Aviation

Traffic rights are one of the biggest issues facing the aviation industry post-Brexit, potentially impacting airlines, airports and other industry participants both in the UK and also overseas. The EU is a liberalised aviation market, meaning that any airline owned and controlled by nationals of EU Member States is free to operate anywhere within the EU without restrictions on capacity, frequency or pricing. Additionally, EU carriers are able to take advantage of the traffic rights contained in the many air service agreements that the EU has negotiated with non-EU countries on behalf of all Member States. While the industry as a whole has been very severely impacted by the COVID-19 pandemic, this section of the Legal Guide focuses on the underlying position, without reference to the impact of the pandemic.

During the transition period
The relationship between the EU and UK

Following Brexit, the UK still remains subject to EU legislation and has the same level of access to the EU market for the duration of the transition period provided for by the Withdrawal Agreement. As such, during the transition period (which is currently due to expire at the end of 2020) the UK continues to be treated by the EU as part of the EU, meaning that EU and UK airlines continue to be able to operate flights between and within the EU and the UK.

The section is part of our Brexit Legal Guide.

Transition period

- The UK ceased to be an EU Member State with effect from 11pm on 31 January 2020. The Withdrawal Agreement, which was approved by both the UK and EU Parliaments, sets out arrangements for the UK’s withdrawal from the EU.
- The UK is now in a transition period until the end of 2020. During this period, EU law continues to apply in and to the UK - meaning that EU and UK airlines will continue to be able to operate flights between and within the EU and the UK until the end of the period.
- The non-binding Political Declaration on the future relationship between the UK and the EU accompanies the Withdrawal Agreement and sets out the parties’ intention to negotiate a Comprehensive Air Transport Agreement (although the UK and EU diverge on whether this should be a separate agreement or part of an overall partnership agreement). There will now be an intense
After the transition period

Air connectivity

The relationship between the UK and third countries

For traffic rights from the UK to non-EU markets where the UK has benefited from traffic rights negotiated by the EU on behalf of all Member States, the UK has focused its efforts on negotiating its own bilateral air service agreements with some key non-EU countries. The UK has concluded bilateral arrangements with a number of countries including the United States, Canada, Brazil, Switzerland, Norway, Israel, Jordan and Morocco. Discussions with several other countries are ongoing.

The relationship between the EU and UK

The UK is seeking to negotiate a new aviation agreement with the EU which will govern the position following the end of the transition period, while the EU is seeking to make this part of an overall, interdependent future relationship agreement.

The non-binding Political Declaration (which accompanies the Withdrawal Agreement) sets out the parties’ intention to negotiate a Comprehensive Air Transport Agreement ("CATA") covering market access, investment, aviation safety and security, air traffic management and provisions to ensure open and fair competition. It also provides for both parties to make further arrangements to enable cooperation between the European Union Aviation Safety Agency ("EASA") and the UK’s Civil Aviation Authority ("CAA"). The Political Declaration is very high-level and there is little detail on key issues such as the extent of market access to be granted under the CATA or on EU ownership and control rules for airlines.

The EU and UK’s respective negotiating directives each published in the last week of February 2020) already evidence a divergence in approach. The EU negotiating directive states that the EU/UK aviation relationship should be comprehensively addressed within the scope of the envisaged future partnership between the EU and UK, and notes that, while certain traffic rights should be granted on a reciprocal basis, the UK cannot have the same rights and enjoy the same benefits as an EU Member State. This approach is now confirmed in the draft text of the future relationship agreement published by the EU on 18 March 2020, which notably would restrict UK airlines from being able to operate intra-EU services (and vice-versa would restrict EU airlines from being able to operate intra-UK services).

The UK, on the other hand, does not agree that all areas of policy should be incorporated into a negotiated treaty; instead it states in its negotiating directive that aviation should be governed by a CATA and a Bilateral Aviation Safety Agreement, which would sit separately from the Comprehensive Free Trade Agreement the UK envisages as the future basis of the relationship between the UK and EU. The UK implies that this will allow it more freedom to determine its approach to policy areas covered by these separate agreements, which will not be governed by an institutionalised relationship between the UK and EU. This approach was confirmed in the draft text of a CATA and Agreement on Civil Aviation Safety published by the UK on 19 May 2020.

