

Corporate flying in the European Union

Review for non-EU operators on aircraft importation and VAT

Choose between full or temporary importation

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The following document is a working paper compiled by OPMAS in order to outline the current EU regulatory framework for corporate flying in the European Union.

If you operate inside the European Union (EU) with a non-EU registered aircraft you may have to import the aircraft into the EU and thus deal with the EU VAT (Value Added Tax) and Duty. You may already know this. If so you probably also know that the previous aircraft importation procedures in the United Kingdom and Denmark offering VAT exemption ceased in January 2011 and 2010 respectively.

This has left many operators without a clear view of the EU importation situation and thus without the necessary knowledge to choose the most effective procedure for aircraft importation and unrestricted access to fly within the EU. Hopefully this paper will help you get the bigger picture.

Full importation - the first option

Most operators will prefer to make a full importation of the aircraft in one of the EU member states and settle VAT and duty in order to be able to fly unrestricted in the EU. This deals effectively with any VAT cabotage issues that may exist and eliminates all uncertainty and risk of violation of customs regulations in all EU member states. This does not mean having to pay the full VAT and duty. The procedure is available for aircraft operated by or for companies as a corporate aircraft, aircraft under management and aircraft flying for companies with an AOC or charter certificate. Please enquire about this solution if you need further information.

Temporary Importation – not without problems

If you don't want to do a full importation it is also still possible to fly without full EU importation under certain restrictive circumstances as explained in figure 1. If an aircraft is not fully imported into the EU, every flight into the EU is considered a "Temporary Importation". The information below is primarily in relation to this "free" procedure.

Flights under a Temporary Importation (TI) are regulated by a very complex inter-European set of regulations and each time an aircraft enters an EU member state's airspace, the operator must comply with that member state's regulations affecting flight operations. Accordingly, flight privileges and restrictions will depend on whether the usage of the aircraft is considered "commercial" or "private" based on the EU Customs Code and individual EU member state's local implementation regulations.

Particularly with respect to passengers, the majority of member states within the EU have rigid limitations and restrictions for who may be carried within their borders and how. Under a TI there are also restrictions as to the period of stay within the EU. Please note that the TI is also often called a Temporary Admission.

Figure 1: Flying in the European Union

Importation status versus privileges and restrictions for flying within the EU

Importation status of aircraft / Entity responsible for aircraft	Imported into the EU	Not imported into the EU
Domiciled in the EU	Flying not restricted Aircraft is in free circulation	Flying not allowed in the EU
Not domiciled in the EU	Flying not restricted Aircraft is in free circulation	Flying limited and regulated by the Temporary Importation (TI) regulation

The legal background: The EU Customs Code and the Istanbul Convention

The Istanbul convention from 1990 regulates the use of TI in the greater part of the world and the EU signed and adopted the convention in the following years.

All EU member states formulate their respective implementation regulations for importation issues based on the EU Customs Code, which is a generic text translated into all EU languages. Every time the EU Commission decides to implement new or changed regulation the Customs Code is updated to reflect the changes based on a directive from the EU Commission.

Regulations relating to TI became a part of the EU Customs Code in 1993 based on the EU adoption of the Istanbul convention and had some minor updates between 1993 and 2001; all versions defined commercial use as “the use of means of transport for the transport of persons or of goods for remuneration or the framework of the economic activity of an enterprise”. This definition meant that part 91 operations or similar corporate flying were categorized under TI as “commercial use” which meant limited flight privileges and many restrictions when entering the EU.

These early definitions did not exactly match the “commercial use” definition in the Istanbul convention, which “means the use of means of transport for the transport of persons for remuneration or the industrial or commercial transport of goods, whether or not for remuneration” but the definition used in the Customs Code was construed to be a more precise way to secure the true intention of the commercial use definition in the Istanbul convention. “Private use” was defined as “the use other than commercial of a means of transport” and this definition is still used in 2011.

In 2003 the EU Commission decided to align these two definitions thus the Customs Code was amended to reflect the definition written in the Istanbul convention. The intention was not really to change the practical definition of corporate flying but merely to have one definition in order not to create any confusion regarding the interpretation. Thus none of the EU member states have used the amendment to change local practices in relation to corporate flying until 2010 when the UK Customs adjusted their local interpretation and thus implementation regulations to positively mention and infer corporate flying as private use.

