Chief Executive Officer;
 - (e) financial control;
 - (f) insurance being taken out;
 - (g) the site of the corporate authority, namely the location or domicile of the shareholders and directors where decisions are made; and
 - (h) whether the day-to-day operation is subject to decision or direction from elsewhere.

4. In the context of an airline, there are other special features that are important to its business which are not covered above or considered in the relevant law cases. The locale where the following decisions on operation are made are highly relevant to the PPB of an airline:
 - (a) the decision to purchase and dispose of its fleet of aircraft;
 - (b) the flight network or route that are to be adopted by the airline;
 - (c) the fares that are to be fixed in conducting its airline business;
 - (d) the engagement, direction and termination of the senior management staff; and
 - (e) whether the airline's business is restricted such that it does not have the ability to decide with whom or how it would operate.
5. If the arrangement of the setting up and operation of a Hong Kong airline is such that its autonomy to continue the business is not protected in the eventuality of the termination of a licence agreement or other service contracts, it indicates that it is not exercising independent control and management of its own airline business.
6. There should be no prohibition in its operation such that it would not be precluded from competing fairly in the open market with other airlines, including that of any shareholder. This is not a view from the perspective of compliance with competition laws but of the independent control and management that the airline has over its own business.

To: Air Transport Licensing Authority

(c/o Air Transport Licensing Authority Secretariat
21/F, East Wing, Central Government Offices, Tamar)
(Fax no. 2524 9397)

Name of licence holder:	
Licence No.:	
Validity period of licence:	

I confirm that the above named is a holder of the aforesaid licence. I refer to the written submission and supporting documents that we (as licence holder) filed with ATLA in substantiating our compliance with the requirement of having the principal place of business (“PPB”) in Hong Kong.

<input type="checkbox"/>	<u>Annual declaration (to be submitted by end June every year)</u> I declare that there was no change to any circumstances affecting our compliance with PPB requirement since our last written submission or last annual declaration, whichever is the latest.
<input type="checkbox"/>	<u>Confirmation upon application for licence variation/renewal</u> I confirm that we will continue to comply with, among other licensing requirements, the PPB requirement as stipulated by ATLA and will duly report to ATLA any changes that may affect our compliance with PPB requirement.
<input type="checkbox"/>	<u>Notification within 14 days of change</u> I hereby notify ATLA of the following change in mode of operations/control that may affect our compliance with PPB requirement (<i>please supplement in separate sheet if necessary</i>):
<input type="checkbox"/>	<u>Immediate notification</u> I hereby notify ATLA of the following circumstances which may render it unable for us to comply with the PPB requirement (<i>please supplement in separate sheet if necessary</i>):

Please tick as appropriate

Signature: _____
(for and on behalf of Board of Directors)

Name: _____

Date: _____