

The Changed Regulatory Environment for the Operation of Business Aircraft in Russia

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The year 2019 was marked by a number of regulatory changes affecting the operation of business aircraft in Russia. The changes are twofold: there has been a drastic change in the application of temporary importation regulations as applied to business jets, and there have been changes to regulations affecting landing permits.

Background

The changes to the regulation of the operation of business aircraft in Russia were initially very confusing to market participants as they encountered an unexplained cessation of business as usual in early 2019. Business as usual had been that foreign (non-Russian) commercial operators of aircraft had been able for decades to conduct domestic flights within Russia on foreign-registered aircraft, based on "one-time flight permits." The Russian Federal Customs Service (the "Customs Service") would look the other way and not inspect whether a flight that was declared to be a private flight was, in fact, a commercial flight. Then, suddenly, in the spring of 2019 the acquiescence of the Customs Service was discontinued, though flight permits could still be obtained. It was not clear why Russia had suddenly decided to commence enforcing its own laws that had long declared cabotage flights to be illegal, i.e., commercial flights within Russia on foreign-registered aircraft that are not customs-cleared and placed on to a Russian commercial operator's certificate for commercial use.

The background to the changed regulatory environment in the spring of 2019 was that a lot of attention was being paid to the illegal operation of foreign-registered aircraft within Russia. There were two related criminal investigations, one directly concerning the illegal operation of aircraft that were not customs-cleared, and the other one concerning the issuance of flight permits in exchange for bribes.

With the commencement of the Sfera Jet case in March 2019, the Customs Service began an across the board halt on the issuance of customs clearances of foreign-registered aircraft for flights within Russia or the Eurasian Economic Union (the "Eurasian Union"). About the arrest of members of management of Sfera Jet and the impoundment of four aircraft (in Russian) see discussion on page 23 here:

- www.bizavnews.ru/images/bizavweek/BizavWeek_468.pdf

and news reports at:

- www.rbc.ru/society/12/03/2019/5c87d6389a794745b1e9a283
- www.rbc.ru/rbcfreenews/5c894ceb9a7947b81199f4e7
- <https://www.interfax.ru/russia/655379>.

There was also a case which commenced on July 8, 2018, in the Meschansky district court in Moscow against a now-former employee of the Russian Agency for Air Transportation ("Rosaviatsia") named Yury Malyshev who accepted a bribe for a flight permit. (See <https://www.rbc.ru/business/16/07/2018/5b4c553d9a7947258b880f72>.) Mr. Filatov, General Director of iFly (<http://www.iflytd.ru/about/>) was arrested for giving a bribe and Mr. Malyshev (at the time, a deputy head of a department of Rosaviatsia) was arrested for accepting the bribe.

It had been known for years that there had been large-scale, pervasive corruption in the issuance of flight permits and customs clearances for domestic flights within Russia of foreign-registered aircraft. Business aviation industry leaders in Russia had previously openly advocated the making of false flight plans for domestic commercial flights, declaring such flights to be private when they were, in fact, commercial. There was a low probability of adverse consequences since regulators at Rosaviatsia and in the Customs Service were incentivized not to inspect flights for which a flight permit had been obtained through certain channels.

The privatization and commercialization of the sale of flight permits for illegal cabotage flights was so pervasive that there was even an investigation by the General Prosecutor's Office of Russia which established that the functions of Rosaviatsia connected with the issuance of flight permits, which are supposed to be provided for free, had been, in fact, transferred to a commercial organization, Aerotrans, for private gain. The Russian Federation Ministry of Transport ruled that Rosaviatsia was issuing flight permits illegally, and sent official communications to the Director of Rosaviatsia and developed a new regulation demanding that permits be issued in conformance with Russian law. Rosaviatsia refused to carry out these instructions and refused to amend its rules accordingly. This inaction by Rosaviatsia was held by the Russian Federation Federal Antimonopoly Service to be a violation of Russian competition law by giving access to information to Aerotrans in a prioritized manner. See Aerotrans and Rosaviatsia v. the Federal Antimonopoly Service of the Russian Federation, Case No. 40-140666/13.

