

Welcome to the European Union: Be Alert to New Customs Regulations

By James E. Cooling,
Cooling & Herbers, PC

“Bienvenue à l’Union Européenne: Votre aéronef a été saisi par les Douanes Françaises!”

Welcome to the European Union: Your aircraft is hereby seized by Customs! You should hope you’re never greeted with those words when arriving in a European country. The global economy dictates that many U.S. and multinational companies with U.S.-registered aircraft fly to destinations within the European Union. But for some operators who are unaware of specific European customs rules, the international business opportunities that a corporate aircraft helps make possible could come at a price ranging from stiff monetary penalties to seizure of the aircraft. The key to avoiding such expensive aircraft-related problems is to be informed before you go.

First, a little background. The European Union (EU) is comprised of 15 independent states founded to enhance political, economic and social cooperation. The member states include Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Portugal, Spain, Sweden, and the United Kingdom. Not surprisingly, the EU promulgated its own Customs Code in order to safeguard the revenue of the European Community and its member states. Corporate aircraft operators who ignore the EU Customs Code do so at their peril.

Non-EU-registered corporate aircraft operators have been fined or have had their aircraft detained on numerous occasions during recent years for operating illegally in member states. This has occurred primarily in Nice and Paris. For example, U.S.-owned and registered Gulfstream III and Challenger aircraft were seized recently at Paris Le Bourget Airport for alleged customs violations. The same has happened at other EU airports.

Hopefully, you will never have to call your CEO from an EU-member country to report that the corporate aircraft and all aircraft documentation have been seized by custom authorities, and that you are making airline reservations for your stranded passengers, and that you would appreciate a wire transfer of \$2 million U.S. to pay the value-added tax (VAT) plus 200,000 French Francs to pay the accompanying fine, and that you are not sure why this is happening because you do not speak the language and are unable to understand the customs officer or read the customs documents – which, by the way, you have refused to sign.

Your CEO probably would listen carefully and either: (1) offer to find you a new job; (2) negotiate with the foreign embassy for two or three weeks while the airplane remains confiscated; (3) post security in an amount equal to the value of the aircraft and the fine and agree to pay later; (4) pay the tax and fine in order to get your airplane released immediately; or, the best option (5) call a customs expert in the EU who handles these types of problems every day.

With professional, experienced help on customs issues, you will: (1) eventually get your aircraft released; (2) understand that it may be advantageous to temporarily import your aircraft into an EU country with a favorable value-added tax rate (the United Kingdom or Denmark); and (3) hopefully, pay a reasonable fine and get your \$2 million security deposit back for your CEO, which may save your job. Then your customs expert will advise you to tell your friends who frequently fly into the EU that the way to avoid a similar experience is to either gain a very good understanding of the EU customs regulations as they are interpreted by each of the 15 member states or, preferably, import the aircraft into the EU and not worry again about being detained by EU customs.

An aircraft is considered imported when it is brought into the EU-member state and all applicable duties and value-added taxes are paid, and the aircraft is entered into the appropriate public record.

If you fly frequently within the EU and decide to import your corporate aircraft into the EU, you should know that value-added tax (VAT) rates and import duties vary throughout EU countries, ranging from about 18.5 percent to 20.5 percent. Certain countries – the United Kingdom and Denmark – have more favorable rates for certain types of aircraft depending on size and weight. The EU is attempting to harmonize these rates but, currently, each member state within the EU can set its own VAT and duty rates based on its own taxing policy.

Martyn Fiddler, an EU customs expert, advises that, to his knowledge, the United Kingdom is the only EU country that does not require an operator to change the state of registration to the country where the importation takes place. The operator can maintain the current U.S. registration and as far as the U.S. is concerned, the status of the aircraft does not change. The aircraft must be physically on the ground in the United Kingdom at the time of importation. VAT is payable to the UK at a rate of zero for large aircraft weighing more than 8,000 kilos (17,637 pounds). Once the aircraft is imported into any EU member state, the EU permits free circulation of the aircraft within the European Union.