TI was not used extensively within aviation before 2010. Most operators preferred to make a full 0% VAT importation in the United Kingdom or in Denmark, thus there was no reason to use TI and be limited by its’ restrictions. This is probably also one of the reasons why Customs authorities in many EU member states have never released a public practice document outlining a detailed interpretation of the main conditions under TI. Some EU member states like France, on the other hand, have always had a very strict approach to non-EU imported corporate aircraft and the French Customs authorities and the infamous flying French Task Force are well known to reject the use of TI and impound any aircraft without the proper documentation for alleged customs violations.

The above mentioned UK change of definition and the missing local practices have resulted in the full picture of TI becoming a grey area; especially the confusion surrounding what constitutes “commercial” and “private” use for a flight under TI. The fact that you can do things correct in one EU member state and end up with problems when you are flying into the next member state without doing anything different, is of course of great concern to and creates risk for many operators.

Figure 2 below presents the conceptions including privileges and restrictions schematic for both commercial and private use.

Over the years we have come across various interpretations and local practices for TI and the privileges and restrictions therein which are described in the next sections.

Private or commercial use

The definitions for “private and commercial use” are specific definitions used by EU Customs authorities in relation to TI and must not be compared to similar definitions used by aviation regulators as these definitions are used in a different context.

The “safe” private use definition is an aircraft owned by a private individual where the usage of the aircraft is solely private; like flying with the family and friends for visits and holidays and where the purpose of any flights is never business orientated. Any other type of flight may be at risk and may be considered commercial use.

Many Part 91 operators or similar corporate flying will claim that they are private operators which is correct according to the FAA and other aviation regulators, but measured against the definitions in the Customs Code, their corporate flying are considered commercial use of the aircraft in the EU.

We have always asked our international contacts, tax lawyers, auditors and customs agents, to forward to us any local news and changes in their local customs/aviation legislation. We have just finalized our own research in some of the larger member states in the EU conducted by renowned auditing companies to check the current status of the customs/aviation legislation. In this flow of information we have not seen any facts or indications that should indicate that corporate flying should not be considered as commercial use.

We have recently received a very clear statement from the German Customs authorities regarding the commercial use definition: *“the German customs authorities assume a commercial transport if order forms, brochure material, catalogues, tools, laptops or similar company material (i.e. goods) are carried by employees onboard a corporate aircraft”.*

We have never before seen the commercial use definition expressed so clearly in a corporate context but it is very much in line with the EU Customs code and what we have heard over the years from other EU member states even though we have not seen such a precise definition elsewhere.

We also received advice from German Customs authorities to always contact them in advance to discuss the usage of an aircraft intended to fly in Germany under TI in order to avoid any misunderstanding about the categorization of a flight.

The only exception we have seen to the above commercial definition is in the United Kingdom where corporate flying under TI is now categorized as "private use". The change was made in connection with the implementation regulation change of the "old" VAT exemption in December 2010. This change must be seen as a very wide interpretation of the Istanbul convention and the EU Customs code, where it is otherwise common practice to interpret exemptions to conventions as narrowly as possible. This change must so far be seen as a solitary approach.

In circumstances where any aircraft is under the operational control of a management company providing services for remuneration and when manufacturers and dealers are flying with the purpose of demonstrating the aircraft to prospective buyers the usage will - more than likely - be categorized as commercial usage in all EU member states including the United Kingdom.

Passenger and crew allowed on board

The basic rule is that aircraft on an internal EU flight are not allowed to carry EU residents on board as passenger and/or crew except for the exemptions described below.