Flight Permits

The issuance of flight permits by Rosaviatsia is governed by Russian Federation Government Decree No. 527, dated April 28, 2018, as further amended by Government Decree No. 652, dated May 24, 2019. Even though the practical application of some of the rules is not straightforward, since the commencement of the case involving iFly and Mr. Malyshev in July 2018, Rosaviatsia has not delayed issuances of flight permits without a stated formal reason. Decree No. 652, in force since May 2019, created a new requirement that, for a foreign carrier to receive permission for a charter to, from, or within the Russian territory on a foreign-registered business aircraft, the foreign operator must obtain non-objections to the planned flight from Russian commercial operators.

As of June 21, 2019, Rosaviatsia introduced new restrictions on the operation of foreign registered aircraft on flights to, from, and within the Russian Federation, including that foreign operators must obtain the non-objection of a number of selected Russian commercial operators who may object to a foreign operator conducting a leg of a flight within Russia, even as part of an international roundtrip of a foreign registered aircraft. An exception is allowed for private flights operated in the interests of an aircraft owner, transit flights through the Russian Federation, flights for the purposes of rendering humanitarian assistance, medical evacuation, transportation of personnel and supplies during natural disasters or in cases of emergency, and certain other flights. See Section 3 of the Russian Aeronautical Information Publication (AIP) Rules of the Air and Air Traffic Services (RAC) which provides, in part:

3.3 A request for flight operations to the territory of the Russian Federation from the territory of a foreign state and flight operations from the territory of the Russian Federation to the territory of a foreign state or within the territory of the Russian Federation as well as transit operations through the territory of the Russian Federation if such operations are executed by aircraft, having the aircraft capacity of not more than 20 passenger seats, shall be submitted by a foreign operator not later than one working day before the beginning of flight operation.

A request for flight operations from the territory of the Russian Federation to the territory of a foreign state or within the territory of the Russian Federation executed by aircraft, having the aircraft capacity of more than 20 passenger seats, and aircraft executing cargo operations and (or) mail transportation shall be submitted not later than 14 working days before the beginning of flight operation.

A request for flight operations to the territory of the Russian Federation from the territory of a foreign state as well as transit operations through the territory of the Russian Federation executed by aircraft, having the aircraft capacity of more than 20 passenger seats, and aircraft executing cargo operations and (or) mail transportation shall be submitted within the following time periods: - for operation of one flight according to charter contract (in case of a transit flight - one turnaround flight or one one-way flight) - not later than 5 working days before the beginning of flight operation;

3.5 The request for single flights shall be submitted in the application Form "N." The form is given on pages GEN 1.2-13 and GEN 1.2-14.

3.5.1 During the preparation of the request the foreign operator shall send requests to the Russian operators, included in the list (further - the list of the Russian operators) published on the website of the Federal Air Transport Agency not later than 5 (five) working days before its submission to the Federal Air Transport Agency. The mentioned requests directed to the Russian operators shall include the following information:

- a full name and postal address of a foreign operator, telephone number, e-mail address and the name of a state granted a foreign airline operator's certificate;
- date of a flight, flight number (if available), point of departure, point of destination and all intermediate points of flight route;
- aircraft type with indication of its nationality and registration marks as well as the name of a state of aircraft registry;
- the number of passengers, mass and the name of cargo transported;
- a full name, postal address and e-mail address of a customer of transport operations (charterer of aircraft);
- the information on consignor and consignee as well as persons (bodies) who are host party in respect of passengers among foreign citizens and stateless persons arriving to the territory of the Russian Federation from the territory of a foreign state as in accordance with the Federal Law of the Russian Federation "On the Migration Registration of Foreign Citizens and Stateless Persons in the Russian Federation"...

