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ASEAN Open Skies 3rd and 4th Protocols: Encouraging Seamless Air Connectivity in ASEAN

Ridha Aditya Nugraha*

Abstract

This article shall explain ASEAN Open Skies' ongoing progress pertaining to the agreements on liberalisation of multilateral air services. The introduction of two new ASEAN Open Skies Protocols, namely the third and fourth agreements in the last two years are aimed to encourage seamless air connectivity in the region and breaking the ice. The article aims to describe the current situation and analysing the potential obstacles in their implementation. At the end, this article provides legal and policy recommendation pertaining to the current development of the agreements.

1. The State of Play

The Association of South East Asian Nations (ASEAN) Open Skies Agreements came into effect on 1 January 2015. It is intended to increase regional connectivity by allowing ASEAN member states airlines fly more freely throughout the region. Noticing the difference stage of liberalisation among the Member States, from the beginning ASEAN Open Skies aims to only allow up to the 5th Freedom of the Air. This situation lasts until now, prohibiting the 6th to the ultimate 8th and 9th Freedoms of the Air which grant cabotage rights.

The ASEAN Open Skies Agreements consist of the ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services (MAFLAFS)¹, the ASEAN Multilateral Agreement on Air Services (MAAS)², and the ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services (MAFLPAS)³. In line with the open skies concept, limitations on capacity and schedule are to be eliminated. This multilateralism aims to replace the existing bilateral service agreements among the Member States.

The existence of ASEAN Economic Community Blueprint 2025⁴ encourages the goals of ASEAN Open Skies. The increasing number of aircraft delivered to the Member States⁵, geographical situation, from the Malaya Peninsula, numerous mountains and terrains, and two archipelagos - namely Indonesia and the Philippines, are also determining factors.

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While the region promotes free movement among its citizens through air connectivity, no ASEAN carrier concept has been established. Currently, restrictions on foreign direct investment vary among ASEAN Member States. To penetrate the regional market, some airlines, either ASEAN or non-ASEAN nationals, have invested in other neighbouring ASEAN Member States. These airlines are, among others, AirAsia (Malaysian carrier based in Kuala Lumpur with a total of 147 fleet)⁶, Jetstar Asia (Australian Qantas's subsidiary based in Singapore with a total of 18 fleet)⁷, Lion Group (Indonesian carrier based in Jakarta with total 108 fleet)⁸, and VietJet (Vietnam carrier based in Hanoi with a total of 71 fleet)⁹.

Huge investments have been made by the abovementioned airlines for serving other ASEAN Member States' domestic market. The targeted countries are big and archipelagic countries such as Indonesia, Malaysia, Thailand, and the Philippines; and now also includes Vietnam, as its aviation business is emerging.

In parallel, this business strategy raises ownership and control issues.¹⁰ Unlike "ownership", the term of "control" has never been challenged in court since it is harder to prove due its nature. Efforts to challenge or test the scope of "control" is rather sensitive and could discourage foreign direct investment growth, specifically the establishment of new airlines within the region. So far, status quo is deemed as the ideal situation and seems to be preserved with caution.

As a breakthrough for encouraging seamless air connectivity, both ASEAN Open Skies Third Protocol and Fourth Protocol are introduced in 2017 and 2018. The last one is a phenomenon whereas ownership and control issue is alive and still becomes a sensitive matter among ASEAN Member States to discuss. Hopefully, the presence of two new protocols could enhance a seamless ASEAN Connectivity by 2025 as targeted.

2. ASEAN Open Skies Third Protocol

Nowadays, code-share arrangements are inevitable due to the increasing competition between airlines. Even before the ASEAN Open Skies Agreement was enacted, code-share practice has existed whether among the Member States' airlines or between the Member and non-Member States' airlines. The Third Protocol in particular, focuses on domestic code-share arrangements in which such rights exist only as part of an international journey.

Article 2 of the ASEAN Open Skies Third Protocol

"[t]he designated airline(s) of each Contracting Party shall be allowed to exercise domestic code-share rights as marketing airline(s) provided that there shall be no exercise of cabotage rights."