Is it that easy? Phil Rickert, a former director of aviation for a major U.S. corporation, says that he occasionally flew his company's EU customers within Europe at no charge. After he was stopped and questioned by EU customs, he imported his company's U.S.-registered corporate aircraft into the United Kingdom and never again experienced an EU customs problem. Rickert said he was very pleased with the guidance he received from his customs broker.

Understanding the EU Customs Code

More background: Commission Regulation (EC) No. 2913/92 was implemented by Commission Regulation (EC) No. 2454/93 and has been amended numerous times with the latest amendment, Commission Regulation (EC) No. 993/2001, being adopted by the EU May 4, 2001. These regulations (including amendments) make up the EU Customs Code. After an EU Customs Code amendment is adopted, it may take 6 to 12 months before all member states implement it. Also remember that EU member states and their customs authorities do not always agree as to how EU legislation should be interpreted. This is not surprising given that EU regulations are promulgated in Brussels and then translated into 11 different languages.

Under certain specific conditions and restrictions, the EU Customs Code permits a temporarily imported aircraft to enter the EU with no customs documentation and no requirement to pay VAT or import duties prior to departure. If you violate any of the conditions and restrictions, an EU member state may take the position that you have illegally imported your aircraft into the EU without proper declaration and without payment of VAT and duty, and seize your aircraft.

Temporary Importation – Private vs. Commercial

Now for the conditions and restrictions: Commission Regulation (EC) No. 993/2001 (766 pages, adopted May 4, 2001) states that a non-EU-registered aircraft in "private use" may enter the EU for a period of up to six months without being liable for VAT or import duty tax liability. "Private use" is defined in Article 555 as "use other than commercial."

"Commercial use" is defined as "the transport of persons or of goods for remuneration or in the framework of an economic activity of an enterprise." This new EU regulation creates a broader definition of commercial use, arguably applying to any aircraft owned by a corporation operating in the EU on behalf of its business

entity. Article 562 states that aircraft in commercial use are permitted to remain in the EU only for “the time required for carrying out transport operations.”

When asked how long this means, Fabien Foucault, a Paris attorney experienced in EU customs matters, advises that it means however long it takes to get your business done. When it’s concluded, you depart. There are no set number of days. If it takes two days to do your business, then the airplane should depart after two days.

How do they know how long you’ve been in country? Remember that EU customs authorities have access to Eurocontrol flight records and can easily track flights to monitor when you come and go within the EU. Occasionally, a non-EU-registered aircraft will depart for a non-EU country such as Switzerland or Norway in order to remain in compliance with EU temporary import regulations.

Carriage of EU Nationals

The import status of the aircraft is not the only concern when flying internationally. Customs authorities also are looking at the status of the people inside the aircraft. Operators of non-EU-registered aircraft being flown in the EU under a temporary import status should be very careful about complying with EU regulations for the carriage of EU passengers and crew members. The most difficult question to answer is whether a corporate aircraft that is registered outside the EU can carry EU nationals within the EU. EU Customs Code Article 561 provides in part that:

“Total relief from import duties shall be granted where means of transport are used commercially or privately by a natural person established in the customs territory of the Community and employed by the owner of the means of transport established outside that territory or otherwise authorized by the owner.”

This EU code section appears to recognize that EU nationals who are employees of the owner of the aircraft, and EU nationals authorized by the owner to be on the aircraft, may travel on flights within the EU if the flight is otherwise in compliance with the EU Customs Code regulations.