The Russian United Business Aviation Association (RUBAA) subsequently submitted a request to the Ministry of Transportation to remove the requirement of Government Decree No. 527 that Russian operators must express their non-objection to international commercial flights originating in Russia. However, as of August 2019, there has, apparently, been no public announcement of a response from the Ministry of Transportation.

Customs Clearances

Since the spring of 2019, new impediments to operating foreign-registered aircraft within Russia arose from the Customs Service, and not Rosaviatsia. The attention of the business aviation community in Russia has, accordingly, shifted to the relevant provisions of the Customs Code of the Eurasian Union (the "Customs Code") and the related procedural requirements. Customs filings must be initiated as soon as a foreign-registered aircraft lands at an airport in the Russian Federation or another member state of the Eurasian Union.

The relevant customs regulations and procedures have been in place since May 29, 2014, when Russia, Kazakhstan and Belarus formed the Eurasian Union (the "Eurasian Union," previously called the "Customs Union"), and Armenia and Kyrgyzstan subsequently joined the Eurasian Union. For an aircraft to arrive in Russia and to be made subject to Eurasian Union customs clearance requirements, a landing permit from Rosaviatsia or another aviation regulator within the Eurasian Union must already be in place, and, as mentioned, Rosaviatsia continues to issue flight permits including for roundtrip international flights that include domestic legs (provided the newly non-objection letters from the Russian operators are in place). Domestic legs are now scrutinized by the Customs Service. What is interesting to note, however, is that there has been no change in governing law, but only a crackdown since the Sfera Jet case commenced.

The Customs Code replaced Russia's own prior national customs code. And, today, the import of aircraft and other goods into Russia is governed by the Customs Code and relevant decisions of the Commission of the Eurasian Union.

Under the Customs Code, the first way to temporarily import an aircraft into the Eurasian Union that foreign business-jet operators should consider is the procedure by which an aircraft is cleared as a "means of international transportation" that is carrying out an international flight. Under this procedure, upon the first landing of an aircraft at an airport within Russia or another country in the Eurasian Union, the operator is to provide to the Customs Service a Vehicle Declaration (as per Decision of the Commission of the Customs Union No. 422, dated Oct. 14, 2010) and a General Declaration (as per the 1944 Chicago Convention on International Civil Aviation), declaring a route that begins and ends outside the Eurasian Union.

For the purposes of a Vehicle Declaration, an international flight is defined in Article 1 of the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air (the "Convention"). For the purposes of the Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of the Convention.

Article 1 of the Convention is interpreted to mean that an aircraft that is cleared for use in “international carriage” may not be used to carry passengers or goods within the territory of the Eurasian Union. This does not preclude the aircraft from making more than one landing inside the Union, a point that may be misinterpreted by Russian customs officials who would then refuse to clear an aircraft intending to make more than one stop within Russia or other countries within the Eurasian Union before ultimately departing the Eurasian Union.

For aircraft performing domestic flights, i.e., those carrying passengers and goods within Russia or other countries within the Eurasian Union, there are two temporary importation procedures available, depending on whether the aircraft is used privately or commercially. The basis for them is Article 53 of the Customs Code, which sets out general rules for customs duties and taxes for goods imported into the territory of the Eurasian Union. There are different manners of importing goods, which are comparable to imports into the European Union, with the most important distinction being between an import for free circulation within the Eurasian Union and a “temporary import” of an item which is to be re-exported. In the case of a temporary import, foreign goods may be used for a specific period on the territory of the Eurasian Union, and may be partially or fully conditionally exempted from payment of import duties and taxes. See Chapter 29 of the Customs Code, and Section 1 of Article 219.

