

## UKRAINE AND EUROPEAN UNION OPEN SKIES

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*This article contains the detailed analysis of current issues and prospects of Ukraine's entry into EU Open Skies agreement.*

*Today, there exist two different meanings of «open sky» term. First was set by the Chicago Convention in 1944 and means the mode of use of air space in the international aviation business. The second meaning is the regime established by the 1992 agreement as one of the confidence measures of international security, as well as an element of verification of agreements on arms control. In addition, this agreement provided the distribution of «Open Skies» as instrument for monitoring and protecting of the environment.*

*In this paper, an «open skies» will be analyzed only as the former.*

*Ukraine started preparation to sign the treaty in December 2007 and since then held five rounds of negotiations. Euro Commission still observes no progress in negotiations with Ukraine on “Open Skies”, as it was said by EC VP Transport Siim Kallas in September 2012.*

*He made note that currently the most controversial issue is the certification of Ukrainian-produced aircrafts.*

*Euro Commission VP also mentioned that it is planned to conclude agreements on unified aviation space with Ukraine up to 2015.*

**Key words:** *Open Skies, Chicago Convention, freedoms of the air, aviation space, aviation law, ICAO, Euro Commission*

Open Skies issue attracts attention of political, scientific, journalist and business quarters for a long time already. Today, there exist two different meanings of «open sky» term.

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Greater part of respective publications and speeches have significant political trend. The order of flights operation in independent aviation space by Open Skies program has a special kind (*sui generis*) according to which country can't reject the operation of flight across its territory by motivating the refusal action with unconditional permission order on all flights over its territory in accordance with the principle of complete and exclusive sovereignty.

Legal analysis is rarely provided that obviously caused by specification of problem.

Open skies is an international policy concept that calls for the liberalization of the rules and regulations of the international aviation industry—especially commercial aviation – in order to create a free-market environment for the airline industry. Its primary objectives are:

- to liberalize the rules for international aviation markets and minimize government intervention as it applies to passenger, all-cargo, and combination air transportation as well as scheduled and charter services

- to adjust the regime under which military and other state-based flights may be permitted.

According to Article 6 of Convention on International Civil Aviation (known as Chicago Convention), scheduled international air services can be performed over the territory or on the territory of a Contracting State only by special permission or other authorization of that State and under the terms of such permission or authorization. Each state has the right to allow, restrict or prohibit, and regulate the performance of any flight on their own or through its territory, including commercial transportation of passengers and cargo. For open skies to become effective, a bilateral (and sometimes multilateral) Air Transport Agreement must be concluded between two or more states.

The freedoms of the air are a set of commercial aviation rights granting a country's airline(s) the privilege to enter and land in another country's airspace. Formulated as a result of disagreements over the

extent of aviation liberalisation they are standardized set of separate air rights which may be negotiated between states:

1. To fly across the territory of either state without landing.
2. To land in either state for non-traffic purposes, e.g., refueling without boarding or disembarking passengers.
3. To land in the territory of the first state and disembark passengers coming from the home state of the airline.
4. To land in the territory of the first state and board passengers travelling to the home state of the airline.
5. To land in the territory of the first state and board passengers travelling on to a third state where the passengers disembark.
6. To transport passengers moving between two other states via the home state of the airline.
7. To transport passengers between the territory of the granting State and any third State state without going through the home state of the airline.
8. To transport cabotage traffic between two points in the territory of the granting State.

The convention was successful in drawing up a multilateral agreement in which the first two freedoms, known as the International Air Services Transit Agreement (IASTA), or «Two Freedoms Agreement» were open to all signatories. As of mid-2007, the treaty is accepted by 129 countries. The third to fifth freedoms shall be negotiated between states. Because only the first five «freedoms» have been officially recognized by international treaties, the ICAO considers the remaining «freedoms» «so-called».

