



## BREXIT: AN AEROSPACE PERSPECTIVE

**A great deal was written in the immediate aftermath of the June 2016 referendum as to the potential impact of Brexit on aerospace interests in the UK and how the future regulatory landscape might look. Much of the literature was inevitably speculative and drew upon existing models from other countries' trading relationships with the EU as a guide to the UK's possible post-Brexit arrangements.**

Since then, we have seen constitutional legal argument in the UK Supreme Court about Parliament's role in the process of triggering Article 50, heated and continuing political debate over a "hard" or "soft" Brexit and continuing disagreement as to whether the UK should seek to maintain access to the single market and membership of the customs union post Brexit. The UK's politicians appear more divided than ever as to the preferred outcome of Brexit so, against that backdrop, is there any more comfort for the aviation industry as to how its interests might be affected and protected during the promised transition period and thereafter? Below we look briefly at the headline issues and consider whether the Government and aviation industry are any closer to resolving them.

### **Traffic rights within the EU**

Continued access for UK airlines to open skies on the EU – a right which currently depends entirely on the UK's membership of the EU – remains a major priority for the UK industry. For any carriers with wide European networks, Brexit represents a significant challenge and

for those who operate extensive fifth freedom rights and cabotage rights in the EU, the impact could be even greater. Ryanair chief executive, Michael O'Leary, for example, has warned of the potential impact of Brexit on low-cost air travel to and from the UK, particularly for those carriers based in the UK. For UK airlines which include elements of European ownership, the potential disapplication of the current regulatory regime for granting operating licences based on EU ownership and control threatens their continued ability to operate as they currently do; likewise EU-based airlines which have UK (rather than European) ownership and control find their own continued licensing placed in jeopardy.

Without a solution which adequately replaces the current access to open skies, the spectre of some airlines moving their operations to the EU whilst they can (subject to meeting ownership and control requirements both now and post-Brexit) and others having to hope they can fall back on bilateral arrangements between the UK and individual EU countries is very real. Some carriers have already made public contingency moves to protect their operations, with easyJet applying for an operating licence in Austria and Ryanair and Wizzair seeking UK operating licences to protect their UK operations.

Brexit also potentially impacts those non-EU airlines operating into the UK which currently benefit from onwards codeshare arrangements with UK carriers from the UK to EU destinations (and indeed those with codeshare arrangements with other EU carriers which operate codeshare flights from points in the EU into the UK). Currently those UK-EU or EU-UK sectors depend for traffic rights on EU open skies by virtue of the UK's EU membership. A solution is needed which will enable such codeshare operations to continue.

**“In a global industry which champions uniform and consistent regulation, regarding it as a major factor in promoting and enhancing safety, it would be a retrograde step to revert to matters of aviation safety regulation being the province solely of domestic legislation and domestic oversight – even if the necessary resources are made available to the CAA to achieve that.”**

### **Traffic rights to third countries**

The principal concern here are those traffic rights that are currently enjoyed by UK airlines by virtue of air services agreements negotiated at EU level with third countries, notably, though by no means exclusively, the US. If the UK no longer benefits from such agreements following Brexit, then for UK and US airlines alike, a solution is required to ensure that those traffic rights continue by some other means, whether by a new UK-US bilateral agreement or by the UK being permitted to be party to the existing EU-US agreement. Access to London Heathrow was a significant consideration for the US in connection with the current EU-US open skies agreement so any change which jeopardised that access would be a serious concern for US carriers. Additionally, a watering down of the EU-US open skies agreement by removing the UK from its ambit would threaten various US anti-trust immunities from which a number of airlines and airline alliances benefit.

Similarly, there will remain multiple bilateral air services agreements between the UK and third countries which are likely to require some adjustment following Brexit, including the need to take a view on, and potentially amend, EU nationality designation clauses in many such agreements which were inserted in order to comply with EU law.

### **Safety regulation**

Current safety regulation of the UK aerospace industry is almost entirely overseen by the European Aviation Safety Agency (EASA) whose remit has increased over the last 15 years to the point where virtually all licences and approvals are issued by or under its aegis. EASA certifications are widely granted reciprocal recognition in other countries and indeed the UK has played a key role over the years in developing and refining EASA's regulations.

