



Ministry of Infrastructure and the
Environment



Bilateral Air Services Agreements

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Legal basis bilateral ASA's: Chicago Convention

- **Article 1 (Sovereignty):** *The Contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.*
- **Article 6 (Scheduled air services):** *No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorisation of that State, and in accordance with the terms of such permission or authorisation.*
- **Article 5 (Right of non-scheduled flight):** permission for unscheduled (charter) services is generally left to national law and policy.



ICAO Definition of a scheduled air service

- A scheduled international air service is a series of flights that possesses all the following characteristics:
- It passes through the airspace over the territory of more than one State;
- It is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public;
- It is operated, so as to serve traffic between the same two or more points, either (i) according to a published timetable, or (ii) with flights so regular or frequent that they constitute a recognisably systematic series.



Freedoms of the air – traffic rights

- The Chicago Convention defines eight freedoms of the air. *Traffic rights* can be distinguished in 3rd – 8th freedom traffic rights;
- The most important traffic rights that are subject to negotiations are 3rd – 5th freedom for pax/combi and all-cargo services or any type of service.
- Third freedom = the right to fly into the territory of the grantor State and there discharge traffic coming from the flag-State of the carrier;
- Fourth freedom = the right to fly into the territory of the grantor State and there take on traffic destined for the flag-State of the carrier.
- Fifth freedom = the right to fly into the territory of the grantor State for the purpose of taking on, or discharging, traffic destined for, or coming from, third States.



Air Service Agreement provisions

- Grant of rights
- Designation (ownco, establishment)
- Revocation / Suspension
- Prices
- Commercial activities
- Fair competition
- Taxes, customs duties, charges
- Safety
- Security
- Settlement of disputes



Annex: Route Schedule

- The Route Schedule is generally attached to the Air Service Agreement as an Annex.

Example of an open route schedule:

- For the designated airline(s) of State A: all Points in state A – all intermediate points – all points in State B – all points beyond v.v.
- For the designated airline(s) of State B: all points in State B – all intermediate points – all points in State A – all points beyond v.v.
- Fifth freedom can be granted on intermediate and beyond points.



Effects of EU External Aviation Policy

- For EU Member States the designation clause of airlines was traditionally based on substantial ownership and effective control of those airlines by the State and/or its nationals.
- In the “Open Skies” judgments (2002) the ECJ ruled that such “nationality” clauses violated the freedom of establishment of EU carriers and that certain elements of ASAs fell under EU competency (exclusive or mixed).
- This marked the start of the External Aviation Policy of the EU.



EU External Aviation Policy (II)

- EU external aviation policy was defined in 2005 in a Road Map which aims:
 - (1) to bring all ASAs in conformity with EU law both by the Commission and the Member States;
 - (2) to create a Common Aviation Area with EU's neighbouring countries;
 - (3) to conclude comprehensive agreements with key strategic third countries;



EU External Aviation Policy II

- (1) The EC has initialled +/- 50 horizontal agreements since 2003
- (2) The EC has concluded Common Aviation Area agreements with various neighbouring countries which aim for gradual market opening and adoption of the Acquis (eg Western Balkans (ECAA), Georgia, Israel, Jordan, Morocco).
- (3) The EC has concluded EU Comprehensive Agreements with a number of countries (eg US, Canada) and is currently negotiating with a number of countries (eg Armenia, ASEAN, Oman, Turkey).



Bilateral system in the Netherlands

- EU law obliges yearly government stakeholder meeting with stakeholders established in the Netherlands.
- Agenda of bilateral wishes & potential negotiations is set with Corendon, KLM, TUI and Schiphol.
- Preparation:
 - bilateral position;
 - wishes (EU clauses, traffic rights, etc);
 - venue



Bilateral negotiations process

- 1-2 days, outcome in (C)MoU, Agreed Minutes, Record of Discussions;
- ICAO ICAN Negotiation events (NL participation in Durban 2013, Bali 2014, Nassau 2016, Nairobi 2018);
- EU law obliges Member States to inform intention and outcome to EC;
- Amendments of ASAs are implemented through national ratification procedures.



Example I: Surinam

- MoU 2004: designation from single to triple;
- KLM and SLM designated.
- Martinair operated briefly from end 2006 – sept 2008 (not commercially viable).
- Complex dossier due to specific market and tariffs.



Example II: Malaysia

- March 2007: Horizontal Agreement with EU
- May 2008: Request for bilateral consultations by Malaysia.
- Malaysia wanted open skies; NL only limited expansion of market access.
- Outcome:
 - Pax/combi services: 7 to 11 frequencies p. wk; domestic code-share; 5th freedom traffic rights.
 - All-cargo: unlimited traffic rights p.wk, domestic code-share, 5th freedom traffic rights, intermodal cargo.
 - Amendment of ASA provisions on commercial activities, tariffs.



Example III: Vietnam

- February 2010: request for bilateral consultations by Vietnam.
- Outcome:
 - amendments of ASA provisions on designation (dual), tariffs, commercial activities, safety & security.
 - capacity: from 3 to 7 frequencies per week, code-share regime, open route schedule



Example IV: Cambodja

- KLM wanted to start code-share operations with Bangkok Airways via Bangkok to Phnom Pehn (2012); requested for by NL.
- Cambodia replied that it needed a formal ASA to be concluded via bilateral consultations (2014);
- Outcome: multiple designation regime, 7 pax/combi frequencies p. wk, open cargo regime, 5th freedom traffic rights for pax/combi and cargo ops on all intermediate points and beyond points in South-East Asia (for Dutch carriers) and Europe (for Cambodian carriers).
- Open code-share regime.



Failed negotiations 1: Kazakhstan

- Bilateral negotiations (2008) based on prior positive talks between airlines of both sides.
- Both parties had 7 frequencies p. wk (any type of aircraft). KLM had 2 extra permits and operated 6 pax services and 3 cargo services to per week to Almaty.
- NL aimed to formalize the permits and add 5 extra frequencies and open up routes to Atyrau (for combi flights AMS-Astana-Atyrau).
- Kazakhstan made a request for KLM to operate to Tokyo and Osaka via Almaty. All seemed ok, but the second day the Kazakhstan delegation did not show up at all.



Failed negotiations 2: Philippines

- As of 2012 KLM was forced to start operating to Manilla indirectly due to fuel costs & extra national taxes for carriers based on flight distance.
- KLM needed permission for 5th freedom on intermediate point Hong Kong or Taipei to optimize its services and wanted to abolish the tax regime.
- Both requests failed. 5th freedom was difficult as this would lead to competition on either HK-Manila or HK-Taipei markets for Philippine carriers and tax regime stayed in place.



Varia: Lufthansa Cargo court case

- LCAG transported flowers from Colombia and Ecuador to the Netherlands via Puerto Rico (US) on the basis of the EU-US agreement (2012).
- This was prohibited by NL on the grounds that those operations were not covered by EU-US agreement, but bilateral ASAs between NL and Col/Ecuador. In order for LCAG to be designated, it should be established in the Netherlands and is not.
- Court case: Dutch administrative court (first level) ruled in favour of NL (2013). Questions were put forward to ECJ by Administrative Court in appeal (RvS) on establishment and scope of EU-US agreement (July 2015). Appeal was withdrawn by LCAG (Dec. 2015).



Final observations

- Bilateral system may seem outdated in many ways.
- EU external aviation policy aims for more liberalization by means of Open Skies agreements with important aviation countries or blocks of countries (ASEAN).
- The ICAO Air Transport Regulation Panel has been working on a Multilateral Agreement for market access liberalization the last five years without much success.
- The overall current international trend seems to be moving back again to a more protective bilateral approach.