The first and second freedoms of air by themselves do not contain any of the rights to perform air transportation, and are not directly involve any commercial activities on the territory of the State. But in some cases, these «technical freedoms» may have a significant economic importance as having the right of passage for a shorter and more efficient routes and the ability to have a refuel can increase the passenger load of aircraft, and thus generate more revenue from the use of those two basic freedoms of the air while operating over third countries.

In cases when this state has a large territory and significant number of direct air routes connecting many other states, granting foreign airlines the right to fly would produce great economic benefits. It is no coincidence that countries, whose territory is essential for transit routes, do not participate in IASTA. Among them are Russia, Brazil, China and Canada. These countries prefer to regulate the transit crossovers and technical landings on a bilateral basis.

Disorder in the air space of the European countries caused by volcanic eruption in Iceland in April 2010 gave a «new momentum» for creation of unified EU airspace management. The European Commission in close cooperation with air traffic experts from EU member states agreed on a mandate for the European air routes management (European Network Manager) and laid the foundation for the way of introducing a unified European air space.

However, some states consider this plan as a risk to national security, and trade unions of aviation industry are concerned that according to the plan implementation several tens of thousands of professionals would be fired.

As you know, Ukraine started preparation to sign the treaty in December 2007 and since then held five rounds of negotiations. But, as president of “Ukraine International Airlines” (UIA) Yuri Miroschnikov mentioned, Ukraine’s entry to the European common aviation space would give a huge competitive advantage for European airlines. They will have virtually unlimited access to the Ukrainian market. And their huge resources and opportunities would be disproportionate in comparison to all Ukrainian airlines. Even one powerful carrier (like Lufthansa) just in one-year term due to dumping and other tools could minimize the position of domestic airlines. And once they lose their financial stability or even leave the market, the foreign company will compensate all the losses due to the increase of tariffs for markets to which it will receive exclusive access. Therefore it is important that public policies and strategies of state would be lined up with the long-term view of development of domestic air industry. However, he noted that it is not a full rejection of Ukraine from the opening of the market. Ukrainian airlines say about deliberate actions to ensure equal conditions for domestic companies in acceding to the «Open Skies» as now the resources of domestic and foreign air carriers obviously are not comparable. And so the proper preparation for the opening of the sky will largely depend on the actions of the state. In Europe rules are unified as they have many years of experience in standardization. Recently Ukraine has started to implement European standards, but still there are many outdated regulatory acts, and some of them even

come from Soviet times. Of course, in such different fields of regulation is very difficult to ensure stable control of safety and equality of opportunity for market participants.

On the EU side also there is one very distinct advantage: leading carriers of member countries almost exclusively own commercially good slots in their base airports. After all, you can offer competitive prices, but if you can not fly to the airport in convenient time, it is a serious disaster for revenues. Again, among the factors that limit the possibility of Ukrainian airlines are unequal taxation and configuration of the aircraft fleet. For example, in EU import of aircraft for international transportation, as a rule, completely exempt from value added tax (VAT). In Ukraine, VAT is not charged only in case of operating leasing, when the ownership of the aircraft is not transferred to the airline. This factor artificially limits the ability of domestic carriers to upgrade the fleet, as the cost of the aircraft is at once increased by 20%.

Another deterrent is that Ukraine has signed but not ratified the Cape Town Convention. This document protects the interests of the owner of the aircraft in situations where the aircraft operator has problems. If the Convention was ratified, in the case of bankruptcy of the air carrier, vendor equipment would have been seamlessly returned to leasing company. Ratification of the Convention would reduce the risk of the lessor for import of equipment in Ukraine. Consequently, payments to leasing company for Ukrainian airlines would be less.

Finally, a formal pretext for delaying the signing of the agreement on Ukraine's accession to the European open skies is a requirement of Schengen visas for Ukrainians to fly to many European countries. Before this time no other country connected the question of visa-free agreement with unified European air space. For example, there is a visa regime with the EU for Georgia and Moldova, but those countries already signed an agreement. Thus, experts link this nuance to the close relationship between politics and economic sectors, including aviation, which are common for Ukraine. However, the Ministry of Infrastructure continues to insist on the introduction of visa-free regime and actually block the signing of the agreement on "Open Skies". The ministry said that Ukraine does not intend to abandon their demands for visa-free regime, as the one-sidedness of the visa regime creates a competitive advantage in favor of Western Airlines and Ukrainian airlines employ more than 20 thousand people who could lose their jobs.