This would appear consistent with an earlier interpretation of EU Customs Code Amendment 2454/93. The interpretation was contained in an official letter dated August 2000 to Air Routing International, Inc., another UK customs professional. The letter, which was from the Director General of French Customs in response to an Air Routing inquiry, advised that the Ministry responsible for Transport considers business aviation transport operations to be in the private domain, which does not require any prior authorization to proceed with the flight other than that a simple flight plan be lodged with the General Directorate of Civil Aviation (D.G.A.C.). This permits the temporary admission of an aircraft owned by a party outside the Customs Union of the European Community to operate within the EU in accordance with EU regulations. The letter further states:

“As such aircraft are always accompanied by a responsible authorized person or senior employee of the third-party company, it is the latter who becomes the de facto beneficiary of the aircraft’s temporary duty-free entry authorization as that person is acting on behalf of such company registered outside the EU. The presence on board of passengers, whether residents or non-residents of the EU, has no influence on the rules and regulations of temporary duty-free entry and passengers will have no formalities to fulfill.

“In conclusion, the fact that a resident of the community is a passenger on board the third party’s (i.e., company registered outside the EU) aircraft must not be considered as the aircraft being used to the passenger’s personal benefit as such person is not a beneficiary of the temporary duty-free entry regime.”

EU Code 993/201 Article 561 and the August 2000 official letter from the Director General of French Customs would indicate that the presence onboard of passengers, whether residents or non-residents of the EU, does not affect the temporary duty-free entry. But would the French director of customs give the same opinion today, now that EC Customs Code 993/201 has broadened the definition of commercial use? Will the Ministry of Transport continue to treat business aviation transport operations to be in the private domain?

One thing is clear. It is extremely important that the owner either be onboard the aircraft or provide a letter or copy of the lease authorizing the passengers to use the aircraft. This demonstrates to customs authorities corporate use of the aircraft, and that the flight is not for hire or reward.

Martyn Fiddler takes a more cautious approach with regard to the carriage of EU nationals. He advises that aircraft operators in the UK should not carry EU nationals or crew, but if they do so, they should be aware of EU Code 742. This regulation provides that customs authorities may revoke a temporary importation authorization if customs finds that the means of transport has been "made available to another person in the customs territory for any purpose other than immediate re-exportation" (ie. to a country outside the EU).

Obviously the EU Customs Code is complex. Compliance requires clarification by the EU to assist non-EU-registered operators in understanding the regulations. Member states may prefer that aircraft operating within the EU be imported into an EU country so as to collect import duties and value-added taxes and safeguard the revenue stream of the European Community.

A 20.5 percent VAT on a Gulfstream or a Challenger or any such aircraft is a lot of money, and operators of non-EU-registered aircraft would be well-advised to carefully comply with the EU customs laws and/or investigate the benefits and burdens of importing a corporate aircraft into an EU-member state. If a company has operations within any of the EU-member states, they should also investigate the possibility of their being entitled to recover the full amount of the value-added tax if they indeed pay it.

Developing a better understanding of international and European Union operations is the goal of the European Business Aviation Conference & Exhibition (EBACE) that will be held in Geneva, Switzerland, May 28-30, 2002. EBACE is sponsored in partnership by the European Business Aviation Association and the National Business Aviation Association. The conference is an opportunity to learn more about operating and basing U.S.-registered aircraft in Europe. It also will be an ideal forum to talk to EU regulatory authorities. For more information, visit www.ebace.com.

The European Union has an office in Washington, D.C. and a Web site at www.eurunion.org. The Web site for the European Union in Brussels, Belgium, is www.europa.eu.int. EU regulations can be obtained in the United States through the European Document Research Group in Washington, D.C., the official agent of the Office for Official Publications of the European Communities, 1100 17th Street NW, Suite 301, Washington DC 20036; tel: (202) 785-8594; fax: (202) 785-8589; e-mail: info@europeandocuments.com. The NBAA Tax Committee has recognized the importance of European customs and VAT issues and is including the subject in its NBAA Tax Conferences.

James E. Cooling is an attorney with the law firm of Cooling & Herbers, P.C. in Kansas City, Missouri. The firm represents United States and foreign business aircraft owners and operators in aircraft transactions and regulatory compliance. A graduate of the University of Notre Dame Law School, Cooling is a pilot, aircraft owner, and member of the NBAA Board of Directors.