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Legal Brexit

Aviation

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AVIATION

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Each chapter provides easily accessible information on the impact of the UK's vote to leave the European Union.

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Holman Fenwick Willan LLP is a global law firm advising businesses engaged in international commerce. With over 450 lawyers and an extensive network of legal contacts and experts, the firm provides the full range of transactional and dispute resolution legal services across the following sectors: aviation, commodities, construction, energy, financial institutions, insurance and reinsurance, logistics, mining, ports and terminals, shipping, space, yachts and travel, cruise and leisure.

The firm's key practice area is aviation (regulatory and commercial): the top-tier aviation regulatory team has unrivalled experience of aviation safety and economic regulation, combined with competition and antitrust expertise – as demonstrated by their work for bodies like IATA. The firm has aviation regulatory specialists in London, Paris, Brussels, Dubai and Hong Kong, and with experience of the aviation regulatory framework in the EU and knowledge of such frameworks in other regions of the world, the firm is ideally placed to advise clients, governments and regulators on the challenges and priorities prior to, during and following the forthcoming Brexit negotiations.

HFW's leading aviation liability practice handles the largest multiparty, multi-jurisdictional disputes, including those arising from major air disasters, and routinely represents leading commercial and general aviation operators in passenger and cargo claims, also acting for manufacturers, airports, maintenance organisations, ground handlers and regulators.

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Zohar Zik is a partner in the aviation department, with particular expertise in finance and leasing transactions, complex commercial contracts and regulatory matters. He has advised extensively on fleet management issues, such as aircraft procurement, purchase and disposal, operating leasing, sub-leasing, lease novations and amendments and end of lease returns. His aviation finance experience includes sale and leaseback transactions, debt financing, hire purchase and conditional sale agreements, receivables financing and securitisation. Zohar also has in-depth experience in advising on commercial agreements for the aviation industry of all types, including contracts for the purchase of buyer's furnished equipment, fuel, catering and maintenance services, and for capacity trading, such as charter and wet-lease agreements. Zohar is the former general counsel – aviation of a leading global tourism company and operator of one of Europe's largest fleets of aircraft. He is qualified in England and Wales and is also a CEDR accredited mediator.

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1. Current Legislative Framework

Since the 1990s in particular, the EU has played an increasingly large role in the regulation of the aviation industry, such that the vast majority of the industry's operations and activities are now governed by EU regulations and/or national legislation implementing EU directives.

The most important areas for UK aerospace companies – crucial to the operations of such an international industry – are traffic rights and market access, licensing of operations and safety regulation, notwithstanding that EU regulation also pervades many of the other day-to-day activities of the industry, such as consumer protection, environmental and data protection. There is obviously great uncertainty as to the impact of Brexit on the regulation of many industry sectors. For aviation, the impact is theoretically immense, and, conversely, that potential impact is tending to encourage the notion that ultimately, following withdrawal negotiations, little will change in practical terms post-Brexit because otherwise the sheer scale of the potential upheaval is much too great to contemplate.

Key Areas of Current EU Regulation

Traffic rights and licensing: in the early 1990s, licensing and operations of airlines within the EU was liberalised by a package of EU regulations. Those have since been updated and consolidated and the current principal regulation in this area is 1008/2008 on the operation of air services in the Community. Pursuant to this framework, there are uniform rules for the licensing of air carriers which are established in EU Member States (with licensing, amongst other criteria, based on the need for an airline to be majority-owned and controlled by nationals of an EU Member State) and for EU carriers to operate air services freely within the EU. These two factors put together have benefited the industry generally and have also facilitated the growth of low-cost carriers in Europe, whose business models focus on short-haul, reasonably priced air travel with high frequencies and short turnarounds; some have taken advantage of EU rules of freedom of establishment and the EU nationality and control criteria in order to set up business in other Member States.