If the UK were no longer to participate in EASA – which on a “hard” Brexit could happen – the ongoing validity of existing certifications would be in jeopardy, pending new domestic safety regulation and a renewed status for the UK Civil Aviation Authority (CAA) as the UK authority with sole responsibility for issuing approvals. The impact would be far-reaching for aerospace companies, affecting aircraft certificates of airworthiness and air operator certificates and the ability for airline group companies easily to move aircraft around their fleets, type certificates for aerospace products, approvals of design and production organisations, and maintenance organisation approvals. However EASA's remit goes further to include many other aspects of civil aviation including aerodrome licensing, third country operator approvals, and flight crew licensing.

In a global industry which champions uniform and consistent regulation, regarding it as a major factor in promoting and enhancing safety, it would be a retrograde step to revert to matters of aviation safety regulation being the province solely of domestic legislation and domestic oversight – even if the necessary resources are made available to the CAA to achieve that.

### **Certainty and transition**

There are a great many regulatory issues affected by Brexit which require attention in many industry sectors, and aerospace is no different. Aviation in the UK is overwhelmingly regulated by EU legislation and, whilst the key priorities for the Department for Transport over the coming months are likely to continue to be traffic rights and safety regulation, the industry will want to know how Brexit will affect many other factors which impact operations. Those include air passenger rights; other consumer regulation; environmental issues; security; ground handling rules; implementation of new rules on the sale of package holidays; the potential for new border and immigration checks which might

compromise airlines' ability to move their passengers easily and whether that could have an impact on schedules; whether freight airlines might be adversely affected if there are delays in carriage of goods due to the UK not being in the customs union; whether airlines and aerospace manufacturers will still be able readily to move their staff between different locations and countries. With continuing uncertainty as to whether the UK will remain in any manner of customs union with the EU post-Brexit, aerospace manufacturing interests which are currently able to move parts and components easily cross-border on a tariff-free basis are also potentially significantly affected.

In trying to discern the future for aviation following Brexit, there was an initial and understandable focus on existing models – chief amongst them the possibility that the UK could become part of the European Common Aviation Area, or, like Switzerland, could have a raft of treaties with the EU, including one which would essentially continue to apply EU open skies and the suite of EU aviation regulations such that little would change for UK aviation interests or indeed for EU companies with operations in or to the UK. However, as time moved on since the June 2016 referendum, those solutions have been appearing further away, not closer.

As sensible as the other existing models – such as the Swiss model or membership of the European Common Aviation Area – may appear in order to limit the impact of Brexit on the aviation sector, the UK's wider political climate cannot be ignored. Access to the single market, on the existing models contemplated, requires an acceptance of EU Treaty freedoms, including the fraught question of freedom of movement, which was undoubtedly a factor in the Brexit vote in 2016, as well as continued influence of the European Court of Justice. The UK Prime Minister made clear in January 2017 that the UK post Brexit will not be a member of the single market. That principle was repeated formally in the UK government White Paper published in February 2017 (The United Kingdom's exit from, and new partnership with, the European Union). Current government policy is also that the UK will leave the customs union, but the potential impact of that on the border between Ireland and Northern Ireland remains an unresolved conundrum in the Brexit negotiations.

Where does that leave those industry sectors for whom access to the single market has been fundamental to the way they currently operate? There was scant comfort, and even less detail, in the February 2017 White Paper. In terms of traffic rights, there was a recognition (paragraph 8.32) that arrangements will be needed to “*continue to support affordable and accessible air transport for all European citizens, as well as maintaining and developing connectivity*” and also that new bilateral arrangements will be needed with countries such as the US in relation to which air services arrangements are currently the subject of EU treaties; and, in relation to safety regulation, an acknowledgement that the

UK's future relationship with certain European Union agencies, including EASA, will need to be discussed (paragraph 8.42).

The role of the Government of the day is to secure the best arrangement possible for ongoing access to EU routes and to preserve routes to and from key third countries where those routes are currently agreed at EU level. In the context of traffic rights to and within the EU, a “soft” Brexit could even resurrect a Norwegian-type approach (though that is beset with difficulties), or it is possible that a bespoke bilateral air services agreement between the UK and the EU may be the best that can be achieved, albeit an imperfect solution if it results in loss of fifth freedom and cabotage rights. One question will be whether there will be scope for a sector-specific deal to preserve UK airlines' access to EU open skies – and which could also preserve the existing rights of EU carriers to operate freely to/from and within the UK.

Whatever the answer to access to EU open skies, industry will hope that the UK Government will secure ongoing arrangements for the UK's continued participation in and oversight by EASA given the upheaval of reverting to safety regulation at national level, which many would see as a backwards step, as well as being expensive and difficult to resource.