If an aircraft is imported into the Eurasian Union temporarily, and is to be used commercially, Section 3 of Article 223 of the Customs Code provides that import taxes and duties shall be imposed on such imported goods at the rate of 3 percent per month of the amount of customs duties and taxes which would be due if the goods were imported for free circulation, to remain permanently in the Eurasian Union. Thus, if an aircraft were temporarily imported, and taxes and duties were paid at the rate of 3 percent per month of the cost of full customs clearance, plus interest on the deferred payments, then the aircraft may lawfully be used commercially within Russia.

If a temporarily imported aircraft is to be used privately by its owner, it may be fully exempted from payment of duties and taxes. Such regime is referred to as “Import 53.” Chapter 29 of the Customs Code is supplemented by three decisions of the Commission of the Eurasian Union affecting business aircraft, decisions numbered 331, 662, and 1388, discussed below. These three decisions provide that a complete exemption from import duties and taxes is provided for a civilian passenger aircraft having a number of passenger seats for not more than 19 people, if the aircraft is owned by a foreign person or legal entity and is used within the customs territory of the Eurasian Union on irregular (not commercially scheduled) flights, and provided further that such use is not intended to generate revenue. A foreign owned aircraft that is imported to Russia temporarily and without any payment of import duties may not be used commercially within Russia.

1. Decision of the Commission of the Customs Union No. 331, was first issued on June 18, 2010, and was last edited on April 29, 2019, by a subsequent decision of the Commission of the Economic Union No. 48 (“Decision 331”). Decision 331 is named: “On approval of a list of goods temporarily imported with full conditional exemption from the payment of customs duties and taxes, as well as the conditions for such exemption, including its deadlines.” Decision of the Commission of the Economic Union No. 48 provides that the following aircraft are exempted from customs duties and taxes: Civil passenger airplanes with a number of passenger seats not more than for 19 people and with empty weight of no more than 28 000 kg (codes 8802 30 000 2, 8802 40 001 1 and 8802 40 003 4), owned by foreign persons and used within the customs territory of the Eurasian Union on irregular (not commercially scheduled) flights, provided that such use is not intended to generate revenue.

2. Decision of the Commission of the Customs Union No. 662, dated May 19, 2011, (“Decision 662”) amended a list of goods temporarily imported with full conditional exemption from duties and taxes which was originally approved by a Decision of the Customs Union Commission, No. 331 dated June 18, 2010, discussed above. Decision 662 provides that the list of temporarily imported goods conditionally exempted from payment of import customs duties and taxes includes the above mentioned categories of civilian passenger aircraft and establishes a maximum period of temporary importation of 30 calendar days. The Decision further stipulates that the total duration of stay of the aircraft in the customs territory of the Union shall not exceed 180 calendar days within one calendar year.

3. Decision of the State Customs Committee of Russia, No. 1388, dated December 04, 2003, and last edited on September 13, 2007, (“Decision 1388”) is named “On the performance of certain customs operations when using the customs regime of temporary import.” Decision 1388 set out a Customs declaration form named: “Declaration of the customs regime of temporary admission.” This customs declaration is still in use and provides that the declarant is to ask for permission to place the goods under the customs regime of temporary importation for a period of a specified number of days from the first date of temporary admission, with full or partial, conditional exemption from payment of customs taxes and duties. The declarant is to state the goals and circumstances of the temporary importation, and is to undertake to export the temporarily imported goods, the aircraft, from the customs territory of the Eurasian Union / Russian Federation in an unchanged condition by a specified date.

In sum, if a foreign, non-Russian-registered aircraft having no more than 19 seats, weighing no more than 28 tons empty weight and owned by a foreign entity or person is flown to Russia for use within Russia and other countries that are members of the Eurasian Union, and if the aircraft is not used on commercial flights while within Russia and the Eurasian Union, and the aircraft is flown out of the Eurasian Union by the date stated in the customs declaration filed with the Russian Customs Service upon arrival of the aircraft in Russia or another country in the Eurasian Union, then the aircraft may be used within Russia on private flights by its owner without payment of otherwise applicable taxes and duties.