It is mentioned in the Customs Code, that EU residents are allowed on aboard if they are employed or authorized by the owner of the aircraft. This is a situation with a lot of pitfalls, as most corporate aircraft are owned by subsidiaries, SPVs, trusts or finance companies, which typically do not employ any of the passengers, and an authorization must be written for a specific trip to be bullet proof which is often not practical. When the owner is a bank or a leasing company they will probably not like to be involved and risk being held responsible of any misuse. Up to now we have only seen the above exemptions for EU residents implemented in minor EU member states and the United Kingdom however with different preconditions for the authorization process. Flying in the United Kingdom according to their local implementation regulation allows authorization by 1) the non-EU registration holder or their non-EU representative provided that one of them are present in the EU while the authorized person is on board the aircraft or 2) by the non-EU owner if the EU resident is an employee.

This UK interpretation is very different from the Customs Code and is getting a special "twist" in relation to point 2 as the United Kingdom categorize corporate flying as "private use" which calls for the documentation of the allowed usage documented in the contract of employment of the person authorized if the owner is the authorizing entity. It sounds grotesque that the right to use a corporate aircraft on a business trip in the EU must be documented in this way, but this clause in the Customs Code is meant to regulate private recreational use of the aircraft and not usage for a corporate flight and only ends up like this because the United Kingdom have changed the definitions of corporate flying from commercial to private.

The Customs Code is very precise in this respect and it is explicitly stated that only the owner can authorize any EU residents on board using this exemption which is also the interpretation adapted elsewhere. The risk is that any authorization, which is not originating with the owner of the aircraft, will be declared void by Customs authorities outside the United Kingdom. Another point to consider is whether or not any EU resident would like to have a right to use the corporate aircraft written into the person's contract of employment as this can be seen as a perk and may be made subject to personal taxation.

All EU member states basically agree that non-EU residents are allowed on board during internal EU flights, but be aware that in some EU member states like France we have seen situations where French Customs authorities consider internal EU flights with EU citizens on board as cabotage even though they may be resident outside the EU.

The regulation regarding passengers and crew on aboard are the same for private and commercial use; the difference is the period the aircraft is allowed to stay in the EU for the aircraft.

Period of stay in the EU

The usage of an aircraft categorized in the "private use" category will be allowed a stay up to 6 months in the EU. In the Customs Code the period is only mentioned as 6 months with no further explanation as to how to interpret the 6 months correctly if we are talking about more than one period or if the aircraft is leaving the EU before the 6 months.

We have noticed many different interpretations of the 6 months rule over the years like:

- * It is only 6 months per aircraft meaning that the TI can never be renewed
- * It is 6 consecutive months per calendar year
- * It is 6 non-consecutive months per calendar year
- * If the aircraft is flying out of the EU after the first period (less than 6 months) the TI can be renewed immediately

We have recently asked 4 different organizations i.e. Customs and customs agents in the United Kingdom regarding the interpretation of the 6 months rule and we received 3 of the above definitions as answers. UK Customs authorities mentioned the last statement as their definition where others have received different answers from the same source. We have seen the same pattern in many EU member states which makes it hard to give any useful advice in this matter other than to inform any operator to be cautious after the aircraft have ended the first entry period.

The usage of an aircraft categorized in the “commercial use” category will be allowed to stay for the time required to carry out the transport operation which is often referred to as the “the period of discharge”. It is mentioned in the Customs Code and in the UK implementation regulation that all flights must begin or end outside the EU which makes perfect sense as the whole idea of the term “cabotage” is that anyone who wants to do business within the EU must compete on equal terms with any EU domiciled entity which must calculate and pay VAT on any aircraft.

On the other hand it seems generally accepted for non-EU owned aircraft used “commercially” to fly internally in the EU if they fly without EU residents/citizens both as crew and/or passenger even though the “period of discharge” is overdue. It is not according to the above regulations but we have never heard anyone in that situation who have encountered problems anywhere in the EU.

It is stated in the Customs Code that the maximum overall period during which an aircraft can stay in the EU under multiple TI entries is 24 months. These 24 months must be seen as the general rule even though it can be “overruled” by a different local interpretation of the 6 months as described above if the usage of the aircraft is private. The 24 months should be measured from the first entry into to the EU.

