

# Can ‘Traffic Rights’ for Non-Commercial Air Operators be derived from EU Law?

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*The European Union’s liberalization of the aviation market provided commercial EU air carriers with free access to intra-Community routes. For non-commercial air operators, the Chicago Convention already provided for certain international ‘traffic rights’. Moreover, the introduction of common rules for civil aviation has brought EU-wide harmonization to the non-commercial sector. Despite this, EU operators of non-commercial flights experience restrictions in certain territories. Some EU Member States accept free circulation of harmonized aircraft; others require registration in the state where the operator is based.*

*This article aims to assess whether ‘traffic rights’ for non-commercial air operators can be derived from EU’s harmonized civil aviation rules or other EU law.*

*I conclude that aircraft subject to EU harmonization of technical requirements and administrative procedures related to air operations can circulate freely intra EU, regardless of where the EU operator is based, provided that the aircraft is registered in an EU Member State. The extent of such ‘traffic rights’ for aircraft registered in third countries, i.e., in states other than Member States of the EU or the European Free Trade Association, is less clear. EU harmonization of technical requirements and administrative procedures related to air operations also sought to address third country aircraft based in Member States. However, EU regulation on airworthiness of such aircraft is supplemented by airworthiness rules laid down by the State of registry, and it may be that the level of harmonization within this area must be considered partial. If so, EU Member States might be able to impose national requirements within the limits of Articles 5(1) and 31 of the Chicago Convention, provided that these requirements are compatible with fundamental freedoms of EU law.*

Keywords: traffic rights | non-commercial aviation | non-traffic purposes | Chicago Convention | EU law

## 1 INTRODUCTION

The European Union has liberalized the aviation market by establishing common rules governing the licensing of air carriers,<sup>1</sup> providing commercial EU air carriers with free access to intra-Community routes. The ‘right to operate an air service between two Community airports’ is considered a ‘traffic right’ in the context of the Air Services Regulation, while an ‘air service’

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<sup>1</sup> Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers, OJ L 240, 24.8.1992, replaced by Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast), OJ L 293, 31.10.2008.

means ‘a flight or a series of flights carrying passengers, cargo and/or mail for remuneration and/or hire’.<sup>2</sup> The right to operate such flights with ‘civil aircraft’<sup>3</sup> *not* carried out for remuneration and/or hire, on the other hand, is not included in the measure’s scope: Such flights are not subject to licensing, nor is the operator required to have an air operator certificate (AOC).<sup>4</sup> The topic of this article is the right for EU operators to perform such flights intra EU. These operations are hereinafter classified as ‘non-commercial’, and they will fall under the ‘general aviation’ category in Annex 6 to the Chicago Convention.<sup>5</sup> For the lack of a better term, ‘traffic rights’ will be used to describe these rights. Inverted commas are added to emphasize that the term has a different meaning than in Regulation (EC) No 1008/2008, as well as in other instruments of international air law.<sup>6</sup> The scope of the article does not extend to the operation of state or unmanned aircraft.

Non-commercial flights, as defined above, are typically (if not exclusively) ‘non-scheduled’ and have hence long enjoyed certain international ‘traffic rights’ through Article 5(1) of the Chicago Convention. Regarding the extent of these rights, some European states – such as Finland and Germany – don’t distinguish between aircraft registered domestically and aircraft registered in other states, which are parties to the Chicago Convention.<sup>7</sup> Sweden and Denmark, on the contrary, have opted for a different approach:

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<sup>2</sup> Regulation (EC) No 1008/2008, Article 2(14), cf. Article 2(4).

<sup>3</sup> *See* Convention on International Civil Aviation, Article 3(a) (Chicago Convention, 7 Dec. 1944), 15 U.N.T.S. 295, cf. an antithetical reading of Regulation (EU) 2018/1139 of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Union Aviation Safety Agency, and amending Regulations (EC) No 2111/2005, (EC) No 1008/2008, (EU) No 996/2010, (EU) No 376/2014 and Directives 2014/30/EU and 2014/53/EU of the European Parliament and of the Council, and repealing Regulations (EC) No 552/2004 and (EC) No 216/2008 of the European Parliament and of the Council and Council Regulation (EEC) No 3922/91, Article 2(3)(a), OJ L 212, 22.8.2018.

<sup>4</sup> Regulation (EC) No 1008/2008, Articles 1(1) and 2(4), cf. Articles 6(1) and 2(8) (antithetical reading), *see also* Regulation (EU) 2018/1139, Article 30(1)(b). Detailed harmonized rules apply, cf. Regulation (EU) 2018/1139, Articles 29 and 31(1)(a), cf. Commission Regulation (EU) No 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, Article 5(3)–(4), OJ L 296, 25.10.2012.

<sup>5</sup> Annex 6 to the Convention on International Civil Aviation: Operation of Aircraft – Part II: International General Aviation – Aeroplanes, p. 1.1-4 (10th. ed., ICAO 2018) [hereinafter ICAO Annex 6 Part II], states that a ‘[g]eneral aviation operation’ is an ‘aircraft operation other than a commercial air transport operation or an aerial work operation’.

<sup>6</sup> E.g., Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, AIRTRN.3(1), cf. AIRTRN.1(g) (Brussels/London, 30 December 2020).

<sup>7</sup> 864/2014 Luftfartslag [Aviation Act, Finland] Chapter 1 section 10 first paragraph first sentence; Luftverkehrsgesetz (LuftVG) [Air Navigation Act, Germany] 1.8.1922, BGBl. I 2007 p. 698 Chapter 1 section 1c no. 5, cf. section 2 para. 7 no. 4, cf. Aeronautical Information Publication: AIP Germany, GEN 1.2-16, (Deutsche Flugsicherung 21.05.2020).

In 1999, a Swedish Government Official Report successfully proposed a reworked civil aviation act, which included a restriction on operating foreign registered aircraft in Sweden for non-commercial purposes.<sup>8</sup> Despite the introduction of a restriction, ‘private flights operated into, in transit over or from Swedish territory with aircraft registered in States, which are parties to the Chicago Convention’ can still take place without prior approval.<sup>9</sup> However, an ‘aircraft which is not used for aviation requiring a permit and which is permanently used within Swedish territory shall be registered in Sweden’.<sup>10</sup> It follows from the preparatory work that the expression ‘requiring a permit’ (*tillståndspliktig*) is applied to distinguish non-commercial (private) operations – which are typically *not* subject to licensing – from commercial operations, which typically *are*.<sup>11</sup>

In 2006, the Danish Civil Aviation Authority (CAA Denmark) published an administrative circular,<sup>12</sup> which provided an interpretation of the following provision of the Danish Air Navigation Act, regarding the use of foreign registered aircraft:

Aviation within Danish territory may only be carried out with aircraft that are ... of a nationality of a foreign State with which agreement has been entered into on such aviation.<sup>13</sup>

A central ‘agreement’ in that respect is the Chicago Convention. Through a strict interpretation of the non-commercial ‘traffic rights’ provided for in Article 5(1), CAA Denmark reached the conclusion that stationing an aircraft used for private flights in Denmark – whether for domestic flights only or as a permanent base for international flights – is prohibited without special per-

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<sup>8</sup> SOU 1999:42: Ny luftfartslag (Sweden 1999) [hereinafter SOU 1999:42] 174. The proposal was enacted in 2010, see Luftfartslag 2010:500 [Aviation Act, Sweden].

<sup>9</sup> Aeronautical Information Publication: AIP Sweden, GEN 1.2-3, point 3, (LFV 17.06.2021), cf. luftfartslag 2010:500 Chapter 1 section 6 first sentence, cf. Article 5(1) of the Chicago Convention.

<sup>10</sup> Luftfartslag 2010:500 Chapter 1 section 6 second sentence (Swedish Transport Agency trans., 2010).

<sup>11</sup> SOU 1999:42 *supra* n. 8, at 174. The choice of criterion complies with Article 6 of Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation, OJ L 373, 31.12.1991, which – since 2006 – states that ‘[a]ircraft operated *under an authorisation* granted by a Member State ... may be operated under the same conditions in other Member States, without further technical requirements or evaluation by those other Member States’ (italics added).

<sup>12</sup> Aeronautical Information Circular: AIC B 39/06 (Naviair 2006); cf. Aeronautical Information Circular: AIC B 66/09 (Naviair 2009).

<sup>13</sup> Lbkg 769 2000 [Air Navigation Act, Denmark], cf. Lbkg 1149 2017 [Consolidated Air Navigation Act no. 1149 of 13 Oct. 2017] Section 1 Chapter 1 section 2 litra b (Civil Aviation Authority trans., 2017).

mission. Permission would only be granted in certain exceptional instances, and only for a limited duration. At the same time, the circular explicitly sought to intensify the sanctioning of violations.<sup>14</sup>

These two events led to similar results for non-commercial aircraft operators in the two Scandinavian countries. However, both events predate 25 August 2016, the date at which detailed harmonization of technical requirements and administrative procedures related to air operations was extended to non-commercial aircraft operations in the EU.<sup>15</sup>

This article will investigate if and to what extent ‘traffic rights’ for non-commercial flights intra-EU, to the benefit of EU operators, can now be derived from EU law.