For a short summary on available temporary importation procedures for foreign private aircraft, in English and Russian, see:

- the Note published by the Customs Service (<https://www.favt.ru/pamyatka-ftc-rf-po-vremennomu-vvozu-chastnyh-vs>)
- a schematic overview (https://www.favt.ru/public/materials/0up/pamyatka/pm_ENG.rtf)
- an infographic (https://www.favt.ru/public/materials/0up/pamyatka/inf_ENG.jpg)

Since March 2019 the availability of the “Import 53” procedure for non-commercial, private flights has been inconsistent. At times, officers of the Customs Service are reluctant to clear flights about which there is any doubt, largely due to the possibility of checks by the Prosecutor’s Office that have occurred in the aftermath of the Sfera Jet case at customs offices at airports in Moscow. As the practice changed drastically, business-jet operators and other market participants have been unclear about the customs procedures available to them, and the respective documentation that now must be prepared and submitted. One may expect that the practice and the application of regulations will become more established and consistent in coming months. In the meantime, we recommend working on planning for a flight within Russia or another country in the Eurasian Union on a case-by-case basis, paying extra attention to the choice of a customs procedure and the submission of the corresponding documentation, and engaging an expert third party, if necessary.

Additional caution is required for any aircraft that are to be used commercially within Russia or another country in the Eurasian Union. If an aircraft is flown into Russia or another country in the Eurasian Union, and a customs declaration is filed claiming the exemption from customs duties that applies to tax-free temporary imports that are not to be used to generate revenue within the Eurasian Union, and the aircraft is then used to generate revenue while present in Russia or elsewhere in the Eurasian Union, then the rules governing a tax-free import will have been violated. Financial penalties and legal risks, up to and including seizure and impoundment of the aircraft until penalties are paid, as in the case of the Sfera Jet situation, may follow, if the aircraft is stopped by the customs service and its operation within Russia or the Eurasian Union is challenged. Different airports and regions within Russia and the Eurasian Union have different reputations for challenging the operation of aircraft that have been temporarily imported for non-commercial use and which are, in fact, used commercially within Russia and elsewhere within the Eurasian Union. Accordingly, the filing of a “Declarations of the customs regime of temporary admission” is not sufficient to allow risk-free operation of foreign-registered jets within Russia and the Eurasian Union on commercial flights.

Further Developments

At the present time, there are consultative meetings being held between representatives of the Russian business aviation community and government officials representing the Ministry for Economic Development and Rosaviatsia. There are drafts of possible legislation concerning the creation of a new Russian registry for business jets to be used on private flights within Russia. However, neither Rosaviatsia nor the Ministry for Economic Development have published the drafts or any notices about the consultative meetings.

It is reported in conversations by participants in the consultative meetings that one aspect of the current draft proposals is that Russian owners of aircraft registered outside of Russia who desire to fly their aircraft within Russia will be required to customs-clear their aircraft in Russia and to place them on a Russian operator’s certificate. This, reportedly, will be required for aircraft that are to be operated privately or commercially in Russia. There are conflicting reports whether Ministry for Economic Development is considering an exemption from import VAT of 20 percent for aircraft imported to Russia to be operated privately. There are reports that the weight limit for the exemption from customs duties, as opposed to import VAT, of another 20 percent, will be increased to equal the weight of a Gulfstream G650. Accordingly, at the present time, March 2020, it is necessary to await the publication of the proposed new legislation governing the import of business jets.

There are news reports about proposal for aircraft registries in special economic zones in Russia; however no draft legislation has been made public. (See <https://tass.ru/ekonomika/6187873>.) It is doubtful that new registries in special economic zones would solve the current regulatory problems of Russian aircraft owners in the short or medium term. Such legislation, if it comes, would be followed by an implementation phase before such registries could be considered as a solution for a Western or Russian operator. Until then, operators must use the tools currently available – clearance as a “means of international transportation,” the “Import 53” procedure for private flights, temporary importation with payment of import duties and import VAT for commercial use, and full importation for free circulation.