Figure 2: Corporate flying under Temporary Importation

Flight privileges and restrictions depending on how the EU member state is considering corporate flying

Member state categorize Corporate flying as		Private use	Commercial use
Type of flight			
Internal EU flight	EU passenger/crew on board	Only with written authorisation ¹⁾	Not allowed, flight must start or end outside the EU
	Only non-EU passenger/crew on board	No restriction	Not allowed, flight must start or end outside the EU
	Period of stay	Maximum 6 months per stay, max 24 months for multiple stays measured from the first entry	Not allowed, flight must start or end outside the EU
Flight starts or ends outside the EU	EU passenger/crew on board	No restriction	No restriction
	Only non-EU passenger/crew on board	No restriction	No restriction
	Period of stay	Maximum 6 months	Period of discharge

1) check specific preconditions for this authorization. Only accepted in a few member states.

Temporary importation practically

The TI is designed by EU Customs authorities to be paperless and therefore you do not need to contact local Customs authorities or customs agents. When the aircraft arrives in the EU, there are no formalities other than filling out a General Declaration or similar as on board EU entry documentation which can then be presented on demand while the aircraft is still in the EU - to document the time of arrival at the first port of entry at an international airport. All IFR flights in the EU are registered by EUROCONTROL in order for them to control the traffic and send invoices for traffic charges; these

invoices will normally work as the perfect documentation for the routing in the EU including the entry and exit in the EU. Documentation for the routing is important if the aircraft have multiple entries under T1 into the EU. The validity of the above mentioned paperless T1 and a T1 document issued by a customs agent is exactly the same.

Conclusion

We have been in the importation business for many years and we are still experiencing new scenarios every month or so. We face new questions and see situations pop up and it is often difficult to give any 100% firm answer. The use of T1 is very confusing especially when it involves flying in more than one EU member state.

It is a known fact that many Customs officers do not know the precise meaning of the regulations and the interpretation of the regulations can even vary from region to region in the same member state. Some EU member states do not check aircraft at all where other member states like France, Germany, United Kingdom, Holland, Italy and Spain do it on a regular basis. If you ask the same question to 10 different persons you will probably get at least 7-8 different answers.

Operators often approach us in order to get our view of a specific situation flying under T1. In 7-8 out of 10 cases where they have chosen to fly under T1, they have misinterpreted the regulations themselves or they have been talking to customs agents who have only knowledge of their own local implementation regulations within their own member state and have not looked at the case in a full EU spectrum.

Please exercise extreme caution if you are flying within the EU and you are carrying EU residents/citizens either as crew and/or passengers. We have heard from more than 200 clients over the years that during a ramp check the passports of those on board are often the first things checked. If you have EU residents/citizens on board and the aircraft is not fully imported the local Customs authorities will normally contact their legal office to check the legalities i.e. peruse the routing and check if it is all done in accordance with the flight privileges and restrictions based on whether or not the flight is categorized as private or commercial. Customs authorities will most likely initiate a case if something is wrong. Flights without EU residents/citizens on board are normally not having any problems and do quite often have very quick ramp checks.

We sometimes hear from operators that they have never had any problems with EU Customs authorities even though that they have been flying without full EU importation and are not even complying with the T1 regulation – knowingly or not. We believe you can compare this to people speeding. You may drive too fast on the roads for many years without being caught too...

It is without a doubt that the interpretation of the T1 implementation regulations are more favorable in the United Kingdom but be aware that they are probably only valid for flying under T1 locally in the United Kingdom. Flying to other member states under these definitions is risky as many other member states have another view of the situation. A violation of the restrictions under a T1 is prosecuted in the jurisdiction where the aircraft is ramp checked according to EU law practice. When the UK Customs authorities wrote their new implementation regulation first published in December 2010, they did twist some of the definitions in the Customs Code in a way that was probably never intended by the authors of the Customs Code. Only the future can tell if the EU Commission will accept these definitions in the long run.

We have been in contact with the EU Commission and have been told that they know about the confusion and the inconsistencies and are working on a harmonization of the regulation in this area, but we are probably looking years ahead before we see any change and real harmonization.

Another factor in the harmonization process is the implementation time of any changes or updates of the Customs Code. When the 2008 change was made to the Customs Code it left each EU member state with a time frame of 5 years - due mainly to necessary changes in local Customs computer systems and other local priorities - to implement the changes in their own local implementation regulation and this fact automatically lead to inconsistencies between the EU member states lasting for years and changes – never adapted - could be overrun by new changes.