In the meantime, it is likely that transitional arrangements will soon be agreed which may preserve the current regulatory regime for a period of perhaps two years post-Brexit, though the details of transitional arrangements have yet to be thrashed out.

### **What will the Great Repeal Bill achieve?**

In the context of the aerospace issues highlighted in this briefing, the short answer is “very little on its own”. Simply inserting EU aviation regulations into UK law, as is proposed, will not address the central issues, namely the licensing, operation, and safety oversight of the UK aviation industry which are overseen at EU level, under the aegis of EU institutions, and are entirely premised on the UK's membership of the EU. If the EU licensing and safety oversight function is taken away, domestic oversight (by the CAA) must take its place, but that is not achieved merely by the Great Repeal Bill, which also does not address the continuation (or not) of traffic rights.

The intended importation into English law of EU legislation also brings with it questions as to the continued influence of Court of Justice of the European Union (CJEU) jurisprudence following the Great Repeal Act. The UK Government February 2017 White Paper confirmed an intention to bring an end to the jurisdiction of the CJEU in the UK. As in other industries, key EU aviation regulations have been very extensively construed and amended by CJEU case law. Once those regulations are part of English law, the intention is that the English courts will apply the regulations as interpreted by the body of CJEU case law in existence as at the date of

Brexit but not beyond; so there will from that point onwards be a divergence between the construction of UK laws and the EU regulations on which they are based. The role of the CJEU post Brexit and indeed during any transitional period remains uncertain and is still the subject of fierce political disagreement within the UK.

### **HFW perspective: current priorities for the aerospace industry**

In this current phase, as negotiations pursuant to Article 50 continue, and are likely to move later this year from discussion of transitional arrangements to discussion of the proposed post-Brexit deal between the UK and the EU, it is more essential than ever for the aerospace industry to ensure that its priorities are being recognised.

Individual organisations however must continue to assess their own priorities – how they currently operate and their understanding of the EU regulations that enable them to operate in that way. Fundamental to that process is recognition of the current regulations that are essential to the continued viability of the business. In other words, what operations and related regulations are “nice to have”, but crucially, where are the lines in the sand? A UK airline, for example, can continue to operate flights to Spain if current EU passenger rights rules on flight delays and cancellations remain or are amended or repealed; the rules may change but the operation continues. The same UK airline cannot fly to Spain at all if it has no traffic rights.

The Government of the day will only be able to represent the interests and priorities of the aviation industry in Article 50 negotiations if it is comprehensively and continually educated as to what those interests, priorities and lines in the sand are. During the biggest period of regulatory upheaval in a generation, it is essential that the aerospace industry takes every opportunity to communicate those matters to its associations and direct to Government. The same applies to aviation interests in the remaining EU27, whose operations and businesses are also potentially affected adversely by Brexit, and who may be in a position to communicate their needs to their own governments and regulators.

**Published: February 2018**

**For more information, please contact any of the following:**



#### **SUE BARHAM**

Consultant, London  
**T** +44 (0)20 7264 8309  
**E** sue.barham@hfw.com



#### **NICK HUGHES**

Partner, London  
**T** +44 (0)20 7264 8555  
**E** nick.hughes@hfw.com



#### **GILES KAVANAGH**

Partner, London  
**T** +44 (0)20 7264 8778  
**E** giles.kavanagh@hfw.com



#### **JEREMY SHEBSON**

Partner, São Paulo/London  
**T** +55 11 3179 2900/  
+44 (0)20 7264 8779  
**E** jeremy.shebson@hfw.com



#### **EDWARD SPENCER**

Partner, London  
**T** +44 (0)20 7264 8314  
**E** edward.spencer@hfw.com



#### **ANTHONY WOOLICH**

Partner, London  
**T** +44 (0)20 7264 8033  
**E** anthony.woolich@hfw.com



#### **ZOHAR ZIK**

Partner, London  
**T** +44 (0)20 7264 8251  
**E** zohar.zik@hfw.com

[hfw.com/brexit](http://hfw.com/brexit)

© 2018 Holman Fenwick Willan LLP. All rights reserved.

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Beirut Brussels Dubai Geneva Hong Kong Houston Jakarta Kuwait London Melbourne Paris Perth Piraeus Riyadh São Paulo Shanghai Singapore Sydney