The most notable feature of the UK’s draft CATA is that whilst it adopts a similar approach to flying rights as the EU’s draft text, it proposes a different approach to nationality requirements:

- The EU’s draft text expects EU airlines to meet existing nationality requirements and therefore to be majority owned and effectively controlled by EU/EFTA States or their nationals. The UK instead proposes to widen this so that EU airlines will fall within the scope of the agreement, provided they are owned and effectively controlled by either EU/EFTA States or their nationals, or UK nationals/the UK.

- The EU’s draft text expects UK airlines to be majority owned and effectively controlled by UK nationals/the UK. The UK, by contrast, proposes to remove ownership and control requirements for UK airlines altogether. Instead, UK airlines would just need to be incorporated and have their principal place of business in the UK, be licensed under applicable law in the UK, hold a UK Air Operator Certificate, and for the UK to maintain effective regulatory control over the airline.

Whether the EU will accept these proposals and others remains to be seen as negotiations continue.

After the end of the transition period, if no CATA (or other form of agreement on aviation) has been concluded by the EU and UK, EU and UK airlines would no longer have rights to operate flights between the EU and UK or (respectively) within the UK or EU.

It is more likely that the situation will be modified by the introduction of agreed elements of the future relationship or some other temporary set of rules or guidance – but there will be no clarity as to what will happen until towards the end of 2020.
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In 2019, specific measures were put in place by the EU to ensure temporary basic air connectivity between the EU and UK in the event of a no-deal Brexit (initially contemplated to occur at the end of March 2019, and later at the end of October 2019) (Regulation 2019/502, the Basic Air Connectivity Regulation or “BACR”):

- The BACR granted first, second, third and fourth freedom traffic rights to UK carriers for several months following the original Brexit date of 31 March 2019, so that they could continue to overfly, make technical stops in the EU, and serve direct routes between the UK and EU (but not operate intra-EU services).
- UK carriers were also granted fifth freedom traffic rights to operate all-cargo services on direct routes between the EU and third (non-EU) countries as part of a service originating or ending in the UK, with the number of services capped at 2018 levels.
- These rights were granted to UK carriers on the condition that the UK conferred equivalent rights on EU carriers and also ensured conditions of fair competition.
- The BACR also allowed EU licensed airlines which would cease to comply with EU majority ownership and control rules as a result of Brexit (eg due to significant investment from or ownership by UK nationals) a grace period to re-establish EU majority ownership and effective control, if they submitted satisfactory plans for re-establishing compliance to their national civil aviation authority.

In March 2019, the Department of Transport and the CAA published the UK’s position for the period during which the BACR would have applied:

- In respect of third and fourth freedom rights, the UK stated that it would allow EU carriers to operate from any point in the EU (ie not just the Member State in which the carrier is licensed) to the UK (although they would no longer be able to operate internal UK services).
- EU carriers would be granted first, second and fifth freedom rights equivalent to those granted to UK carriers by the BACR.
- As regards nationality restrictions as a condition for eligibility to operate services between the EU and UK, the UK stated that EU carriers would only need to satisfy the CAA that they were majority owned and effectively controlled by nationals of EU Member States, nationals of other EEA countries and/or UK nationals (ie it would not be necessary to demonstrate ownership and control by nationals of their own Member State).

As noted above, it is possible that similar rules could be put in place during 2020 to apply following the end of the transition period, if the EU and UK cannot reach an agreement on aviation before the end of the transition period.

Aviation safety

The EU and UK’s respective draft texts on a future aviation agreement contain broadly similar terms on aviation safety, including for example, on the mutual recognition of safety certificates and licences for aircraft, pilots and cabin crew between the EASA and CAA, and for establishing a regime to facilitate the mutual recognition of environmental, noise, and design & production certificates.

