

En Route to the EU – ASEAN Open Skies Agreement

*Anggia Rukmasari**

Abstract

Four years ago a Joint Declaration was adopted in the European Union (“EU”)¹ and the Association of Southeast Asian Nations (“ASEAN”)² Aviation Summit in Singapore (the “Joint Declaration”). The European Commission (the “EC”) and ASEAN proposed to take aviation cooperation to a new level by negotiating a comprehensive air transport agreement between the EU and ASEAN, particularly on the possibility of a bloc-to-bloc open skies agreement. If the process goes well, soon, the aviation world will have its first inter-regional open skies agreement to have ever been concluded.

Unlike the EU which has a well established open skies system, ASEAN is still paving its way to adopting such a regime. In fact, not all of the ASEAN member States are on the same page for a full liberalization of this industry in the region. From the above, integrating the two unique characteristics of each of the EU and ASEAN open skies regimes into one regime of inter-regional open skies as mandated by the Joint Declaration will be a challenging task for both of the blocs. From the legal perspective, some issues such as market access, ownership and control, competition regulations, etc. need to be resolved to materialize this plan. This present contribution will try to answer the possibility of making the EU-ASEAN single aviation market come true. In addition, it will also critically analyze some legal aspects that must be considered by both of the blocs to conclude an open skies agreement particularly on market access, ownership and control, competition regulations, as well as safety and security aspects.

Keywords: EU-ASEAN Open Skies Agreement, open sky, liberalization

* Anggia Rukmasari is a senior associate at Bahar & Partners, a law firm based in Jakarta, Indonesia. She is also now sitting as the Secretary General of the Indonesian Air Law Society. She completed her post-graduate degree in 2014 from the International Institute of Air & Space Law, Leiden University, The Netherlands.

¹ EU is an international regional organization comprising 28 European States and governing common economic, social, and security policies. The EU’s members are Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

² ASEAN is an international regional organization comprising 10 South East Asia States and governing common economic, and social policies. The ASEAN’s members are Indonesia, Malaysia, Thailand, Singapore, Brunei Darussalam, Lao PDR, Vietnam, Myanmar, Cambodia, and the Philippines.

บทคัดย่อ

เมื่อสี่ปีก่อน สหภาพยุโรปและสมาคมประชาชาติแห่งเอเชียตะวันออกเฉียงใต้ (อาเซียน) ได้ร่วมทำแถลงการณ์ร่วมในงานประชุมสุดยอดผู้นำด้านการบินที่สิงคโปร์ คณะกรรมาธิการยุโรปและอาเซียนได้เสนอให้มีความร่วมมือทางการบินในระดับที่เพิ่มขึ้นด้วยการเจรจาความตกลงด้านการบินระหว่างสหภาพยุโรปกับอาเซียน โดยเฉพาะอย่างยิ่งในรูปแบบความตกลงเปิดเสรีการบินระหว่างกลุ่ม หากแผนการดำเนินไปด้วยดี โลกการบินจะมีความตกลงเปิดเสรีการบินระดับภูมิภาคกับภูมิภาคฉบับแรกเกิดขึ้น

อาเซียนแตกต่างจากสหภาพยุโรปที่วางระบบเปิดเสรีการบินไว้อย่างดี อาเซียนยังอยู่ในระยะเริ่มก่อร่างระบบดังกล่าว ในความจริงแล้วรัฐสมาชิกในอาเซียนทุกรัฐไม่ได้อยู่ในระดับความพร้อมการเปิดเสรีในอุตสาหกรรมการบินที่เท่าเทียมกัน ด้วยเหตุนี้การรวมการเปิดเสรีการบินของสหภาพยุโรปและอาเซียนเข้าด้วยกันในความตกลงเปิดเสรีการบินตามแถลงการณ์ร่วมจึงเป็นงานที่ท้าทายของทั้งสองฝั่ง ในมุมมองทางกฎหมาย จะต้องมีการจัดการประเด็นต่างๆ เช่น การเปิดตลาด ความเป็นเจ้าของและการควบคุมกฎระเบียบการแข่งขันทางการค้า ฯลฯ เพื่อให้แผนเป็นไปได้จริง บทความนี้พยายามหาคำตอบถึงความเป็นไปได้ในการทำให้ตลาดการบินเดียวสหภาพยุโรป-อาเซียน เกิดขึ้นได้จริง นอกจากนี้บทความยังได้วิเคราะห์ประเด็นทางกฎหมายที่ต้องพิจารณาจากทั้งสองฝั่งเพื่อจะทำความตกลงเปิดเสรีการบิน ได้แก่ การเปิดตลาด ความเป็นเจ้าของและการควบคุม กฎระเบียบการแข่งขันทางการค้า รวมถึงมุมมองด้านความปลอดภัยและการรักษาความปลอดภัย

คำสำคัญ: ความตกลงเปิดเสรีการบินสหภาพยุโรป-อาเซียน, เปิดเสรีการบิน, เปิดเสรี

En Route to the EU – ASEAN Open Skies Agreement

On 12 February 2014, a Joint Declaration was adopted in the EU and ASEAN³ Aviation Summit in Singapore. The EC and ASEAN member States proposed to take aviation cooperation to a new level by exploring the possibility of a bloc-to-bloc open skies agreement (the “Plan”). If the process goes well, soon, the aviation world will have its first inter-regional open skies agreement to have ever been concluded.