I will first give a short introduction to the principle of sovereignty in the air as regards non-commercial flights, to provide a wider context for the effects of harmonization at EU level.

## 2 BASIC PRINCIPLES

It follows from Article 1 of the Chicago Convention that a state’s sovereignty over its airspace is ‘complete and exclusive’. This treaty provision reflects international customary law, confirmed both by the International Court of Justice (ICJ) and the Court of Justice of the European Union (CJEU).<sup>16</sup> The wording excludes a customary right of innocent passage, unlike in the territorial sea.<sup>17</sup> According to Abeyratne, the state hence enjoys ‘complete discretion as to the admission of any aircraft into its airspace’.<sup>18</sup>

Article 5 of the Chicago Convention does, however, include certain ‘traffic rights’ for non-scheduled flights. For flights carried out ‘for remuneration or hire’, these rights have limited importance, because in this case ‘the privilege of taking on or discharging passengers, cargo, or

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<sup>14</sup> The European Commission has recently sent a letter of formal notice to Denmark as a first step in a possible infringement procedure, see *Air transport: Commission calls on DENMARK to apply EU legislation on foreign-registered aircraft correctly*, European Commission (9 June 2021), [https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_2743](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743) (accessed 5 January 2022). Denmark has since adjusted its practice regarding aircraft registered in other EU Member States, see *Aeronautical Information Circular: AIC B 19/21* (Naviair 2021).

<sup>15</sup> Regulation (EU) No 965/2012, Article 10(3)(b), cf. Commission Regulation (EU) No 800/2013 of 14 August 2013 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, Article 1(9), OJ L 227, 24.8.2013.

<sup>16</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986 p. 14, at para. 212, cf. Case C-366/10 *Air Transport Association of America and others v. Secretary of State for Energy and Climate Change*, 21.12.2011, ECLI:EU:C:2011:864, at para. 118.

<sup>17</sup> *Nicaragua v. United States of America*, at para. 214, cf. United Nations Convention on the Law of the Sea Articles 17 and 8(2), 10 Dec. 1982, 1833 U.N.T.S. 397.

<sup>18</sup> Ruwantissa Abeyratne, *Convention on international civil aviation: A commentary* 17 (Springer 2014).

mail’ in accordance with Article 5(2) is ‘subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable’. According to Haanappel, Article 5(2) is hence a ‘virtually dead provision in international air law’.<sup>19</sup> For flights *not* carried out for remuneration or hire, the legal status is different, as Article 5(2) does not apply. Article 5(1) is applicable, however, and provides that each contracting state agrees that ‘all aircraft of other contracting States ... shall have the right to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission’. The first two rights (‘flights into’ and ‘in transit non-stop’) are unambiguous. What the right ‘to make stops for non-traffic purposes’ entails, is less obvious. Denmark contends that the right is limited to technical stopovers.<sup>20</sup> While Article 96(d) explicitly states that a ‘[s]top for non-traffic purposes means a landing for any purpose other than taking on or discharging passengers, cargo or mail’, taken at face value, it would limit traffic rights for those non-scheduled flights that are non-commercial in ways hardly foreseen during the drafting process of the Convention.<sup>21</sup>

As long ago as 1952, the Council of the International Civil Aviation Organization (ICAO) discussed the provision in detail after an in-depth legal analysis performed by the ICAO Air Transport Committee.<sup>22</sup> Through a contextual and teleological interpretation, the Committee and Council concluded that ‘a ‘stop for non-traffic purposes’ as referred to in Article 5[1] of the Convention should be taken to include the freedom to load and unload passengers or goods *not* carried for remuneration or hire’ (italics added).<sup>23</sup> The conclusion was reached in the Council with only two votes opposing it, even though the result seemed to conflict with the wording of Article 96(d). It could be argued that the Council decision has limited value as a source of law. While disagreements between contracting states relating to the interpretation of the Chicago Convention ‘shall ... be decided by the Council’ in accordance with Article 84, the decision was not a part of the resolution of such a dispute. However, the interpretation has further support in the Convention as a *set* of instruments: The three other authentic language versions of the Convention – French, Spanish and Russian – do not use the term ‘non-traffic’, but rather

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<sup>19</sup> Peter P.C. Haanappel, *The law and policy of air space and outer space: A comparative approach* 110 (Kluwer Law International 2003).

<sup>20</sup> *See supra* n. 12.

<sup>21</sup> On the contrary, Böckstiegel and Krämer point out that the relatively limited financial importance of non-commercial aviation led the states to agree on limiting the states’ sovereignty regarding non-commercial flights early on in the negotiations at the Chicago conference, *see* Karl-Heinz Böckstiegel & Paul Michael Krämer, *Völkerrechtliche Gestaltungsvorgaben für die Einführung einer wettbewerbsorientierten Allokation von Start- und Landeslots (1. Teil)*, 3 *Zeitschrift für Luft- und Weltraumrecht* 269, 272–273 (1995).

<sup>22</sup> ICAO Doc. 7255-18 C/840-18 214–218 (ICAO 8 May 1952).

<sup>23</sup> Ruwantissa Abeyratne, *Aeronomics and law – Fixing anomalies* 7–8 (Springer 2012), *cf.* ICAO Doc. 7278-C/841 (ICAO 10 May 1952), *cf.* ICAO Doc. 7255-18-C/840-18 214–215 (ICAO 8 May 1952).

‘non-commercial’ (‘non commerciales’ / ‘no comerciales’ / ‘некоммерческими’). In accordance with Vienna Convention on the Law of Treaties (VCLT), the ‘terms of the treaty are presumed to have the same meaning in each authentic text’.<sup>24</sup> A harmonized interpretation of the four language versions of Articles 5(1) and 96(d) is possible, however, if a stop for ‘non-traffic purposes’ is construed as meaning a stop for any purpose other than taking on or discharging passengers, cargo or mail *carried for remuneration or hire*. This interpretation resonates well with the ICAO Council decision of 1952.<sup>25</sup>

Furthermore, contemporary legal scholars interpreted Article 5(1) in the same manner, both before and after the Council decision of 1952.<sup>26</sup> If nothing else, such teachings represent ‘subsidiary means for the determination of rules of law’.<sup>27</sup>

ICAO’s *Policy and Guidance Material on the Economic Regulation of International Air Transport* re-iterates the conclusion of the Council, while indicating that flights with stops ‘taking on or discharging of passengers or goods not carried for remuneration’ are subsumed under the term ‘flights into’ to avoid the apparent conflict with Article 96(d).<sup>28</sup> This is underpinned by a contextual interpretation in relation to Article 5(2). While guidance material is non-binding, the decision of the ICAO Council – on which it is based – has led to fairly consistent state practice, at least among Western states, such as EU Member States. In other words, state practice – being a relevant source of international law as per VCLT Article 31(3)(b) – supports the existence of certain international ‘traffic rights’ for non-commercial flights.

It is beyond the scope of this article to analyse exactly how far such traffic rights reach. In any event, Article 5(1) cannot be interpreted in isolation, as Denmark and Sweden are dualistic nations, where the obligations of international law must be transformed or incorporated into national law to have a legal effect.<sup>29</sup> When transformed into national law, the rights might well go beyond the international obligation, depending on the intention of the national legislature. A possible example of the latter is the passive transformation of Article 5(1) into Swedish law in

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<sup>24</sup> Vienna Convention on the Law of Treaties Article 33(3), 23.5.1969, 1155 U.N.T.S. 332.

<sup>25</sup> The expression ‘stop for non-traffic purposes’ is also included in the EU–UK Trade and Cooperation Agreement, *see supra* n. 6, as per Article AIRTRN.1(t), cf. (g). The meaning is ‘a landing for any purpose other than taking on board or discharging passengers, baggage, cargo and/or mail *in air transport*’, where the definition of ‘air transport’ is limited to operations ‘held out to the public *for remuneration or hire*’ (italics added).

<sup>26</sup> Otto Riese, *Luftrecht: Das internationale Recht der zivilen Luftfahrt unter besonderer Berücksichtigung des schweizerischen Rechts* 135. (K.F. Koehler 1949); Bin Cheng, *The law of international air transport* 194–195, (Stevens & Sons Ltd. 1962).

<sup>27</sup> Statute of the International Court of Justice, Article 38(1)(d), 26 June 1945.

<sup>28</sup> ICAO Doc. 9587: Policy and Guidance Material on the Economic Regulation of International Air Transport 1-5 (ICAO 4th ed. 2017).

<sup>29</sup> On the Swedish dualistic legal system, *see* James Crawford, *Brownlie’s Principles of Public International Law* 93 (Oxford University Press 8th ed. 2012).