Up until the 31 December 2019, the six ASEAN Member States which have ratified the Third Protocol are Vietnam (26 November 2018), Singapore (3 January 2019), Malaysia (6 March 2019), Myanmar (13 March 2019), Thailand (26 June 2019), and the Philippines (19 December 2019)¹¹. The Third Protocol is in force since 13 March 2019 with the third signatories. The term "cabotage rights" in the aforementioned sentence includes the holding out of air services for sale on purely domestic routes by the marketing airline(s) of that Contracting Party.

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For example, Thai Airways code-sharing with Vietnam Airlines allows the sale of Bangkok-Hanoi ticket via transit in Ho Chi Minh City, but not Ho Chi Minh City-Hanoi route and vice versa in its Bangkok-Ho Chi Minh City-Hanoi leg, and vice versa. Thai Airways is not allowed to embark new passengers nor cargo during its Ho Chi Minh City transit. This measure is to keep the advantage still at Vietnamese carriers' for securing the domestic market.

From the perspective of passenger protection, the implementation of Third Protocol among all Member States means encouraging international liability regime, either the Warsaw Convention of 1929¹² or Montreal Convention of 1999¹³, to apply rather than domestic law. More options for passengers to buy a single or return ticket pertaining to code-share flights.

3. ASEAN Open Skies Fourth Protocol

Not much has been gained pertaining to liberalisation of multilateral air service agreements. ASEAN Open Skies Fourth Protocol¹⁴ was introduced in November 2018 as a breakthrough. This protocol aims to increase connectivity by introducing co-terminal rights.

Article 2 of the ASEAN Open Skies Fourth Protocol

"[t]he designated airline(s) of each Contracting Party shall be allowed to exercise co-terminal rights, provided that there shall be no exercise of cabotage rights."

The term "cabotage rights" includes the holding out of air services for sale on purely domestic routes by the designated airlines(s) of that Contracting Party. As of 31 December 2019, six states have ratified this protocol, namely Singapore (31 May 2019), Thailand (26 June 2019), Malaysia (16 August 2019), Myanmar (12 September 2019), Vietnam (31 October 2019), and the Philippines (4 December 2019).¹⁵ The Fourth Protocol is in force since 16 August 2019 with the third signatories.

The notion of "...shall be no exercise of cabotage rights..." means any carrier is prohibited to embark passenger and cargo within the domestic transit right. As an example, Garuda Indonesia is not allowed to embark new passengers and cargo during transit in Kuala Lumpur from its Jakarta-Kuala Lumpur-Penang leg, and vice versa. The aircraft is entitled to fly between two points within another ASEAN Member States but without any economic right. This scheme is to protect Malaysian carriers' domestic market from new foreign competitors. Protectionism is aimed to be set up at this stage.

ASEAN Open Skies Fourth Protocol also raises a new question whether this is a new - 10th Freedom of the Air, or whether it is just an improvised version of the existing ones. The current practices in six ASEAN Member States - Singapore, Thailand, Malaysia, Myanmar, Vietnam, and the Philippines - shall determine the premise. If the protocol succeeds, this could be a model for other regional jurisdiction with similar nature like ASEAN. One of them is African Union with its Yamoussoukro Decision which also aims up to 5th Freedom of the Air among its Member States that also faces some obstacles in implementing.

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The implementation of the Fourth Protocol shall encourage the enforcement of international liability regime, especially those travelling with low-cost carrier (LCC) in ASEAN. Noticing its point-to-point business model and the status quo of the ASEAN Open Skies, most of the time a passenger needs to buy two separate tickets when flying to another country. With Kuala Lumpur (Malaysia)-Ho Chi Minh City (Vietnam)-Hanoi (Vietnam) as example, the first Kuala Lumpur-Ho Chi Minh City leg is an international flight. No doubt, international convention either the Warsaw Convention of 1929 or the Montreal Convention of 1999 shall prevail.

However, the Ho Chi Minh City-Hanoi leg is a domestic flight if the passenger has no consecutive single ticket. As the consequence, there is a room for domestic law which could also mean less legal certainty for the non-nationals. The Fourth Protocol exists to ensure the highest passenger protection by allowing a passenger to buy Kuala Lumpur-Hanoi through one single ticket even though there will be a change of aircraft and flight number in Ho Chi Minh City.