If no CATA or other form of agreement on aviation has been concluded by the end of the transition period, the UK would no longer form a part of the EASA aviation safety system following the end of the transition period. Again, it is more likely that the situation would be modified by the introduction of agreed elements of the future relationship or some other temporary rules or guidance which may be similar to those that had been put in place for a no-deal Brexit during 2019.

In this regard:

- The UK Government’s January 2019 guidance concerning aviation safety in the event of a no-deal Brexit stated that many of the functions currently performed by the EASA in relation to aviation safety approvals and certifications would be conferred on the CAA. It also explained that in many cases aerospace businesses, airlines and aviation personnel might need to take action to ensure they continue to hold appropriate safety certificates, licences or other documentation.
- In the event of a no-deal Brexit, the automatic mutual recognition of aviation safety certificates provided under the EASA system would have ceased to apply to the UK. However, the CAA’s September 2019 guidance on aviation safety in a no-deal scenario explained that it would continue to recognise EASA certificates, approvals and
licences for use in the aviation system and on UK-registered aircraft for a period of at least two years following Brexit. At the end of such period (or sooner, if the certificate expired during the intervening period), new certificates issued by the CAA under UK legislation would be required.

- The EU Commission’s January 2019 notice on Withdrawal of the United Kingdom and EU aviation safety rules indicated that it would take a different approach and that certificates previously issued to UK persons and businesses, before exit day, by the CAA, UK companies approved by the CAA, or EASA would no longer be automatically accepted in the EASA system as of the date of the UK’s withdrawal from the EU.

- In March 2019, a new regulation on aviation safety was put in place by the EU to take effect in the event of a no-deal Brexit. This would have temporarily (for 9 months) extended certain certificates (in particular “type certificates”) that can only be issued by the EASA on the basis of certificates issued by the UK once it was a third country. The regulation would also have ensured that parts and appliances for which a certificate of conformity was issued by a UK company approved by the CAA before a no-deal Brexit could still have been used in and on aircraft in certain circumstances.

The CAA and UK Government have also worked with the USA, Canada, Brazil and Japan to ensure that replacement bilateral aviation safety agreements are in place post-Brexit.

Aviation security

The EU and UK’s respective draft texts on a future aviation agreement cover mutual compliance with international aviation security standards, and measures on mutual assistance and cooperation. Both texts cover these matters in relatively high level terms and the UK draft CATA also footnotes that additional arrangements on aviation security are yet to be discussed. Exactly what level of cooperation to expect on aviation security therefore remains to be seen as negotiations continue.

If no CATA or other form of agreement on aviation has been concluded by the end of the transition period, again it is more likely that the situation would be modified by the introduction of agreed elements of the future relationship or some other temporary rules or guidance which may be similar to those that had been put in place for a no-deal Brexit during 2019.

In this regard:

- The UK Government’s February 2019 guidance in the event of a no-deal Brexit explained that EU aviation security standards and procedures would be incorporated into UK law. It stated that the UK Government would not impose any additional screening checks for EU passengers or cargo arriving into the UK.

- The EU Commission also confirmed, as part of its Contingency Action Plan, that it would take action to ensure that passengers and cargo from the UK transiting in the EU would continue to be exempted from a second security screening, by applying the so-called “one stop security” system. If no CATA or other form of agreement on aviation has been concluded by the end of the transition period, the UK would no longer be part of the EU’s “ACC3” security designation scheme for cargo arriving from the rest of the world. However, the UK Government’s February 2019 guidance indicated that, in such a scenario, it would set up its own security designation mirroring the EU’s scheme to ensure that there would not be additional obstacles for international trade.

Measures taken by individual airlines

A number of EU and UK airlines have chosen to take contingency measures in response to the many uncertainties that may result from Brexit, for example, by setting up airlines in both the EU and the UK.

“Airlines will need to keep a close eye on the status of traffic rights agreements between the UK and third countries to check whether their planned operations continue to be permitted by these agreements post-Brexit. They will also want to monitor the progress and timing of a new aviation agreement between the EU and UK, as the status and content of such an agreement will affect the planning of operations involving EU and UK destinations”.

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