

Wet leasing uncertainty

Marcus Pyke and Tim Boström, Associates at Bird & Bird, take a look at recent amendments being considered for the EU wet-leasing regime and how it might facilitate changes in the US–EU wet-leasing market

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The news that the EU Commission is currently considering the implementation of changes to the current EU regulatory framework on wet leasing of aircraft has been welcomed within the European airline community



The intention is that this initiative will lead to a reciprocal relaxation of time limits imposed by the US DoT for Community Carriers wishing to wet lease aircraft to US carriers



as, if brought into effect, it will hopefully bring much needed certainty to European carriers (known as ‘Community Carriers’), at least for those seeking to operate to or from the US.

Current restrictions

The current EU regulatory provisions relating to wet leasing of aircraft by

Community Carriers are primarily set out in EU Regulation 1008/2008 (‘1008/2008’) which, amongst other things, regulates the licensing of Community Carriers and their rights to take aircraft on dry or wet lease. In essence, Community Carriers are free to take on wet-lease aircraft registered within the EU with limited restrictions imposed, provided that this would not endanger safety. For wet leasing of aircraft registered outside the EU however, Community Carriers are subject to a number of restrictions, reflecting the principle set out in 1008/2008 that wet leasing of aircraft registered in third countries outside the EU should only be permitted in “exceptional circumstances”. The relevant restrictions in 1008/2008 state that in order to take a non-EU registered aircraft on wet lease, the Community Carrier must obtain the prior approval from the competent authority in the relevant member state. Such approval should be granted if (a) the Community Carrier can show that for the purposes of the proposed wet leasing, all safety standards equivalent to those imposed in the EC are met, and (b) one of the following conditions is fulfilled:

Wet leasing is required in order for the Community Carrier to:

- (i) meet exceptional needs;

- (ii) satisfy seasonal capacity needs which cannot be met by leasing EU-registered aircraft; or
- (iii) overcome operational difficulties and it is not possible or reasonable to lease EU-registered aircraft.

Where a Community Carrier is able to demonstrate that condition (i) above is satisfied, the competent authority may approve the proposed wet leasing for a period of seven months, subject to renewal for a further period of seven months. There is no express time limit for the conditions in (ii) and (iii) above, however these are understood to be of a short-term nature such that the approval would only be given in respect of the relevant season and until such time as the operational difficulties can be overcome respectively.

In addition to the express restrictions referred to above, a competent authority may attach additional conditions to its approval as it sees fit. Such conditions will form part of the relevant wet lease.

Open skies

Historically, US carriers were not permitted to wet lease aircraft from foreign carriers. In 2007 however, the US and the EU signed a comprehensive Air Transport Agreement (ATA). The ATA (which is often referred to as the US–EU

Open Skies Agreement) contemplates an open wet-lease regime between the signatories' constituent states, provided all participants within any such wet leasing hold the appropriate authority and meet all relevant conditions under applicable laws and regulations.

As a consequence of the ATA, Community Carriers have since 2008 been able to wet lease aircraft to US carriers, as well as to other Community Carriers, for operations to and from the US. As with the EU regime, there are conditions imposed by the US Department of Transport (US DoT). Unlike in the EU, where it is the Community Carrier in its capacity as wet lessee which must obtain approval for the wet leasing, in the US it is the foreign wet lessor which must apply for authorisation from the US DoT. These US conditions will apply equally in the situation where an aircraft is subject to a wet-lease between two Community Carriers for operations to the US.

Up until recently, authorisations issued by the US DoT were typically granted on the basis of unlimited time periods. In this context it is, however, noted in the Memorandum of Consultations which accompanied the ATA, that statements of authorisations (from the US regulators) would "at least initially" be issued on a limited term (six to nine months) or exceptional basis. In recent times, the US DoT has also started imposing time limits, similar to those in 1008/2008, when a Community Carrier wet leases an aircraft from another Community Carrier for operations to or from the US. The EU Commission seems to regard this as a retaliatory measure by the US DoT, which has been brought about through pressure exerted by members of the US aviation industry who see the EU's seven plus seven month limit as discriminatory to US carriers (as it would prevent US carriers from having an equal opportunity to compete within the EU-US wet-leasing market).

Relaxation of time limits

To address these concerns, the EU Commission has, in consultation with

EU member states and EU industry stakeholders, implemented an initiative with the intended purpose of establishing a non-restrictive wet-lease agreement between the EU and the US by way of clarification of the scope of the ATA. The only amendment to the EU wet-leasing regime which has been proposed as part of this initiative is the relaxation of the seven plus seven month time limit; all the other requirements under 1008/2008 regarding wet leasing would remain applicable. The intention is that this initiative will lead to a reciprocal relaxation of time limits imposed by the US DoT for Community Carriers wishing to wet lease aircraft to US carriers, or use wet-leased aircraft, for use between the EU and the US. It is important to note that this proposal would not create new traffic rights but would rather refer back to (and clarify) the rights established by the ATA and is seen as consistent with the overriding objective of the ATA to remove market access barriers and maximise consumer benefits.

Some Community Carriers that use wet-leased capacity for flights to and from the US have faced difficulties recently from the uncertainties caused by the current stand-off. Whilst the US DoT has in certain cases granted limited extensions beyond the seven plus seven month period, it has been made clear that these represent a gesture of goodwill on the understanding that an amended regime between the EU and the US will be put into effect soon. In the meantime, Community Carriers are currently encountering problems in connection with business planning and investment decisions. Whether or not the proposed changes would have any practical implications remains to be seen, but it is noted that the Commission's own analysis has revealed that the use of wet-leased capacity on flights between the EU and the US is currently rather limited. Moreover, given that the initiative seems to be limited to flights between the EU and US only, the potential benefits it would present to regional airlines are debatable. ■