Prior to liberalisation of the skies in Europe in the 1990s, airline licensing was granted on a national basis and was predicated on national majority ownership and control. Traffic rights were historically negotiated and agreed on a bilateral basis between States. That remains the case in air service agreements with third countries – albeit with some adjustments where one of the parties is an EU Member State; but, within the EU – for EU airlines – there are no bilateral or other restrictions on the routes which can be operated and any airline with EU ownership and control can establish itself anywhere within the EU and obtain an operating licence.

The EU has also steadily assumed competence to negotiate traffic rights and wider aviation agreements on behalf of all Member States with third countries. There exists a number of comprehensive open skies agreements between the EU and other countries, notably with the USA, and also with Canada and certain other states. Where such agreements exist, the UK derives traffic rights to operate to those third countries from the EU agreements.

Consumer Regulation

With the liberalisation of the skies in the EU in the 1990s, the consequent increase in the availability of reasonably priced air travel and the resulting increased numbers of air passengers, the focus on consumer protection also grew exponentially. These days, virtually all consumer protection regulation applying to UK airline operations is based upon or derives directly from EU regulations. Amongst the key EU regulations in this area are:

- Regulation 261/2004 on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights: this Regulation, together with a number of judgments of the Court of Justice of the European Union (CJEU) which have interpreted and extended the obligations it imposes (particularly those relating to the circumstances in which standard compensation payments must be made in respect of flight delays or cancellations), has spawned an extensive claims industry in a number of EU jurisdictions, not least the UK.
- Regulation 1107/2006 concerning the rights of disabled persons and persons with reduced mobility: uniform rules providing for non-discrimination of persons with reduced mobility in terms of their access to air travel and for assistance to be provided on a free-of-charge basis, both at the airport and once on board the aircraft.
- Directive 90/314 on package travel, package holidays and package tours: this introduced consistency in terms of information to be provided to consumers booking a package holiday, and enshrined the principle that the organiser of a package holiday, eg the UK tour operator, must accept responsibility and liability for all aspects of the package holiday it has sold, as well imposing obligations on organisers to provide some financial protection for their customers in the event of their insolvency. This legislation is the subject of an amending Directive which is currently required to be implemented into English law in 2018.

Safety regulation

Safety and technical regulation for UK aerospace companies is predominantly within the remit of the European Aviation Safety Agency (EASA), as regulator, and under the aegis of the suite of EASA regulations dealing with issues such as the licensing and certification of aircraft, aerospace products, of manufacturers and maintenance organisations, as well as flight crew, air traffic controllers and aerodromes.

The UK, as an EU Member State, participates fully in the EASA regime. Also on the subject of safety, EU regulation 2111/2005 created a blacklist, which is regularly updated, of air carriers which are banned from operating into the EU on safety grounds, and which also imposes upon those who are contracting for the sale of air carriage (thus covering airlines and tour operators) the obligation to inform passengers at an early stage of the reservation process of the identity of the air carrier which will be operating their flight.

In addition, there is a large body of other EU legislation which regulates the UK aviation industry covering a wide range of issues, including: application into EU law of the Montreal Convention 1999 rules on liability for the death of or injury to passengers and for damage to or delay of baggage and cargo, minimum insurance levels, air accident investigation, security, noise and environmental issues, and air traffic management, including the package of legislation relating to Single European Sky (the aim of which is to enhance the use of European airspace and air traffic management, including by moving away from the practice of airspace being divided on the basis of national boundaries). There are also, of course, broader areas of EU law applicable generally but also relevant to aviation, such as competition and state aid, VAT, data protection, employment rights and other consumer protection obligations. This chapter does not address those broader issues and focuses purely on aviation-specific regulation.

2. Transitional Framework

As with other industry sectors, for aviation nothing changes immediately with the Brexit vote. All EU regulation which applied on 23 June 2016 still applies now, and will do so until the UK formally exits the EU following post-Article 50 negotiations or until some alternative arrangement is put in place between the UK and the EU, whichever is the earlier. Depending on what arrangement is agreed on the UK's withdrawal, many of the regulations may well continue to apply much as before.