1957, which led to the result that several foreign registered aircraft were *permanently* based in Sweden by 1999.<sup>30</sup> The aim of the analysis below is not, however, to establish whether the Swedish change of law in 2010 conflicted with Article 5(1) of the Chicago Convention. The issue at hand is rather whether EU primary and/or secondary law – at least since 2016 – provides non-commercial aviation with rights that reach beyond the wording of the Swedish law and Danish practice, due to the direct effect and supremacy of EU law.<sup>31</sup>

### 3 HARMONIZATION – A BASIS FOR DERIVED ‘TRAFFIC RIGHTS’?

#### 3.1 INTRODUCTION

The Grand Chamber of the CJEU confirmed in 2011 that ‘the Member States have retained powers falling within the field of the Chicago Convention, such as those relating to the award of traffic rights’.<sup>32</sup> This quote indicates that Member States – at the time – could apply a liberal or restrictive policy regarding traffic rights, within the limits of the Convention and general EU law.

However, Article 100(2) Treaty on the Functioning of the European Union (TFEU)<sup>33</sup> provides the legal basis for the EU legislature to ‘lay down appropriate provisions for ... air transport’. Since the EU and its Member States have ‘shared competence’ in the field of transport according to Article 4(2)(g) TFEU, it follows from Article 2(2) TFEU that the ‘Member States shall exercise their competence to the extent that the Union has not exercised its competence’. In other words, if the EU has exercised its competence within the field of ‘traffic rights’ for non-commercial air operators, the Member States no longer have the competence to regulate this specific field. Regarding traffic rights for flights carrying passengers, cargo and/or mail for remuneration and/or hire between Community airports, the EU has exercised its competence, see Article 1(1) of Regulation (EC) No 1008/2008. Operations outside the scope of this Regulation include, *inter alia*, various commercial ‘specialised’ operations, commercial local flights as well as non-commercial flights.

The legal issue is, first, whether the EU – through other harmonization measures – has exercised its powers within the field of non-commercial ‘traffic rights’ intra-EU for operators of aircraft registered in EU Member States. In answering this question, traffic rights for commercial operations outside the scope of Regulation (EC) No 1008/2008 will be examined briefly to provide a wider context. The second question is whether non-commercial ‘traffic rights’ also extend to

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<sup>30</sup> SOU 1999:42 *supra* n. 8, at 174.

<sup>31</sup> Case C-26/62, *van Gend & Loos v. Netherlands Inland Revenue Administration*, 5.2.1963, ECLI:EU:C:1963:1; Case C-6/64, *Flaminio Costa v. E.N.E.L.*, 3.6.1964, ECLI:EU:C:1964:66; Treaty on the Functioning of the European Union Article 288(2), 13 Dec. 2007, OJ C 202, 7.6.2016 [hereinafter ‘TFEU’].

<sup>32</sup> Case C-366/10, *Air Transport Association of America and others*, at paras 70–71.

<sup>33</sup> Treaty on the Functioning of the European Union Article 288(2), 13 Dec. 2007, OJ C 202, 7.6.2016.

EU operators of aircraft registered in third countries. For the purposes of this article, a ‘third country’ is a state where EU secondary legislation on civil aviation does not apply, i.e., states other than EU and EFTA Member States. The article has an EU centric perspective, however, in that specific legal issues related to EFTA States and the Agreement on the European Economic Area (EEA)<sup>34</sup> are not discussed.

### 3.2 COMMERCIAL TRAFFIC RIGHTS DERIVED FROM HARMONIZING MEASURES

The 2018 Basic Regulation on common rules in the field of civil aviation covers operations falling both inside and outside the scope of Regulation (EC) No 1008/2008.<sup>35</sup> For example, commercial ‘specialised operations’, such as commercial flying display flights, are regulated by the Basic Regulation, but fall outside the scope of Regulation (EC) No 1008/2008, provided that no passengers, cargo and/or mail are carried.<sup>36</sup> Could such display flights rely on traffic rights intra EU, regardless of where the EU operator is based and in which EU Member State the aircraft is registered? If the answer is affirmative, could the Basic Regulation, in combination with its implementing rules, also be the founding basis for *non-commercial* ‘traffic rights’?

The Basic Regulation does not contain an explicit provision for commercial traffic rights. Case law of the CJEU demonstrates, however, that the absence of an explicit provision in a harmonizing measure is not necessarily decisive in determining the measure’s effect regarding traffic rights: The *International Jet Management* case concerned an Austrian commercial air carrier with an EU operating licence, which was fined by German authorities for entering German airspace without prior authorisation when performing non-scheduled flights from third countries to destinations in Germany.<sup>37</sup> German air carriers, on the contrary, were not required to obtain a prior authorisation. The air carrier successfully invoked the general principle of non-discrimination on grounds of nationality under Article 18 TFEU, even though air services fall outside the scope of Article 57 TFEU on services, and despite the fact that Regulation (EC) No 1008/2008 does not explicitly cover traffic rights for flights between the Community and third countries.<sup>38</sup>

The CJEU highlighted that the Regulation does not only cover ‘the right of ‘Community air carriers’ to operate ‘intra-Community air services’, but also the licensing of those air carriers’.<sup>39</sup>

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<sup>34</sup> Agreement on the European Economic Area, OJ L 1, 3.1.1994.

<sup>35</sup> Regulation (EU) 2018/1139, Article 2(1)(b), cf. Regulation (EC) No 1008/2008, Articles 1(1) and 2(4).

<sup>36</sup> Regulation (EU) 2018/1139, Article 2(1)(b), cf. Regulation (EU) No 965/2012, Article 5(6), cf. Article 2(7), cf. Annex to EASA ED Decision 2015/006/R, GM1 SPO.GEN.005(a)(15), cf. Regulation (EC) No 1008/2008, Article 1(1), cf. Article 2(4).

<sup>37</sup> Case C-628/11, *Criminal proceedings against International Jet Management GmbH*, 18.3.2014, ECLI:EU:C:2014:171.

<sup>38</sup> *Ibid.*, paras. 34–39.

<sup>39</sup> *Ibid.*, para. 41.



Furthermore, carriers operating flights to and from third countries are not excluded from the scope of the licensing rules.<sup>40</sup> Since the conditions for the issue of an operating licence are harmonized, the licence guarantees that the air carrier will be ‘in compliance with the common rules, in particular those concerning safety, and must therefore be recognised by the authorities of the other Member States.’<sup>41</sup> The opposite conclusion would lead to duplicated checks, and it would be contrary to the objectives of the Regulation, including the aim ‘to complete the internal aviation market’.<sup>42</sup> Another point emphasized by the CJEU is that ‘other rules of European Union secondary legislation relating to the aviation sector’ applied to the contested operations, including Regulation (EC) No 785/2004 on insurance requirements.<sup>43</sup> The case demonstrates that traffic rights could be derived from a set of harmonizing measures, covering vital aspects of the operation, though the rights were not entirely unconditional.<sup>44</sup>

It is not the first time that the CJEU has interpreted the rules on licensing of air carriers more broadly than their explicit scope, on the basis that other relevant rules are harmonized. In the *Neukirchinger* case, the principle of non-discrimination was applied to commercial hot-air ballooning, even though the activity falls outside the scope of the harmonized licensing rules, and the operator only had a national licence.<sup>45</sup> A central argument was that the EU legislature had adopted secondary legislation, including the Basic Regulation then applicable in the field of airworthiness, as well as rules on the harmonization of technical requirements and administrative procedures related to, *inter alia*, air operations.<sup>46</sup>

Turning back to commercial ‘specialised’ operators in today’s legal framework, these are neither licensed nor subject to a requirement for an air operator certificate. However, the operators are required to submit a ‘declaration’ to the competent authority prior to commencing operations.<sup>47</sup> The competent authority is designated by the Member State in which the EU operator has its ‘principal place of business’.<sup>48</sup> The operator is required to use aircraft with a certificate of airworthiness issued in accordance with Regulation (EU) No 748/2012,<sup>49</sup> or aircraft ‘leased-

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<sup>40</sup> *Ibid.*, para. 42.

<sup>41</sup> *Ibid.*, para. 48.

<sup>42</sup> *Ibid.*, paras. 49–50.

<sup>43</sup> *Ibid.*, para. 51–52, cf. Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators, OJ L 138, 30.4.2004.

<sup>44</sup> Case C-628/11, *International Jet Management GmbH*, at paras 59.

<sup>45</sup> Case C-382/08, *Michael Neukirchinger v. Bezirkshauptmannschaft Grieskirchen*, 25.1.2011, ECLI:EU:C:2011:27, at paras 25–29.

<sup>46</sup> *Ibid.*, para. 23.

<sup>47</sup> Regulation (EU) No 965/2012, Annex III, ORO.DEC.100, cf. Article 2(7), *contra* ORO.AOC.100(a).

<sup>48</sup> Regulation (EU) No 965/2012, Annex III, ORO.GEN.105.