Another major factor is how comprehensive the local implementation regulations are made. The newest UK implementation regulation is an impressive and very detailed 31 pages where most other member states are publishing 1-2 pages basically just copying the text in the Customs Code or less and without any practical guidance of the usage, if anything is published at all. The latter makes it very difficult to view, compare and understand the regulations in a full EU spectrum.

The “safe” route for non-EU imported aircraft owned or operated by a non-EU entity is a flight that starts or ends outside the EU and this is independent of whether or not the flight is commercial or private and if the aircraft is carrying EU residents/citizens both as crew and/or passenger. Cabotage in relation to VAT will only become an issue in relation to internal EU flights.

Our advice is that no corporate flight organization should use a TI unless they have verified their specific situation in each EU member state they plan to visit with the aircraft. Otherwise you risk flying in good faith after opening a TI in one EU member state and then get ramp checked by Customs authorities in another member state where they have a different view of the situation and it may result in the Customs authorities impounding the aircraft.

An aircraft owned or operated by an EU entity should never fly into EU unless the purpose of the flight is an importation.

Impoundment of the aircraft means at least that the aircraft is grounded for some days and you will have to hire a local tax lawyer to help you have a dialogue and negotiation with the local Customs authorities. Worst case you will have to pay the local VAT (ranging from 15-25%) based on the value of aircraft plus maybe a fine. Only full EU importation of the aircraft eliminates this complexity and rules out the possibility of any costly experience in any EU member states.

Please see figure 3 for a quick way to have an overview the different types of importation and associated privileges and restrictions and figure 4 for the EU member state status for corporate flying.

Figure 3: Importation at a Glance

Quick chart for flight privileges and restrictions for flying within the EU – categorized after type of importation

Type of importation	Flight privileges and restrictions
Full importation	<ul style="list-style-type: none"> - Aircraft is in free circulation in the EU - No restrictions for the period of stay in the EU - No restrictions for carrying EU residents/citizens as passengers and/or crew during internal EU flights
Temporary importation Private use	<ul style="list-style-type: none"> - Aircraft can fly within the EU for up to 6 months per entry with a maximum of 24 months for multiple stays measured from the first entry into to the EU ¹⁾ - EU residents/citizens as passengers and/or crew are only allowed in special situations ²⁾
Temporary importation Commercial use	<ul style="list-style-type: none"> - All flights must start or end outside the EU - Aircraft can stay for the period of discharge (the time it takes for a turn-around) - Internal EU flights are not allowed

1) check local definitions of the 6 months rule if you have multiple entries.

2) check specific preconditions for this authorization. Only accepted in a few member states.

Figure 4: EU Member status for corporate flying under Temporary importation

Quick chart for flight privileges and restrictions for flying within the EU – categorized by EU member state

Type of flying	United Kingdom	Any other EU member state
Corporate flying allowed in mentioned member state	Yes ¹⁾	Corporate flying is ok, but all flights must start or end outside the EU ²⁾
Corporate flying with aircraft under control of management company	Corporate flying is ok, but all flights must start or end outside the EU ²⁾	Corporate flying is ok, but all flights must start or end outside the EU ²⁾

1) Corporate flying is categorized as "private use".

2) Corporate flying is categorized as "commercial use".

Epilog

The contents of this document has its origin in our experience with the EU VAT legislation and a lot of different situations and cases we have seen in our importation business over the last 15 years. We do not consider our review to be the full picture of all importation issues wherefore we will be more than happy to receive any comments and inputs based on the above in order for us to create a more precise picture of all issues within this topic in the different EU member states.

We hope that this document will be of help for anyone flying corporate in the EU, in order to better understand the most important factors within importation and be able to fly in the EU without any Customs problems.

ABOUT OPMAS

Our team has more than 20 years of cumulative experience. We developed the original 0% VAT "Danish Route" and have processed more than 1,500 aircraft over the years. We are dedicated to aviation with extensive legal and aviation experience, specializing in minimizing VAT exposure for aircraft owners and operators flying into and within the EU.

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