In today’s air transport industry liberalization trend, EU is the world’s largest and most successful example of regional market integration and liberalization. European aviation markets were traditionally protected, fragmented and highly regulated by States. Until in April 1997, the EU completed a regional integration of the operation of air services among its member States into a single aviation market. The EU liberalized its air transport sector in three stages, which are known as the first, second and third packages.⁴ The EU’s successful liberalization of the air transport industry ushered in a period of unprecedented growth in air transport and introduced many new entrants and business models into the market.

Unlike the EU, ASEAN is still paving its way to adopting such a regime. In fact, not all of the ASEAN member States are on the same page for a full liberalization of this industry in the region. Thus, liberalization in this region is being conducted gradually.⁵ In fact, although since 2015 the multilateral agreements on air services as the ASEAN open skies agreement package⁶ has come into effect, country like Indonesia still put limitation into its implementation in the name of sovereignty to protect its domestic market and interests.

³ ASEAN is an international regional organization comprising 10 South East Asia States and governing common economic, and social policies. The ASEAN’s members are Indonesia, Malaysia, Thailand, Singapore, Brunei Darussalam, Lao PDR, Vietnam, Myanmar, Cambodia, and the Philippines.

⁴ Brian F. Havel: *Beyond Open Skies, A New Regime for International Aviation*, Kluwer Law International, 2009, p. 12.

⁵ Unlike, the EU open skies regime, in the ASEAN context, to date, open skies does not go beyond the fifth freedom. For further details please refer to the ASEAN Multilateral Agreement on Air Services signed in Manila on 20 May 2009 (“MAAS”) available at <http://cil.nus.edu.sg/rp/pdf/2009%20ASEAN%20Multilateral%20Agreement%20on%20Air%20Services-pdf.pdf>, last accessed on 1 April 2015; and ASEAN Multilateral Agreement on the Full Liberalization of Passenger air Services signed in Bandar Seri Begawan on 12 November 2010 (“MAFLPAS”) available at <http://cil.nus.edu.sg/rp/pdf/2010%20ASEAN%20Multilateral%20Agreement%20on%20Full%20Liberalisation%20of%20Passenger%20Air%20Services-pdf.pdf>, last accessed on 1 April 2015.

⁶ Unlike EU which established its liberalization regime through the EU internal regulation (the Commission Regulation (EC) No. 1008/2008 on Common Rules for the Operation of Air Services in the Community) and the 2002 CJEU open skies rulings, ASEAN member States set its open skies regime through negotiations that are put into multilateral agreements, i.e. MAAS, MAFLPAS, and ASEAN Multilateral Agreement on the Full Liberalization of Air Freight Services signed in Manila on 20 May 2009 (“MAFLAFS”). Thus, these multilateral agreements are distinctive characteristics of the ASEAN open skies policy compared to the one established under the EU. These multilateral agreements and their implementing protocols are bibles for the implementation of open skies in ASEAN. To know exactly how the ASEAN open skies unique system works is by going through each of these multilateral agreements.

From the above, integrating the two unique characteristics of each of the EU and ASEAN open skies regimes into one regime of inter-regional open skies as mandated by the Joint Declaration will be a challenging task for both of the blocs.

The EU – ASEAN Open Skies Plan Prospect

To make this Plan taking place, all of the pieces of the puzzle then need to fall in place. From the EU side, it is no doubt that they are very ready to make this plan soon come true. As a regional organization, the EU already has a well-established internal (open skies) system. I analyse that they have at least three characteristics that strongly sustaining the implementation of the open skies policy within the region, namely (i) a “one door” external policy, (ii) regulatory convergence, and (iii) joint bodies/agencies.

The “one door” external policy is that EU has a centralized authority/supervisory body dealing with open skies policy, the EC. The EC is acting as the representative of the EU member States. Thus, dealing with the EC is considered as dealing with the 28 EU member States. This “one door” external policy has been proven to make coordination among member States in the region more effective and efficient. Next, the regulatory convergence is that the EU member States recognizes an internal legal system (with its clear sanctions) among them. It successfully brings the member States to fully implement and obey any policy concluded, including the open skies policy. The last interesting feature is the existence of agencies/bodies/forum for special purposes related to European aviation, *inter alia*, Eurocontrol and the European Aviation Safety Agency (EASA). The existence of those bodies has effectively divided up the complex area of aviation into special/functional bodies or agencies that ease the EC's tasks in monitoring the implementation of the EU open skies policy.