<sup>49</sup> Commission Regulation (EU) No 748/2012 of 3 August 2012 laying down implementing rules for the airworthiness and environmental certification of aircraft and related products, parts and appliances, as well as for the certification of design and production organisations, OJ L 224, 21.8.2012.

in’ in from a third country.<sup>50</sup> In the latter case, a ‘prior approval of the competent authority’ is required.<sup>51</sup> No similar requirement explicitly applies if the operator uses an aircraft registered in an EU Member State other than its home state. This strongly suggests that the operator is free to choose aircraft registered in *any* EU Member State. The interpretation is supported by the objectives of the Basic Regulation, which include, *inter alia*, to ‘facilitate, in the fields covered by this Regulation, the free movement of goods, persons, services and capital, providing a level playing field for all actors in the internal aviation market’.<sup>52</sup> Free movement of services within the area of leasing of aircraft registered in EU Member States relies on traffic rights.

In the case of certain ‘high risk’ activities, a special authorisation from the competent authority *of the operator* is required in addition to the submitted declaration.<sup>53</sup> Whether such an authorisation is required due to the operation’s ‘specific nature and the local environment in which it is conducted’, however, should be ‘determined by the competent authority of the place where the operation is conducted’.<sup>54</sup> In other words, the *host state* has influence over whether an operation will be authorized only in the case of certain ‘high risk’ operations. An antithetical reading of this provision suggests that the host state cannot require an authorization for commercial ‘specialised operations’ other than those posing a ‘high risk’.

Furthermore, it follows from the Basic Regulation that ‘declarations made by natural and legal persons ... shall be subject exclusively to the rules, conditions and procedures laid down in this Regulation and national administrative requirements and shall be valid and recognised in all Member States, without further requirements or evaluation’.<sup>55</sup> The logical conclusion is that flights performed by a ‘specialised operator’ with a declaration submitted in Member State A, is allowed to operate in Member State B without any prior approval. Similarly, if Member States apply a registration requirement each time an aircraft moves from a base in one state to another, it leads to administrative burdens and costs, which essentially amount to ‘further requirements’.

The above indicates that commercial traffic rights can in fact be derived from the Basic Regulation, either directly through interpretation of the Basic Regulation’s provisions, or indirectly through the activation of Article 18 TFEU on non-discrimination, based on the scope of the Basic Regulation in combination with other applicable secondary legislation.

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<sup>50</sup> Regulation (EU) No 965/2012, Annex III, ORO.SPO.100(b).

<sup>51</sup> Regulation (EU) No 965/2012, Annex III, ORO.SPO.100(c)(2).

<sup>52</sup> Regulation (EU) 2018/1139, Article 1(2)(b).

<sup>53</sup> Regulation (EU) No 965/2012, Annex III, ORO.SPO.110(a).

<sup>54</sup> Regulation (EU) No 965/2012, Annex III, ORO.SPO.110(a)(2).

<sup>55</sup> Regulation (EU) 2018/1139 Article 67(1).

### 3.3 NON-COMMERCIAL ‘TRAFFIC RIGHTS’ FOR AIRCRAFT REGISTERED IN EU MEMBER STATES

The 2008 Basic Regulation<sup>56</sup> on civil aviation does not contain an explicit provision regulating non-commercial ‘traffic rights’, nor does the 2018 Basic Regulation that has replaced it.<sup>57</sup> Could ‘traffic rights’ still be derived from these harmonizing measures, based on implicit provisions and the measures’ exhaustive extent, in the light of the intentions of the legislator?

Prior to 2008, non-commercial air operations were nationally regulated, though harmonized insurance requirements and airworthiness rules applied.<sup>58</sup> The 2008 Basic Regulation *extended* the EU’s competence to regulate *non-commercial operation* of ‘[a]ircraft ... registered in a Member State’.<sup>59</sup> While the 2008 Basic Regulation was repealed and replaced in 2018, the discussion below initially focuses on the first, since it is necessary to analyse the legislator’s intention behind the extension of EU’s competence. Furthermore, the 2008 Basic Regulation is the legal basis for the Commission Regulation still in force covering non-commercial operations.<sup>60</sup> Where relevant differences between the two Basic Regulations exist, these will be highlighted.

When analyzing the scope of EU secondary legislation in relation to non-commercial operations, one must keep in mind that the Chicago Convention does not provide the host state with an unconditional right to require prior permission for international non-commercial flights (that are non-scheduled) with ICAO compliant<sup>61</sup> aircraft, unlike for most commercial flights.<sup>62</sup> Furthermore, ICAO standards and recommended practices (SARPs) do not assume air operator certificates for other than commercial operations.<sup>63</sup> There was consequently no obvious need to extend the scope of Regulation (EC) No 1008/2008 on air services to ensure that non-commercial flights could operate freely in the EU.

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<sup>56</sup> Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC, OJ L 79, 19.3.2008.

<sup>57</sup> Regulation (EU) 2018/1139.

<sup>58</sup> Regulation (EC) No 785/2004, Article 5(1), cf. Article 2(1); Regulation (EC) No 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, Article 1(1)(a), *contra* Article 1(1)b, cf. Article 7, OJ L 240, 7.9.2002.

<sup>59</sup> Regulation (EC) No 216/2008, Article 4(1)(b), cf. Article 8(1), cf. preamble para. 8.

<sup>60</sup> Regulation (EU) No 965/2012.

<sup>61</sup> Aircraft with a certificate of airworthiness issued in accordance with Article 31 of the Chicago Convention.

<sup>62</sup> Chicago Convention Article 5(1), *contra* Articles 5(2), 6 and 7.

<sup>63</sup> Annex 6 to the Convention on International Civil Aviation: Operation of Aircraft – Part I International Commercial Air Transport – Aeroplanes, p. 1-1 and Appendix 6 (11th. ed., ICAO 2018) [hereinafter ICAO Annex 6 Part I].

However, in developing the 2008 Basic Regulation, ‘restrictions to the free movement of certain categories of aircraft’ in non-commercial operations were identified in the legislative process.<sup>64</sup> At the time, such ‘categories of aircraft’ included aircraft which didn’t enjoy traffic rights through Article 5(1) of the Chicago Convention, due to the lack of an ICAO compliant certificate of airworthiness, and/or aircraft that some Member States would not accept in their airspace due to lack of technical harmonization at EU level, as per Article 4(2), cf. Annex II, of the initial Basic Regulation of 2002.<sup>65</sup> By extending EU competence to rules on non-commercial air operations, the EU legislature sought to secure freedom of movement of all aircraft subject to technical harmonization at EU level, whether ICAO compliant or not.<sup>66</sup>

The result of the harmonizing effort of 2008 is that non-commercial operators must comply with ‘essential requirements’ in Annex IV of the Basic Regulation, as well as ‘conditions to operate an aircraft in compliance with the essential requirements set out in Annex IV’ adopted by the European Commission.<sup>67</sup> The Commission has introduced such ‘conditions’ through the addition of Annex VI (‘Part-NCC’)<sup>68</sup> and Annex VII (‘Part-NCO’)<sup>69</sup> to the Regulation on Air Operations.<sup>70</sup>

The underlying question is whether these ‘essential requirements’ and ‘conditions’ are exhaustive, or if Member States may add further requirements, such as a requirement of registration in the state where the aircraft is based. The answer will depend on [1] whether the Basic Regulation introduces total harmonization and [2] whether the harmonization extends to the field of such ‘traffic rights’.

As is typical for EU legal acts, the 2008 Basic Regulation does not in itself state that the harmonization level is total. However, the emphasis on ‘common’ rules<sup>71</sup> indicate that the legislature has chosen total harmonization rather than minimum or partial harmonization. The regulation’s main objective, which is to establish and maintain a ‘*uniform* level of civil aviation safety’

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<sup>64</sup> Opinion No 03/2004 of the European Aviation Safety Agency for amending Regulation (EC) No 1592/2002 of the European Parliament and of the Council on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, to extend its scope to the regulation of pilot licensing, air operations and third country aircraft 6 (EASA 2004).

<sup>65</sup> Regulation (EC) No 1592/2002.

<sup>66</sup> Opinion No 03/2004, *supra* n. 64, at p. 6–7, *contra* Regulation (EC) No 216/2008, preamble para. 5, cf. Article 4(4), cf. Annex II.

<sup>67</sup> Regulation (EC) No 216/2008, Article 8(5)(a), *accord* Regulation (EU) 2018/1139, Article 31(1)(a).

<sup>68</sup> Non-commercial operations with complex motor-powered aeroplanes and helicopters, cf. Regulation (EU) No 965/2012, Article 5(3).

<sup>69</sup> Non-commercial operations with other-than-complex motor-powered aeroplanes and helicopters, cf. Regulation (EU) No 965/2012, Article 5(4).

<sup>70</sup> Regulation (EU) No 800/2013, cf. Regulation (EU) No 965/2012, Article 5(3)–(4).

<sup>71</sup> Regulation (EC) No 216/2008, preamble paras 1 and 29, *accord* Regulation (EU) 2018/1139 [title].