Given the current unknowns about the pending new legislation governing the import of business jets, a foreign owner of a business jet who desires to operate the aircraft within Russia or another country in the Eurasian Union must analyze the cost of customs-clearing the aircraft and placing it on to a Russian operating certificate. The selected aircraft placed onto such a certificate may then be lawfully operated on charter flights within Russia and the other countries of the Eurasian Union.

It would be necessary to select an operator that is a Russian company that holds a Russian aircraft operating certificate (AOC). This is because Chapter 15 of the Russian Air Code requires that only a carrier that is an operator which holds a license to perform domestic air carriage where the point of departure, the point of arrival and all landing points are located on the territory of the Russian Federation may conduct such flights. Chapter 11 of the Russian Air Code deals with the arrival and departure of foreign aircraft.

There is a short list of likely operators, including Rusjet, Meridian, Tulpar and one or two others. The Maltese operator, Aim of Emperor is in the final stages of obtaining a Russian AOC which will be operational in the first quarter of 2020.

Possibly, an aircraft owner may choose to shift the aircraft it desires to import and customs clear for operation in Russia to a Bermuda or Ireland registration. Such a change in aircraft registration would permit utilization of the 83-bis agreement between Bermuda and Ireland and Russia which allows Bermuda- or Ireland-registered aircraft to be used commercially within Russia. All Sirius-Aero and Aeroflot aircraft are, for example, registered in Bermuda.

However, in this connection, on May 27, 2019, Rosaviatsia issued a Letter suggesting that Russia may no longer permit the registration of aircraft in countries such as Bermuda, and that aircraft maintenance and crew training obligations must be transferred to Russian commercial operators pursuant to Article 83-bis of the Convention on International Civil Aviation if there is any discrepancy between the actual condition of an aircraft and its Russian type certificate. See Rosaviatsia Letter Number 17009/03. The letter was issued in response to a request for information on the compliance of the foreign manufactured aircraft with the requirements of type certificates of the Russian Federation, with such information to be submitted to the Prosecutor General of the Russian Federation.

The letter states that, as of March 2019, in the Russian Federation, more than 800 foreign-made aircraft are used in commercial operation. Of these, 95 percent are registered in offshore registries. The operation of these aircraft, including maintenance of their technical condition is carried out in accordance with the terms of agreements concluded by the Russian Federation with foreign states under Article 83-bis of the Convention on International Civil Aviation. The letter reports that Rosaviatsia received a letter from the Ministry of Foreign Affairs of the Russian Federation, dated Oct. 29, 2018, No. 20700/dp, with information on the legal status of the "Agreement between the Government of Bermuda and the Government of Russia regarding the transfer of functions and responsibilities for oversight." According to that letter, the said Agreement is not an international treaty of the Russian Federation, and, in the event of an inconsistency between the requirements of the said Agreement and the requirements of Russian legislation, it is necessary to follow the regulatory legal acts of the Russian Federation.

Rosaviatsia proposed that, upon the conduct of a regular inspection of the aircraft of Russian operators, their compliance shall be verified with the requirements of the Federal Aviation Rules setting out "Requirements for legal entities, and individual entrepreneurs engaged in commercial air transport." In the event of noncompliance by a Russian operator, which is not rectified within 365 days, the Russian operator will not be able to continue to operate aircraft registered in Bermuda.

The practical consequence of Rosaviatsia Letter Number 17009/03 is yet to be established, but it does raise an additional risk factor that has to be considered by a foreign operator that is considering placing a Bermuda-registered aircraft on to the certificate of a Russian commercial operator.

Upon request, we can provide additional information concerning the matters discussed in this article, and suggest a plan for registering an aircraft for use within Russia. Please let us know of any questions you may have by emailing ops@nbaa.org.