

## Update

# The EU air law consequences of Brexit for the UK

The momentous decision of the majority of the British people who voted in the referendum held on 23 June to leave the EU raises a number of complex and difficult legal questions. In this Update, we look at the likely consequences from the point of view of EU air law.

At the outset, it should be stressed that there will be no change in the legal position for the time being, and there will not be until the departure process under Article 50 of the Lisbon Treaty is complete and the European Communities Act 1972 (which gives legal effect to the EU and EU law in the UK) has been amended or repealed. The referendum vote itself was advisory rather than binding and the consequences of the vote, and the timing of the next steps, will be determined by the UK Parliament. The discussion below is about what is likely to be the situation after these steps have been taken.

### **The single EU air transport market – market access**

One of the great achievements of the EU is the single air transport market. The UK was a keen proponent of and stimulus for this, and its airlines and people have been beneficiaries. Taken as a whole, the EU is easily the single biggest destination market from the UK, accounting for 49% of passengers and 54% of scheduled commercial flights.

The most significant consequence will be that air carriers which have been granted their operating licence by the UK CAA will no longer be “Community carriers” for the purposes of EU Regulation 1008/2008 (“Regulation 1008”), and thus will no longer be able to enjoy the right to fly

between any two points in the EU/EEA that is conferred by such status under the Regulation. In the absence of any other arrangements, the old bilaterals between the UK and the other EU Member States, which have been overtaken by EU liberalisation and hence dormant for years, would become effective again, and should provide a sufficient legal basis for most 3rd and 4th freedom services, but in most cases only those two freedoms. The services most affected will be 7th and 9th freedom services – in other words, between two non-UK points in the EU (eg, Amsterdam – Barcelona) and between two points in the same EU Member State (eg, Rome – Milan), which would no longer be automatically permitted.

An airline in such a position wishing to preserve these operating rights could consider obtaining an operating licence from a continuing EU Member State, which would ensure its continued status as a Community carrier, but in that case it would need to obtain its AOC from such Member State and, more importantly, have its principal place of business in that Member State. As this is defined as “the head office or registered office ... within which the principal financial functions and operational control, including continued airworthiness management...are exercised”, this would not necessarily be a

straightforward matter, and might require some complex restructuring. Furthermore, it will need to ensure that it is more than 50 per cent owned and effectively controlled by EU nationals, which may require additional restructuring of the shareholding position.

While an airline such as Ryanair, which holds its operating licence from the Irish CAA, would remain a Community carrier, its right to operate (7th freedom) services between the UK and other points in the EU as a result of Regulation 1008 would no longer be automatically assured, in the absence of special arrangements being agreed. Its right to operate 7th and 9th freedom services in/to/between other EU Member States would not of course be affected.

### **Airline ownership and control**

Under Regulation 1008, a Community carrier must be more than 50% owned and effectively controlled by Member States and/or nationals of Member States. If this requirement were no longer to apply to UK-licensed carriers, the UK would be free to change to a more restrictive or more liberal ownership and control rule, although it is currently difficult to see why the UK would not wish to retain the current Community ownership and control rule. Provided this were the case, UK-licensed airlines which are currently majority owned by non-UK EU nationals (such as KLM UK and Thomas Cook Airlines) could continue to hold their operating licence without any problem.

Given the fact that IAG is the holding company of British Airways and Iberia (as well as Vueling and Aer Lingus) the question may arise of the continued compliance by these airlines with the ownership and control rules. It is our understanding that the corporate structure has been carefully arranged (principally to avoid problems under the ownership and control clauses in bilaterals with non-EU countries) so that, despite the IAG involvement, BA continues to be majority owned and effectively controlled by UK nationals and Iberia similarly by Spanish nationals. Thus, there should be no problems for these airlines from the point of view of compliance with the ownership and control rules.

### **Possible solutions**

A key part of EU external aviation policy has been the extension of EU aviation liberalisation to neighbouring countries, and this has been achieved with many of them, such as Switzerland, Norway, Morocco, Israel and the Western Balkan countries (the so-called European Common Aviation Area (“ECAA”) which covers 36 countries and 500 million people). It is also an ongoing process, with an agreement on the point of being signed with Ukraine, and plans to negotiate with other Mediterranean countries. This has been achieved in a variety of different legal ways – eg, in the case of Norway membership of the European Economic Area (“EEA”), in the case of Switzerland a package of cooperation agreements in seven specific sectors, one of which concerns air transport, and in most other cases an agreement giving access to the ECAA.