(italics added), is a further indication of total harmonization.<sup>72</sup> Moreover, the legislature has explicitly exempted certain aircraft from the scope of the Basic Regulation, since ‘[i]t would not be appropriate to subject all aircraft to common rules’.<sup>73</sup> For operations of aircraft within the scope of the Basic Regulation, on the contrary, the national and European authorities are obliged to ensure ‘the *uniform implementation* of all necessary acts ... within their respective areas of responsibility’ (italics added).<sup>74</sup> Only total harmonization can provide uniform implementation in a strict sense.

If the harmonization level is total, ‘the Member States lose the power to derogate from the provisions of the EU legal act apart from the exceptions explicitly provided for by the legal act at issue’, according to van den Brink’s interpretation of CJEU case law.<sup>75</sup> The flexibility provisions in Article 14 of the Basic Regulation support the notion that derogations – including additional national requirements – are not possible to a greater degree than Article 14 explicitly allows. It follows from the above that the Basic Regulation is a total harmonization measure.

The next question is whether the harmonized area extends to non-commercial ‘traffic rights’. The ‘principal objective’ of the Basic Regulation is to ‘establish and maintain a high uniform level of civil aviation *safety*’ (italics added).<sup>76</sup> This could be interpreted as meaning that the regulation only harmonizes safety aspects, while other aspects (such as ‘traffic rights’) are outside the specific harmonized area. Such an interpretation could be compatible with Sweden’s code and Denmark’s administrative practice. However, an additional objective of the Basic Regulation is ‘to facilitate the free movement of goods, persons and services’,<sup>77</sup> which indicates that it reaches beyond the area of safety alone. The Basic Regulation rather established ‘a comprehensive framework for the definition and implementation of common technical requirements and administrative procedures in the field of civil aviation’.<sup>78</sup>

It follows from the case law of the CJEU that ‘*travaux préparatoires*’ and ‘legislative history’ might play a role in consolidating a legal interpretation.<sup>79</sup> From the preparatory work of the

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<sup>72</sup> Regulation (EC) No 216/2008, Article 2(1), *accord* Regulation (EU) 2018/1139, Article 1(1).

<sup>73</sup> Regulation (EC) No 216/2008, preamble para. 5, cf. Article 4(4), cf. Annex II, *accord* Regulation (EU) 2018/1139, preamble para. 4, cf. Article 2(3)(d), cf. Annex I.

<sup>74</sup> Regulation (EC) No 216/2008, Article 2(3)(d), *accord* Regulation (EU) 2018/1139, Article 1(3)(f).

<sup>75</sup> Ton van den Brink, *The Impact of EU Legislation on National Legal Systems: Towards a New Approach to EU – Member State Relations*, in 19 *Cambridge Yearbook of European Legal Studies* 211, 219 (Cambridge 2017).

<sup>76</sup> Regulation (EC) No 216/2008 Article 2(1), *accord* Regulation (EU) 2018/1139, Article 1(1).

<sup>77</sup> Regulation (EC) No 216/2008, Article 2(2)(b), cf. preamble para. 10, *accord* Regulation (EU) 2018/1139, Article 1(2)(b), cf. preamble para. 42 (though ‘capital’ is now added).

<sup>78</sup> Regulation (EC) No 216/2008, preamble para. 33.

<sup>79</sup> Case C-264/19, *Constantin Film Verleih GmbH v. YouTube LLC and Google Inc*, ECLI:EU:C:2020:542, at para. 31; C-601/15 *J. N. v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2016:84, at para. 57.

Basic Regulation of 2008 cited above, it is apparent that the EU opted to harmonize regulation of non-commercial operation of aircraft, because continued national regulation ‘could aggravate the current restrictions to the free movement of certain categories of aircraft’.<sup>80</sup> Since the purpose of including non-commercial operations in the 2008 Basic Regulation as a harmonizing measure was to avoid restrictions on free movement, it strongly supports the interpretation that the specific harmonized area includes ‘traffic rights’ intra-EU for such operations. The opposite conclusion would mean that the regulation's *effet utile* would be undermined, and it would be contrary to the object and purpose of the EU Treaties, in accordance with which secondary law should be interpreted.<sup>81</sup>

The 2018 Basic Regulation provides additional support for derived ‘traffic rights’. The Regulation provides that ‘aircraft covered by Annex I to this Regulation and registered in a Member State may be operated in other Member States, subject to the agreement of the Member State in the territory of which the operation takes place’.<sup>82</sup> Aircraft of categories listed in ‘Annex 1’ – such as homebuilt and historic aircraft – are excluded from the scope of the Basic Regulation.<sup>83</sup> An antithetical reading of this provision supports that aircraft *not covered by Annex I* may be operated *without* special agreement of the Member State in whose territory the operation takes place. Furthermore, non-commercial operators of *complex* motor-powered aircraft (‘NCC operators’)<sup>84</sup> are required to submit a declaration prior to commencing operations.<sup>85</sup> The competent authority for an NCC operator is the ‘authority designated by the Member State in which the operator has its principal place of business, is established or is residing’.<sup>86</sup> NCC operators are hence in a similar regulatory position to commercial ‘specialised’ operators discussed above, in the sense that the declaration ‘shall be subject exclusively to the rules, conditions and procedures laid down in this Regulation and national administrative requirements and shall be valid and recognised in all Member States, without further requirements or evaluation’.<sup>87</sup>

The *International Jet Management* case demonstrates how the CJEU has put emphasis on whether an activity is regulated by common rules – ‘in particular those concerning safety’ – in

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<sup>80</sup> Opinion No 03/2004, *supra* n. 64, at para. 19.

<sup>81</sup> E.g., Case C-83/13, *Fonnschip A/S v. Svenska Transportarbetareförbundet and Facket för Service och Kommunikation (SEKO) and Svenska Transportarbetareförbundet v. Fonnschip A/S*, ECLI:EU:C:2014:2053, at paras 41–44.

<sup>82</sup> Regulation (EU) 2018/1139, Article 2(3) last paragraph.

<sup>83</sup> The two previous Basic Regulations on civil aviation contain a similar exemption mechanism, cf. Regulation (EC) No 1592/2002 Annex II and Regulation (EC) No 216/2008 Annex II.

<sup>84</sup> Typically, larger business aviation aircraft, as opposed to simpler general aviation aircraft.

<sup>85</sup> Regulation (EU) No 965/2012 Annex III ORO.DEC.100.

<sup>86</sup> Regulation (EU) No 965/2012 Annex VI NCC.GEN.100.

<sup>87</sup> Regulation (EU) 2018/1139 Article 67(1).

order to determine the extent of traffic rights.<sup>88</sup> For non-commercial aviation with aircraft registered in EU Member States, all safety aspects are subject to harmonization at a detailed level, including requirements within the areas of initial and continuing airworthiness, air crew licensing, operations and insurance.<sup>89</sup> However, neither in this case nor in the *Neukirchinger* case does the CJEU state that traffic rights can be derived directly from the secondary legislation at issue. Instead, the Court considers that Article 18 TFEU on non-discrimination is activated, which in turn leads to derived traffic rights. A possible explanation for this indirect application, is that the EU legislator had explicitly neither exercised its shared competence by adopting measures on licensing of commercial hot-air balloon operators,<sup>90</sup> nor liberalized transport services other than ‘intra-Community air services’.<sup>91</sup> In the case of non-commercial air operations, the legislator has – on the contrary – actively sought to avoid restrictions to free movement of aircraft.

In summary, I conclude that non-commercial operations of aircraft registered in an EU Member State and operated by an EU operator are subject to total harmonization, which also includes ‘traffic rights’ intra-EU, regardless of where the aircraft is based. The Member States cannot add further requirements, such as a requirement of a traffic permit or a national registration requirement.

Even if the opposite were the case, the all-encompassing harmonization of non-commercial operations could be capable of activating Article 18 TFEU and fundamental freedoms of the EU Treaties. It will depend on the factual circumstances whether this will be the case in a scenario involving non-commercial aviation. Some scenarios will be analysed in Chapter 4 below, regarding non-commercial operations of third country aircraft performed by EU operators.

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<sup>88</sup> *See supra*, n. 41.

<sup>89</sup> Commission Regulations (EU) Nos 748/2012; 1321/2014 of 26 November 2014 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks, OJ L 362, 17.12.2014; 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 311, 25.11.2011 and 965/2012 of 5 October 2012 laying down technical requirements and administrative procedures related to air operations pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, OJ L 296, 25.10.2012; Regulation (EC) No 785/2004.

<sup>90</sup> Regulation (EC) No 2407/92, Article 1(2), cf. Case C-382/08, *Neukirchinger*, at para. 25.

<sup>91</sup> Regulation (EC) No 1008/2008 Article 15(1) and (2), cf. Case C-628/11, *International Jet Management*, at para. 39.