Further, from the EU's perspective, realization of the Plan will be easier because EU has already a lot of experience in engaging in open skies agreements with its key partners, for example, with Canada in 2009 and with the US in 2009. Although those experiences happened at a different level, in this case, a State and a regional organization, those experiences will buoy the EU's confidence in dealing with open skies with other new partner(s), including regional organizations like ASEAN.

Interestingly, the three characteristics of the EU, which hold a vital role to the success of the implementation of the EU open skies policy, cannot be found in the ASEAN open skies policy. In fact, ASEAN has its own characteristics that are completely the opposite of what the EU has. ASEAN has no “one door” external policy like the EU does; consequently, ASEAN still uses a traditional bilateral agreement approach in concluding air transport external affairs with its key partners. Unlike the EU, which has regulatory convergence, ASEAN has a fragmented internal legal system that leads to no general recognition of law and no legal standard within its member States. Further, ASEAN has no centralized authority like the EU has with the EC, the European Parliament, and the Court of Justice of the European Union. As a result, internally, ASEAN has no authority in supervising the implementation of the open skies policy, meanwhile, externally, it will result in ASEAN's

key partner(s), whereas every time they deal with ASEAN, they have to negotiate with each of the ten ASEAN States, instead of just one as with a group of nations. Lastly, the salient characteristic of ASEAN open skies is that ASEAN has MAAS, MAFLPAS, and MAFLAFS as its open skies policy guidelines of which each is open to reservation from the member States. The reservation will impede full implementation of the policy within the region. These ASEAN characteristics are completely hampering the full implementation of the ASEAN Single Aviation Market (“**ASAM**”)/ASEAN open skies policy in the region.

From the ASEAN side, the above conditions make realization of the Plan look too ambitious. For the time being, the ASEAN States are obviously not ready to implement the Plan. There is plenty of internal homework needing to be fixed so that ASEAN is able to compete with the EU in the future under the framework of the inter-regional open skies policy. Adopting the three EU characteristics within ASEAN will be a good starting point, which at the same time will also be the hardest point for the ten member States to be realized. Why? Because some ASEAN States still see this regional policy as a threat to their national interests. Thus, ASEAN States put their sovereignty above all. In fact, sovereignty issues complicate the prospects for example in harmonizing competition policies as well as safety, security and air traffic management issues. Thus, having those three EU characteristics will only be another ambitious goal if each ASEAN member State still insists on upholding its sovereignty above all.

Knowing the above facts, either from the EU or ASEAN sides, my answer to my first question is that the Plan is feasible to be realized to the extent that each of the blocs has an already well-established internal open skies system. How to measure that a regional open skies is well established then? Although there is no commonly agreed well-established open skies system parameter, criteria released by the US DOT and a regional system owned and applied by the EU may be used as reference considering that US is one country and the EU is one regional organization which have pioneered the system and so far are deemed successful.⁷

⁷ See Defining “Open Skies,” 57 Fed. Reg. 19323-01, 1992; See also *Towards Open Skies*, a policy Paper by DOT, 1992, p. 5-21. According to the DOT, there are 11 key characteristics of open skies, as follows:

1. Open entry on all routes;
2. Unrestricted capacity and frequency on all routes;
3. Unrestricted route traffic rights including no restrictions as to international and beyond points;
4. Pricing flexibility;
5. Liberal charter arrangements;
6. Liberal cargo regime;
7. Ability to convert earnings and remit in hard currency promptly and without restriction
8. Open code-sharing opportunities;
9. Self-handling provisions (the right of the carrier to perform and control its airport functions in support of its operations);
10. Pro-competitive provisions on commercial opportunities, user charges, fair competition and inter-modal rights; and
11. Explicit commitment to non-discriminatory operation of and access to computer reservation systems.

Some Legal Aspects to be considered in realizing the Plan

Moving on to the next question, on what the Plan implies in regard to market access, ownership and control, regulatory competition, and safety and security in the two blocs, it will be difficult for the weak system within ASEAN to make ASEAN carriers survive competing with the EU carriers. A legal basis for going beyond the fifth freedom is still far off any discussion agenda within the ASEAN Transport Ministry, so are the ownership and control provisions in ASEAN internally which still need approval from other ASEAN member States will hamper full implementation within ASEAN itself and the Plan, where it will be difficult for EU carriers to penetrate the bloc. In terms of completion of regulation and safety and security provisions, having no common recognized competition regulation and different level of compliance of safety and security standards within ASEAN will cause the EU to have to adjust to each of the ASEAN States' conditions in implementing the Plan. In short, the ASEAN side is still not yet ready to face the implications of the Plan in those areas. This situation will also affect EU carriers where they cannot maximize their interests from the implementation of the Plan. Thus, it can be said that for the time being, in implementing the Plan the EU shall have to wait for there to be internal progress of ASEAN open skies to maximize the work of the working group in bridging common interests and compromising to solve the problems between the blocs.