Given this policy towards neighbours, and the UK’s current major role in the EU single air transport market, it might seem that an obvious and simple way forward would be for the UK to continue to be part of the ECAA, by means of one of the mechanisms mentioned above, or something similar. This would indeed provide a relatively simple solution, but it is by no means certain that it would be easy to achieve, as it would require the agreement of all the other 27 EU Member States, and it is possible that one or more of them could see competitive advantage for its airlines in denying continued access to the UK’s. It was one thing to extend the ECAA to a number of relatively small countries that provide additional market opportunities for EU airlines, but whose own airlines posed little competitive threat; it is quite another thing to bring in the UK. In this case, if the UK wished current liberal arrangements to continue, it would have to seek to achieve this by way of bilateral negotiations with individual Member States (or possibly a group or groups of them) which were interested in such continuance. Difficult questions of competence (ie, whether the EU or the Member States had the legal right to negotiate with the UK) would be likely to arise, and could well prevent any wide-ranging liberal agreement with only some of the Member States.

### **Aviation relations with the US**

At present, aviation relations between the US and the UK (and all the other EU Member States) are governed by the Agreement concluded between the US and the EU and its Member States in 2007 (often referred to as the “open skies agreement”). This basically gives airlines from either side the right to operate air services between any point in the US on the one hand and any point in an EU Member State on the other (though the provisions are rather more detailed than this). The Agreement does not contemplate the possibility of a Member State leaving the EU, and its provision on termination envisages termination by either party, party being defined as either the US or “the European Community and its Member States”. One of the most significant practical effects of the Agreement (and one of the main negotiating requirements on the US side) was free access for US airlines to Heathrow, which previously had been limited under the applicable US/UK bilateral to just two US airlines. This opportunity was quickly taken up, and since 2008 a number of US airlines have been operating at Heathrow.

It would seem therefore that upon the UK’s ceasing to be a Member State the Agreement will no longer apply to the territory of the UK, and aviation services between the UK and the US will either have to continue on an informal basis or, more probably, an alternative arrangement will need to be agreed – either by way of continued inclusion of the UK in the Agreement (as Norway and Iceland currently are, by reason of their EEA membership) or by way of a separate bilateral arrangement between the UK and the US. The question of access for US airlines to Heathrow could become a negotiating point once again.

## Aviation relations with other countries

The only other agreement like the EU/US agreement currently in effect is the similar agreement with Canada, although in that case access to Heathrow was less of an issue. Continuation or replacement arrangements with Canada will therefore also need to be negotiated. There are also the neighbouring countries which have been included in the ECAA, referred to above, and individual arrangements will need to be made with them if no multilateral solution is provided by means of the UK's also joining this.

The European Commission has been negotiating for some time with other countries – Brazil, Australia and New Zealand – and just recently was given by the Council a significant mandate to open negotiations with several additional countries - Turkey, Qatar, the UAE and the ASEAN countries. One important consequence in EU law of the Commission's being given a negotiating mandate is that thereupon the competence for relations with the other countries concerned shifts from the Member States to the EU. In other words, the Commission has the sole right to conduct such negotiations and the EU has the sole right to conclude agreements and Member States are no longer entitled to do so. Therefore, once the UK ceases to be a Member State it will not be included in the EU negotiations, but will become entitled again to negotiate and conclude agreements with such other countries.

## Other EU legislation

There is a great deal of other EU legislation relevant to aviation, concerning issues such as VAT, competition law, state aid, airline insolvency, passenger rights, employment rights, data protection, consumer rights, mutual recognition of court judgments, the environment, safety, security, airports and air traffic management. Each of these areas will require careful consideration, and many of these areas are themselves subject to changes proposed by the EU's Aviation Strategy on 7 December 2015. To take but one example from the finance context as an example of the micro-level work that will be involved assessing and re-writing legislation, the government will need to look carefully at and possibly need to replace or amend the Cape Town Convention Regulation passed in November last year, in particular the specific issues of articles VIII (choice of law) and XI, alternative A (insolvency) on which the UK did not make declarations, given (full or shared) EU competence.