### 3.4 'TRAFFIC RIGHTS' FOR AIRCRAFT REGISTERED IN THIRD COUNTRIES

The Basic Regulation of 2008 also extended EU competence to the non-commercial operation of '[a]ircraft ... registered in a third country and ... used into, within or out of the Community by an operator established or residing in the Community'.<sup>92</sup>

The legal analysis above is also relevant in a scenario where an EU operator operates an aircraft registered in a *third country*, but with caveats: First, the preparatory work points towards a *different objective* for harmonization. The EU legislature sought to support 'the principle of free movement established by the Chicago Convention' by introducing 'appropriate surveillance' and harmonized rules.<sup>93</sup> The objective was explicitly to address 'third country aircraft more or less permanently based in the territory of Member States'.<sup>94</sup> Such aircraft's presence in the EU was based on Article 5(1) of the Chicago Convention. While harmonization of the rules regulating operations of aircraft registered in EU Member States was intended to *secure freedom of movement* for aircraft not already circulating freely, the objective of harmonization of the rules regulating operations of third country aircraft was to address safety for aircraft already in circulation, thanks to the Chicago Convention.

Second, rules on airworthiness of third country aircraft is not harmonized at the same detailed level as aircraft registered in EU Member States. For *initial airworthiness*, only 'essential requirements' are in place.<sup>95</sup> This is logical, since '[e]very aircraft engaged in international navigation shall be provided with a certificate of airworthiness issued or rendered valid by the State in which it is registered' in accordance with Article 31 of the Chicago Convention. The essential requirements were initially supposed to transform ICAO standards and recommended practices on airworthiness<sup>96</sup> into hard law.<sup>97</sup> However, the legislature opted for less detailed rules, seeking to achieve 'a regulatory framework that was clear, but at the same time sufficiently general

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<sup>92</sup> Regulation (EC) No 216/2008, Article 4(1)(c), cf. Article 8(1), cf. preamble para. 8, *accord* Regulation (EU) 2018/1139, Article 2(1)(b)(ii), cf. Articles 29, 30(5)(b) and 31(1)(a).

<sup>93</sup> Comment Response Document to the consultation document on the applicability, basic principles and essential requirements for pilot licensing and air operations and for the regulation of third country aircraft operated by third country operators (EASA 2004), at paras 15–17.

<sup>94</sup> *Ibid.*

<sup>95</sup> Regulation (EC) No 216/2008, Article 4(1)(c), cf. Article 5(1), cf. Annex I, *accord* Regulation (EU) 2018/1139, Article 2(1)(b)(ii), cf. Article 9(1), cf. Annex II.

<sup>96</sup> Annex 8 to the Convention on International Civil Aviation: Airworthiness of Aircraft (9th ed., ICAO 2001) [hereinafter ICAO Annex 8].

<sup>97</sup> Proposal for a Regulation of the European Parliament and of the Council on establishing common rules in the field of civil aviation and creating a European Aviation Safety Agency COM(2000) 595 final — 2000/0246(COD) (Annex), OJ C 154E, 29.5.2001 (European Commission 2001).



to allow the Agency to work efficiently.<sup>98</sup> While enforcing the high level rules for initial airworthiness are thus unlikely to lead to a breach of convention obligations on the part of Member States, it could be argued that the level of harmonization is not ‘total’, but rather partial. Also, in the field of continuing airworthiness, only essential requirements apply;<sup>99</sup> detailed rules (‘Part-T’) apply solely to ‘licence air carriers’.<sup>100</sup> This could be regarded as a further indication of partial harmonization of third country aircraft. If partial, Member States might in fact exercise the residual competence within that narrow field, provided that such exercise is compatible with Article 5(1) and 31 of the Chicago Convention.

Since it is therefore unclear whether ‘traffic rights’ for operation of third country aircraft can be derived directly from EU secondary legislation, I will turn to primary EU law. It is settled case law that ‘air transport’ is ‘subject to the general rules of the Treaty’, even within areas where the EU legislature has not exercised its competence.<sup>101</sup> The same applies if the EU legislature has only implemented minimum harmonization measures.<sup>102</sup> When Member States exercise their competence to supplement rules laid down by the EU – as well as those established by the State of registry – the general rules of primary EU law must therefore be respected. Below, I will investigate how such general rules – in combination with the harmonization of the segment described above – might lead to derived traffic rights.

#### 4 TRAFFIC RIGHTS DERIVED FROM FUNDAMENTAL FREEDOMS

##### 4.1 THIRD COUNTRY AIRCRAFT AND THE TREATIES’ TERRITORIAL AND PERSONAL SCOPE

To activate fundamental freedoms of the EU Treaties, such as the freedom of movement of services, the situation at issue must fall within the material, personal and territorial scope of the relevant Treaty provision.<sup>103</sup> Article 17 of the Chicago Convention provides that ‘[a]ircraft have the nationality of the State in which they are registered’. In accordance with customary international law, the jurisdictional position of a *ship* is such that it is ‘assimilated to the territory of the State the flag of which it flies’ (when on the high seas).<sup>104</sup> Aircraft are in a similar position, for instance regarding the State of registry’s competence to exercise jurisdiction with regard to

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<sup>98</sup> Common Position (EC) No 17/2002 adopted by the Council on 19 December 2001 with a view to adopting Regulation (EC) No . . ./2002 of the European Parliament and of the Council of ... on common rules in the field of civil aviation and establishing a European Aviation Safety Agency (European Council 2007), Statement of the Council’s Reasons no. II(5).

<sup>99</sup> Regulation (EU) 2018/1139, Article 2(1)(b)(ii), cf. Article 29, cf. Annex V point 6.

<sup>100</sup> Regulation (EU) No 1321/2014 Article 1(b), cf. Annex Va (Part-T), T.A.101.

<sup>101</sup> Case C-167/73, *Commission v. France*, 4.4.1974, ECLI:EU:C:1974:35, at para. 32.

<sup>102</sup> Case C-389/96, *Aher Waggon GmbH v. Germany*, 14.7.1998, ECLI:EU:C:1998:357, at paras 15–16.

<sup>103</sup> E.g., Catherine Barnard, *The substantive law of the EU: The four freedoms* 205–207 (Oxford University Press 6th ed. 2019).

<sup>104</sup> *The case of the S.S. «Lotus»*. Permanent Court of International Justice, no. 9, 7. September 1927, at p. 25.

offences and other acts committed on board.<sup>105</sup> The State of registry is also the competent state regarding the issue of certificates of airworthiness and licences for personnel.<sup>106</sup> For non-commercial operations, the State of registry likewise regulates most or several aspects of the operation of aircraft, which in commercial air transport, on the other hand, would fall under the competence of the ‘State of the Operator’.<sup>107</sup> In summary, the territorial and personal link between non-commercial operators of *third country aircraft* and EU law is relatively weak at the outset.

However, the scope of the Basic Regulation of 2018 includes ‘the design, production, maintenance and operation of aircraft ... registered in a third country and operated by an aircraft operator established, residing or with a principal place of business in the territory to which the Treaties apply.’<sup>108</sup> Furthermore, the scope *ratione personae* includes associated pilots.<sup>109</sup> It follows from the *Neukirchinger* case that secondary legislation may activate general rules of the EU Treaties within areas otherwise excluded, as long as the legislation’s objective is sufficiently broad.<sup>110</sup> The Basic Regulation has likewise a broad objective in that it seeks to facilitate, *inter alia*, ‘the free movement of goods, persons, services and capital’.<sup>111</sup> Consequently, the legislature has in effect brought the use of third country aircraft under the personal and territorial scope of EU law in a wider sense. The general rules of the EU Treaties must hence be assumed to apply for non-commercial operations of third country aircraft by EU operators, to the extent that the aspect in question is not subject to full harmonization.

Case law within the field of commercial sea law supports this line of reasoning: The CJEU has concluded that certain rights to provide maritime transport services could be derived from a harmonization measure to the benefit of a ‘proprietor of a vessel flying the flag of a third country’, when the proprietor is established in the EEA.<sup>112</sup> The scope *ratione personae* of the harmonization measure was the decisive factor, and general Treaty provisions were activated, despite the relatively weak link between third country vessels and EU/EEA law.<sup>113</sup>

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<sup>105</sup> Convention on offences and other acts committed on board aircraft, 14 September 1963, 704 U.N.T.S. 220 Article 3(1).

<sup>106</sup> Chicago Convention Article 31–32.

<sup>107</sup> ICAO Annex 6 Part II, Ch. 2.1.4, 2.1.1.4, 2.2.2.2.1 and 2.5.2.4, cf. ICAO Annex 6 Part I, Ch. 4.2.1.1, 3.1.6, 4.2.8.2 and 7.2.3, cf. p. 1-10.

<sup>108</sup> Regulation (EU) 2018/1139 Article 2(1)(b)(ii), *accord* Regulation (EC) No 216/2008, Article 4(1)(c).

<sup>109</sup> Regulation (EU) 2018/1139 Articles 20–21(1), *accord* Regulation (EC) No 216/2008, Articles 7(1)–(2).

<sup>110</sup> Case C-382/08, *Neukirchinger*, at paras 25–30.