But the real obstacle to the signing of the agreement is not a visa regime with Europe. Ukrainian Civil Aviation Service noted that there are number of technical issues on inconsistencies of aircraft certification systems in the EU and Ukraine. The key issue, on which Ukraine insists, is to let Ukrainian and Soviet-produced aircrafts to have access to air transportation market and operation as the part of "Open Skies" certified park.

Unfortunately, Euro Commission insists that, under EC Regulation N216/2008, the Ukrainian State Register of civil aircraft has to withdraw all non-certified European Aviation Safety Agency (EASA) aircraft. Moreover, Ukraine has to pass the certification authority to EASA. In response, Ukrainian Civil Aviation Service pointed out that, according to the Chicago Convention, Ukraine as a developer and manufacturer of aircraft is responsible for maintaining the airworthiness of tens of thousands of uncertified EASA aircraft and their components, and therefore can not agree to the following conditions. Now only An-26 has certificate of EASA. All our other aircrafts, including «Ruslan» and AN-148, are flying over Europe without this certificate, and each type of aircraft certification costs \$ 40 million a year. Only option to address this issue is the agreement on mutual recognition of certificates of airworthiness (BASA).

### **Conclusion**

As summary, we can come to the conclusion that there is ambiguity of the Ukraine-EU "Open Skies" issue. From one point of view, mutual opening of aviation markets, as well as to application of the same standards in security, air traffic management, social services and protection of the environment would be huge step ahead for the state and for the passengers. But as a number of issues exist, probably Ukraine should not rush into signing the agreement, because it will be disastrous for Ukrainian carriers and aircraft industry. The state can not cope with the domestic monopoly on air service, so it obviously can't protect domestic airlines from European powerful carriers.

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He made note that currently the most controversial issue is the certification of Ukrainian-produced aircrafts.

Euro Commission VP also mentioned that it is planned to conclude agreements on unified aviation space with Ukraine and other countries (Azerbaijan, Tunisia, Turkey and Egypt) up to 2015.

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**Мазур В. І., Іванкевич О. В., Чмельов В. О. Україна і відкрите небо Європейського Союзу / Інститут міжнародних відносин Національного авіаційного університету.**

*Стаття містить детальний аналіз поточних проблем та перспектив щодо вступу України до договору Відкритого неба Європейського Союзу.*

*На сьогодні існує два тлумачення терміну «відкритого неба». Перше було запроваджене на Чиказькій конвенції у 1944 р. і являє собою режим використання авіаційного простору у міжнародних авіаційних перевезеннях. Під другим значенням розуміють деякі запобіжні заходи з міжнародної безпеки, запроваджені у 1992 р., а також один з елементів верифікації договорів, що контролюють процес озброєння. На додачу, цей договір встановив режим «відкритого неба» у як інструмента для моніторингу та захисту навколишнього середовища.*

*В даній статті проаналізовано перше тлумачення «відкритого неба».*

*Україна почала готуватися до підписання договору у грудні 2007 р. і вже провела п'ять раундів переговорів. Єврокомісія досі не бачить значного прогресу у переговорах з Україною по «відкритому небу», як зазначив віце-президент Єврокомісії з питань транспорту Сіім Каллас у вересні 2012 р.*

*Він також зауважив, що найбільш спірним питанням залишається ліцензування літаків українського виробництва.*

*Віце-президент Єврокомісії також зазначив, що переговорний процес з Україною з питання об'єднаного авіаційного простору планується завершити до 2015 р.*

**Ключові слова:** відкрите небо, Чиказька конвенція, авіаційний простір, авіаційне право, «свободи» авіаційного простору, ІКАО, Європейська комісія.