As a general rule, EU Regulations have direct effect in UK law, with no need for them to be re-enacted in national law. It is standard practice for the UK to introduce by way of statutory instrument implementing Regulations relating to EU Regulations, but the principal purpose and effect of these is enforcement – the creation of offences for non-compliance with the provisions of the Regulation. Consequently, once the 1972 Act is repealed, none of the EU Regulations currently in force will have continuing legal

effect; the statutory instruments will continue in force but will have no practical effect as the underlying obligations for contravention of which they create offences will no longer exist.

In theory, therefore, the UK will have the choice whether or not to re-implement EU Regulations in its domestic law – either verbatim or with modifications or intended “improvements”. Hence, for example, Regulation 261/2004 on denied boarding, cancellation and delay of flights will no longer apply to flights departing UK airports (although it will of course continue to apply to flights to UK airports from points in EU Member States), but it will be open to the UK to choose to re-enact it, either as it is or with modifications (eg, by imposing a monetary cap on care obligations). However, in practice the UK's freedom to do so may be limited if it wishes access to the internal air transport market, as the invariable model in all cases to date is that this is only granted as part of a package including the whole aviation “acquis” (ie, existing body of legislation). Similar considerations apply to other controversial EU aviation Regulations such as the emissions trading scheme (“EU ETS”) which, following the “stop the clock” derogation, only applies to intra-European flights; in the case of the EU ETS, however, it may well be the case that this will be superseded in the next few years by the market-based mechanism to be recommended by ICAO at its General Assembly this October, which we understand will be a carbon offsetting scheme.

## Safety and technical issues

The EU agency EASA now plays a central and crucial role in aviation safety regulation in Europe, and the UK has been a key player in this (and its predecessor, the JAA). The EASA Regulation will no longer apply as a matter of EU law upon the UK's departure, but it should be possible to arrive at a workable alternative arrangement ensuring the UK's continued participation, albeit on a different institutional basis. Currently, EASA has non-EU members, such as Norway and Switzerland, although they do not have a vote, and there are Working Arrangements with Pan-European Partners, such as Turkey. EASA Air Operations Regulation (EU) No 965/2012 Part-NCC was scheduled to apply in the UK from 25 August 2016 in relation to non-commercial flights, and we see no reason why this would be suspended in the current circumstances.

## British overseas territories

The United Kingdom is responsible for a number of overseas territories, for example, the Cayman Islands, which plays a very significant role in commercial aircraft financing. Although the Cayman Islands is an overseas territory of the UK, it is not part of the EU (neither are Bermuda, the British Virgin Islands and Gibraltar). Accordingly, the relationship between the UK and each of these jurisdictions should remain the same.

By contrast, the Isle of Man is a self-governing British Crown dependency which is not in the EU but is part of the EU customs union; there may therefore eventually be an impact on structures designed to import business jets into the EU for free circulation via the Isle of Man.

### **Conclusion**

If the UK leaves the EU without any alternative arrangements having been put in place, there will be major adverse practical consequences for UK-based airlines, passengers and others involved in the industry. Hence, it seems very unlikely that this state of affairs will be allowed to arise. There will be a significant amount of preparatory and negotiating work to be done by UK officials in the coming months. Simple solutions exist to most of the issues, such as membership of the ECAA, continuation of existing EU aviation law, and continued inclusion of the UK in “open skies” agreements with the US and Canada, but it is quite possible that achieving these solutions will not be easy; to take but one example of a difficulty that has arisen in another context, following a referendum in 2014 on the restriction of immigration, Switzerland risks breaching its air transport agreement with the EU which binds Switzerland to freedom of movement of labour.

It is a fundamental decision for the UK going forward whether it will accept the continuance of EU legislation in return for liberalised market access in circumstances where that legislation has effectively been rejected by the majority of those who voted in the referendum, especially legislation relating to freedom of movement of people; and accept having to take or leave new EU legislation in the future when the UK may have no say in its development.

It would certainly be a shame if the UK, which has done so much to help bring about and into practical effect the EU single aviation market, which has been so successful and so beneficial for the aviation industry and consumers in the EU, were now to find it difficult to remain a full part of it; but possible objections based on political and/or protectionist considerations from some Member States may have to be dealt with. In any event, there will be no immediate change in the legal framework, or indeed during the transitional period, which is likely to last at least two years.

Clyde & Co LLP  
The St Botolph Building  
138 Houndsditch  
London EC3A 7AR

T: +44 (0)20 7876 5000  
F: +44 (0)20 7876 5111

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