<sup>111</sup> Regulation (EU) 2018/1139 Article 1(2)(b), *accord* Regulation (EC) No 216/2008, Article 2(2)(b).

<sup>112</sup> Case C-83/13, *Fonnschip*, at paras 32, 33 and 44.

<sup>113</sup> Case C-83/13, *Fonnschip*, at paras 32, 33 and 41.

Some examples illustrating how ‘traffic rights’ can be derived from fundamental freedoms are provided below.

#### 4.2 FREEDOM TO PROVIDE SERVICES

A scenario can be imagined, where a German national operates an aircraft rental business based in Germany. The fleet includes aircraft registered in a third country. The German national might wish to rent aircraft out to pilots established in Denmark. However, the Danish authorities require a special permission and the payment of a fee, and the duration would typically be limited to six months.<sup>114</sup> Furthermore, no permission will be granted if the aircraft cannot be registered in Denmark due to lack of compliance with Danish rules on standard certificates of airworthiness. Can these requirements be upheld, considering the right to *provide services*?

Article 56(1) TFEU ensures freedom to provide services for ‘nationals of Member States who are established in a Member State other than that of the person for whom the services are intended’. The above scenario is covered by the personal and territorial scope of this provision, including the requirement for an inter-state element.

What constitutes ‘services’ is further specified in Article 57 TFEU. While this provision ‘does not apply as such to the air transport sector’,<sup>115</sup> the CJEU has confirmed that ‘the leasing and hiring of aircraft constitute services within the meaning of [Article 57 TFEU]’.<sup>116</sup> The scenario hence falls within the material scope of the provision.<sup>117</sup>

According to case law, Article 56(1) TFEU precludes any restriction ‘which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services’.<sup>118</sup> In our scenario, the German national can legally run a rental business of third country aircraft in Germany. While it depends on the factual details whether the services will be prohibited or impeded in Denmark, the Danish measures will undoubtedly be ‘liable to’ have one of these effects. If the aircraft design meets

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<sup>114</sup> Aeronautical Information Circular: AIC B 19/21 (Naviair 2021).

<sup>115</sup> Case C-382/08, *Neukirchinger*, at para. 22, cf. Article 58(1) TFEU.

<sup>116</sup> Case C-9/11, *Waypoint Aviation SA v. Belgium*, 13.10.2011, ECLI:EU:C:2011:658, at para. 20.

<sup>117</sup> Part Three Title IV TFEU distinguishes between ‘right of establishment’ (Title IV Chapter 2) and ‘services’ (Title IV Chapter 3). It follows from Article 57(3) TFEU that a service provider can rely on the services provisions only as far as the activities are not covered by the rules for ‘establishment’. If an activity is provided in another Member State ‘on a stable and continuous basis’, the provisions of ‘establishment’ applies. Activities provided ‘on a temporary basis’, on the contrary, is covered by the chapter on ‘services’, cf. Case C-55/94, *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano*, 30.11.1995, ECLI:EU:C:1995:411, at paras 25–27.

<sup>118</sup> Case C-628/11, *International Jet Management*, at para. 57.

the essential airworthiness requirements in the EU, but not the detailed airworthiness requirements applicable to aircraft registered in EU Member States,<sup>119</sup> a change of registration from the third country to Denmark won't be legally possible. In such a case, the restriction amounts to a prohibition. In any case, the services are rendered 'less advantageous'. Therefore, a restriction exists.

The question then is whether the restriction can be justified. Denmark may rely on the express derogations of Article 52 (1) TFEU, cf. Article 62. Denmark can also rely on overriding reasons of public interest, for instance *air safety*.<sup>120</sup> It follows from settled case law that exceptions to fundamental freedoms must be construed narrowly. Furthermore, the burden of proof is on the Member State to show that the conditions are met. The wording of the Danish circular indicates that compliance with airworthiness standards and access to oversight are central aspects motivating the measure.<sup>121</sup> In other words, air safety might justify the restriction. However, the restriction must be 'proportionate to the legitimate aim of the national provisions'.<sup>122</sup> This requirement is fulfilled if the restrictions are 'suitable for securing the attainment of the objective which they pursue and do not go beyond what is strictly necessary in order to attain it'.<sup>123</sup>

Third country aircraft used by persons based and residing abroad would have access to Denmark's airspace and airports due to Articles 5(1) and 15 of the Chicago Convention. As there is no predictable correlation between where a person is established and to what extent an aircraft is used within a certain country's airspace, it is doubtful that the measure is suitable. In *International Jet Management*, the CJEU would not accept that Germany – regarding access to German airspace – distinguished between intermediate stops and destinations, since Germany could not explain why 'the safety interests relied upon can be ignored' only in the first case.<sup>124</sup>

Even if the restriction is suitable to the objective pursued, the question remains as to whether it goes beyond what is strictly necessary to attain it. It is likely that it goes too far, as it effectively bans the use of aircraft that meet harmonized essential airworthiness requirements, operated in accordance with fully harmonized rules on air operations, air crew licensing and insurance.

A potential counterargument is that third countries do not necessarily impose the same airworthiness directives for an aircraft on their register, which would have applied if the aircraft

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<sup>119</sup> Regulation (EU) No 748/2012, Article 1(1).

<sup>120</sup> Case C-382/08, *Neukirchinger*, at paras 40–42.

<sup>121</sup> *See supra* n. 114.

<sup>122</sup> Case C-628/11, *International Jet Management*, at para. 68.

<sup>123</sup> Case C-451/99, *Cura Anlagen GmbH v Auto Service Leasing GmbH (ASL)*, 21.3.2002, ECLI:EU:C:2002:195, at para. 32.

<sup>124</sup> Case C-628/11, *International Jet Management*, at para. 75.

was registered in an EU Member State. However, if the assessment of the European Commission is correct, the Chicago Convention does not preclude that the EU also applies continuing airworthiness requirements, including ‘mandatory safety information’, to third country aircraft operated by EU operators in the EU.<sup>125</sup> In the absence of detailed airworthiness rules at Union level applicable to non-commercial operators, the Member States ought to be in a similar position through the retention of such competence. Exercising this competence would provide a national regulatory alternative with a less negative effect on intra-EU trade than an outright ban.<sup>126</sup>

The likely conclusion is that the restriction is not proportionate and that non-commercial ‘traffic rights’ hence go further than the Danish circular indicates.

#### 4.3 FREE MOVEMENT OF GOODS

In another scenario, a Finnish aircraft owner would like to sell his/her aircraft manufactured and registered in a third country – and legally operated in Finland – to a pilot in Sweden. If the aircraft only complies with ICAO Annex 8 and hence EU’s essential requirements on airworthiness – not the detailed airworthiness requirements applicable to aircraft registered in EU Member States – the Swedish buyer will be unable to use the aircraft in Sweden due to the registration requirement in force for aircraft permanently operated in Sweden.

Article 28(1) TFEU provides that ‘[t]he Union shall comprise a customs union which shall cover all trade in goods’. According to settled case law, ‘goods’ are ‘products which can be valued in money and which are capable, as such, of forming the subject of commercial transaction’.<sup>127</sup> It is clear that an aircraft is covered by this interpretation of ‘goods’. With regard to territorial scope, the rules of Part Three Title II Chapter 3 TFEU on quantitative restrictions apply ‘to products coming from third countries which are in free circulation in Member States’, cf. Article 28(2) TFEU. On the premise that the import formalities have been complied with and duties paid upon initial import to Finland, the aircraft is in free circulation in accordance with Article 29 TFEU.

Article 34 TFEU provides that ‘[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States’. The term ‘between’ indicates

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<sup>125</sup> Regulation (EU) No 1321/2014, Annex Va (Part-T), T.A.201(1)(f)(ii), cf. Notice of proposed amendment (NPA) No. 2010-10 Draft opinion of the European Aviation Safety Agency (EASA 2010), at paras 37–41.

<sup>126</sup> EASA has admitted that in some specific cases ‘there might be conflicts between mandatory requirements issued by the State of Registry and mandatory safety information issued by the Agency’. A similar conflict could obviously arise if mandatory safety information is issued by the national authority. However, in such cases ‘the operator would need to consider alternative means in order to resolve such conflict’, cf. Opinion No. 06/2012 of the European Aviation Safety Agency of 27 November 2012 [...], at p. 9.

<sup>127</sup> Case C-7/68, *Commission v. Italy*, 10.12.1968, ECLI:EU:C:1968:51.

that there is a requirement for an inter-state element. In our scenario, this condition is fulfilled. The Swedish measures are obviously not covered by the ordinary meaning of the term ‘quantitative restrictions’. The question is hence whether they are ‘measures having equivalent effect’ to quantitative restrictions.