4. The Way Forward for Multilateralism in the Region

Aviation is important in strengthening ASEAN integration. However, the Single Aviation Market or also known as ASEAN Open Skies development is based on consensus. The ASEAN Way is alive, which means no ASEAN institution nor any Member State has the authorisation to ensure the ratification and implementation of an agreement. No hard laws pertaining to multilateralism could be enforced to ASEAN Member States, including the new ASEAN Open Skies Third and Fourth Protocols in obtaining ratification.

As one of the main consequences, there is no guarantee on when and whether the two protocols will be fully implemented. The ASEAN Way becomes one of the internal factors which determine the direction ASEAN Open Skies will take. Four ASEAN Member States, namely Brunei Darussalam, Cambodia, Indonesia, and Lao PDR have yet to take action on this matter.

Tourism will potentially become the external factor deciding its direction. Currently, tourism is being promoted in ASEAN since it has a significant impact in the national economy. Thailand, followed by Indonesia, Malaysia, Vietnam and Lao PDR are among the leaders in terms of international tourist visits. However, besides infrastructure, there is a lack of flights caused by the restrictions placed on the Freedom of Air. The premise saying tourism is the key determining factor shall be proven in the next several years.

At the end, liberalisation in the ASEAN skies seems to be more feasible than liberalisation on land which speaks on foreign direct investment limitation. Both new ASEAN Open Skies Protocols should be analysed promptly also with consideration, in parallel, that the region has already enacted ASEAN-China Open Skies agreement. Failure to analyse the impact could mean putting ASEAN Member States airlines not in an equal position with Chinese carriers for future competition.

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¹ASEAN Multilateral Agreement on the Full Liberalisation of Air Freight Services, done in Manila, the Philippines, 20 May 2009.

²ASEAN Multilateral Agreement on Air Services, done in Manila, the Philippines, 20 May 2009.

³ASEAN Multilateral Agreement on the Full Liberalisation of Passenger Air Services, done in Bandar Seri Begawan, Brunei Darussalam, 12 November 2010.

⁴The ASEAN Economic Community Blueprint 2025 was adopted by ASEAN Leaders at the 27th ASEAN Summit in Kuala Lumpur, Malaysia, 22 November 2015.

⁵Global Market Forecast - Global Network, Global Citizens 2018 (Airbus) <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.airbus.com/content/dam/corporate-topics/publications/media-day/GMF-2018-2037.pdf&ved=2ahUKewiute2TpYvkAhUXX30KHeoxAslQFjAAegQlAxAB&usg=AOvVaw1gEZjQDCgmRdda0U-St0HV>> accessed on 2 January 2020.

⁶AirAsia, Preliminary Operating Statistics for the 3rd Quarter 2019, <https://ir.airasia.com/misc/AAGB-Prelim-3Q19-Operating-Statistics.pdf> accessed on 1 January 2020.

⁷Jetstar Asia Fleet Details and History as per-31 July 2019, <https://www.planespotters.net/airline/Jetstar-Asia> accessed on 1 January 2020.

⁸Lion Air, *Armada Kami*, <http://www.lionair.co.id/id/lion-experience/armada-kami> accessed on 1 January 2020.

⁹VietJet Air Fleet Details and History as per-30 December 2019, <https://www.planespotters.net/airline/VietJetAir> accessed on 1 January 2020.

¹⁰Ridha Aditya Nugraha, *Reviewing Ownership and Control of the Indonesian Airlines*, ASEAN Aviation Integration Platform (AAIP) Policy Paper No. 2 Year 2019, http://www.ukm.my/aaip/wp-content/uploads/2019/03/AAIP-Policy-Paper-No.-2_2019-Reviewing-Ownership-and-Control-of-the-Indonesian-Airlines-12.pdf on 1 January 2020.

¹¹ASEAN Transport Instruments and Status of Ratification, <https://asean.org/storage/2017/05/loR-matrix-Air-Transport-Instruments.pdf> accessed on 1 January 2020.

¹²Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929.

¹³Convention for the Unification of Certain Rules for International Carriage by Air, done at Montreal, 28 March 1999.

¹⁴ASEAN Open Skies Protocol 4 on Co-Terminal Rights between Points Within the Territory of Any Other ASEAN Member States, done at Bangkok, on 9 November 2018.

¹⁵ASEAN Transport Instruments and Status of Ratification, <https://asean.org/storage/2017/05/loR-matrix-Air-Transport-Instruments.pdf> accessed on 1 January 2020.