It is settled case-law that ‘any measure capable of hindering, directly or indirectly, actually or potentially, intra-Community trade constitutes a measure having an effect equivalent to a quantitative restriction’.<sup>128</sup> This also includes restrictions or prohibitions on the use of products in the territory of Member States, if they have ‘considerable influence on the behaviour of consumers’.<sup>129</sup> The case cited concerned the use of personal watercraft, which was previously highly restricted in Sweden, contravening EU law. In the case of aircraft, the restriction goes further since the aircraft cannot be operated at all in Sweden if the operation is of a permanent nature. The buyer will hence have a limited interest in buying the aircraft, which means that a quantitative restriction applies.

To be justified, the restriction must pursue a legitimate aim.<sup>130</sup> It follows from the preparatory work of the Swedish code that the measure is introduced on the assumption that the national aviation authority has limited rights to perform oversight activities of foreign registered aircraft, for which *air safety* is the typical purpose.<sup>131</sup> While ensuring air safety must be regarded as a legitimate aim, ‘the national provision must be appropriate for securing the attainment of the objective pursued and not go beyond what is necessary in order to attain it’.<sup>132</sup>

Since the Swedish code was enacted, EU harmonization has introduced the ‘*State of the operator*’ principle for non-commercial operators of third country aircraft. For such operators, the competent authority is ‘the authority designated by the Member State where the operator has its principal place of business, is established or is residing’.<sup>133</sup> The previous and default state of law entailed that the *State of registry* is the competent state for non-commercial air operators.<sup>134</sup> The new regime introduces oversight powers to the authorities in the state where the operator is based, which includes the right to verify, e.g., ‘continued compliance with the applicable

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<sup>128</sup> C-389/96, *Aher-Waggon*, at para. 17, cf. Case C-8/74, *Procureur du Roi v. Benoît and Gustave Dassonville*, 11.7.1974, ECLI:EU:C:1974:82, at para. 5.

<sup>129</sup> C-142/05, *Åklagaren v. Percy Mickelsson and Joakim Roos*, 4.6.2009, ECLI:EU:C:2009:336, at para. 26.

<sup>130</sup> Objectives listed in Article 36 TFEU or ‘overriding reason relating to the public interest capable of justifying a hindrance to the free movement of goods’, of which one example is ‘road safety’, cf. C-110/05 *Commission v. Italy*, 10.2.2009, ECLI:EU:C:2009:66, at para. 60. Air safety must be an equally legitimate objective.

<sup>131</sup> SOU 1999:42 *supra* n. 8, at 174.

<sup>132</sup> C-142/05, *Mickelsson & Roos*, at para. 29.

<sup>133</sup> Regulation (EU) No 965/2012, Annex VI, NCC.GEN.100, cf. Annex VII, NCO.GEN.100(b), contra NCO.GEN.100(a).

<sup>134</sup> *See supra* n. 107.

requirements of non-commercial operators of other-than complex motor-powered aircraft'.<sup>135</sup> Among those requirements are essential requirements on continuing airworthiness.<sup>136</sup> In other words, the issue that the Swedish code sought to address, has – at least in part – been addressed by EU law.

Even if Sweden is entitled to apply more rigorous ways to document compliance with the essential airworthiness requirements secured by EU law, alternatives to bans exist. As demonstrated above, certain additional continuing airworthiness requirements might be introduced. This further supports the notion that the restriction does not meet the proportionality test.

#### 4.4 FREE MOVEMENT OF CAPITAL

An owner of a third country aircraft in Germany, wishing to lend the aircraft out to a person in Denmark, would be deterred from doing so due to the Danish restrictions on the use of aircraft registered in third countries. Depending on the aircraft model, its airworthiness specification and other variables, the restriction could take the form of an operating ban. According to the CJEU, 'the cross-border lending of a vehicle free of charge constitutes a capital movement'.<sup>137</sup> As emphasized by the Court, 'the essential element of a loan is the option of using the goods loaned'.<sup>138</sup> Since the person in Denmark might be unable to use the aircraft, the question is whether the national legislation is compatible with the rights of free movement of capital.

Article 63 TFEU provides that 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.<sup>139</sup> The issue is whether the Danish policy on the use of third country aircraft amounts to a restriction on capital movements. In the case cited above, the Netherlands imposed *full* registration tax in the Netherlands for a person borrowing a vehicle registered in another Member State from a resident of that state, without taking into account the duration of the vehicle's use. While taxation on cars is not harmonized at EU level, the Member States must respect EU law when they exercise their competence.<sup>140</sup> The restriction in our case is less strict, if the aircraft complies with Danish rules for the issue of a certificate of airworthiness: A six-month approval might be given without incurring costs in the same order of magnitude as a full car registration tax. However, if the aircraft does not qualify for a Danish certificate of airworthiness, the use of the aircraft will be

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<sup>135</sup> Regulation (EU) No 965/2012, Annex II, ARO.GEN.300(3).

<sup>136</sup> Regulation (EU) 2018/1139, Article 2(1)(b)(ii), cf. Article 29, cf. Annex V point 6.

<sup>137</sup> Case C-578/10, *Staatssecretaris van Financiën v. L.A.C. van Putten and Others*, 26.4.2012, ECLI:EU:C:2012:246, at para. 36.

<sup>138</sup> Case C-578/10, *van Putten and Others*, at para. 39.

<sup>139</sup> Albeit '[w]ithin the framework of the provisions set out in [Part Three Title IV Chapter 4 TFEU]'.

<sup>140</sup> Case C-578/10, *van Putten and Others*, at para. 37.

prohibited, even though the aircraft complies with the EU's essential requirements on airworthiness.

As such, the rule is not overtly discriminatory, but as in the case concerning vehicles in the Netherlands, the national measure is 'liable to make such cross border capital movements less attractive'.<sup>141</sup> Danish residents are dissuaded from accepting loans of aircraft offered by residents of another Member State. The conclusion must therefore be that the Danish measures amount to a restriction on capital movements.

For a restriction to be compatible with EU law, it must be 'justified by reasons referred to in [Article 65(1) TFEU] or by overriding requirements of the general interest and ... applicable to all persons and undertakings pursuing an activity in the territory of the host Member State'.<sup>142</sup> Air safety could probably be subsumed under 'public security' in accordance with Article 65(1). However, the national rules must also 'be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it'.<sup>143</sup> Based on the proportionality analysis above regarding services and goods, it is unlikely that the result will be different if the Danish requirements are tested against the freedom of movement of capital.

## 5 CONCLUSION

Non-commercial 'traffic rights' for EU operators of aircraft registered in EU Member States can be derived from EU harmonization of technical requirements and administrative procedures related to air operations<sup>144</sup> in combination with fully harmonized rules on airworthiness, aircrew licensing and insurance,<sup>145</sup> as long as the aircraft used is covered by the scope of the Basic Regulation on civil aviation.<sup>146</sup>

Non-commercial EU operators of aircraft registered in third countries enjoy certain 'traffic rights' intra-EU for international flights based on Article 5(1) of the Chicago Convention, provided that the flights are 'non-scheduled'. The extent of these 'traffic rights' is not entirely clear, but in exercising these rights, operators are obliged to comply with fully harmonized technical requirements and administrative procedures related to air operations.<sup>147</sup> It is uncertain if 'traffic rights' can be derived directly from this harmonizing measure, since the EU legislator

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<sup>141</sup> Case C-578/10, *van Putten and Others*, at para. 40.

<sup>142</sup> Case C-367/98, *Commission v. Portugal*, 4.6.2002, ECLI:EU:C:2002:326, at para. 49.

<sup>143</sup> *Ibid.*

<sup>144</sup> Regulation (EU) No 965/2012, Article 5(3) and (4), cf. Annex VI–VII.

<sup>145</sup> Regulations (EU) Nos 748/2012; 1321/2014; 1178/2011; Regulation (EC) No 785/2004.

<sup>146</sup> Regulation (EU) 2018/1139, Article 2(1)(b)(i)–(ii).

<sup>147</sup> Regulation (EU) 2018/1139, Article 2(1)(b)(ii), cf. Article 31, cf. Regulation (EU) No 965/2012, Article 1(2), cf. Article 5(3) and (4), cf. Annex VI–VII.



sought to support the principle of free movement *already established* by the Chicago Convention. Moreover, since EU regulation on airworthiness of third country aircraft is not *de facto* exhaustive,<sup>148</sup> it could be argued that the level of harmonization within this area is partial rather than full. If partial, it cannot be ruled out that EU Member States might be in a position to impose certain national requirements within the limits of Articles 5(1) and 31 of the Chicago Convention. Such requirements must be compatible with fundamental freedoms of the EU Treaties, including free movement of goods, services, and capital.

If the requirements amount to a restriction on free movement of services, goods or capital, the restrictions must pursue a legitimate aim and be proportionate. It is unlikely that a blanket ban on basing aircraft registered in third countries permanently in Sweden or Denmark can be considered a proportionate measure in compliance with EU law.

In conclusion, ‘traffic rights’ for non-commercial air operators can be derived from EU primary and secondary law.

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<sup>148</sup> Regulation (EU) 2018/1139, Article 2(1)(b)(ii), cf. Article 9(1), *contra* Regulation (EU) 1321/2014, Article 1(b).