However, there are invariably developments in the pipeline for new or amended EU regulation in the aviation sector and that is certainly the case at present. Draft revisions to air passenger rights rules (EC Regulation 261/2004) have been discussed between the Commission, Council and the Parliament, and then stalled, for over two years now. There is a fresh impetus to push those forward. The same applies to revisions to airport slot allocation rules, which include the formal introduction EU-wide of secondary slot trading – a concept in any event already widely practiced at London Heathrow and Gatwick. The new published Directive relating to package holidays – which in part modernises the previous law in this area and brings more travel arrangements, in particular online sales, into the remit of package holiday regulation - is due for implementation by EU Member States in 2018. Those UK tour operators and travel agents (and indeed airlines) selling holiday products will need some certainty for their business operations as to whether the UK will be adopting domestic legislation to implement the new Directive or not.

On 7 December 2015, the European Commission published 'An Aviation Strategy for Europe', setting out proposals and aims in a number of areas of aviation regulation. The EU's vision for the next few years includes a stepping-up of the negotiation of EU third-country air transport agreements – with recommendations for the negotiation of such agreements with China, ASEAN, Turkey, Saudi Arabia, Bahrain, UAE, Kuwait, Qatar, Oman, Mexico and Armenia. Bilateral air safety agreements are also contemplated with important manufacturing countries, such as China and Japan. The Commission urges the completion of the Single European Sky project, and also the revision of the basic regulation which sets out the EASA framework (Regulation 216/2008). Proposed developments in relation to EASA include some changes to EASA's remit and functions and the development of a legislative framework and detailed EASA regulations relating to the design and operation of drones – a hot topic generally in aviation regulation in many countries.

Whilst the development and implementation of new or amended aviation regulation in the EU can be a notoriously slow process, there will be plenty of work-streams ongoing over the next two to three years. The UK has in general played a very active role in helping to frame EU aviation regulation but inevitably that is not likely to be the case in relation to any of the developments currently being looked at. The consequence could well be that post-Brexit, UK aviation will remain bound by the EU aviation regulatory framework but will be able to take little or no part in any recent amendments to that regulation.

3. Post EU Exit

One of the main drivers for the UK aviation industry is the need for UK airlines to maintain their traffic rights to (and within) the EU; conversely, it is also likely to be important for EU airlines, which currently enjoy unrestricted traffic rights to UK destinations, to maintain those rights so that the discussions will not be just one way. There are other important priorities, such as the desirability of maintaining the current mutual recognition of certifications, including air operator certificates and certificates of airworthiness for those airlines with aircraft based across the EU.

On current models, there are three main options for aviation post Brexit:

- Becoming a member of the European Common Aviation Area (ECAA) – that is likely to go hand in hand with remaining a part of the EEA, and is the approach taken by, for example, Norway;
- A bilateral agreement between the UK and the EU by which the UK would have access to the single market – Switzerland is the main cited example of this in an aviation context; and
- Reverting to aviation arrangements between the UK and individual EU member states being dealt with on a purely bilateral basis.

3.1 The UK leaves the EU but remains a part of the EEA

The ECAA is a multilateral agreement between the EU, its Member States and a number of other countries, including Norway and Iceland, as well as certain of the Balkan states, which in effect extends liberalisation of aviation in terms of traffic rights and the application of the key aspects of the EU aviation regulatory framework over a wider area beyond the confines of EU territory. Membership of the ECAA would therefore afford to UK airlines the same intra-EU traffic rights from which they currently benefit and would render the UK aviation industry subject in very large part to the same suite of EU regulations to which they are currently subject and as outlined in the first section of this chapter. As part of this ongoing arrangement, the UK would also continue to apply and be subject to the EASA framework for safety regulation and would participate in EASA, albeit as a non-voting member. The UK joining the ECAA would therefore be the approach which would be the most seamless and least disruptive for UK aviation.

This approach is not without complications, however. The agreement of the remaining 27 EU Member States would be required for the UK to join the ECAA. As a continuing member of the EEA and in the absence of further negotiation, the UK would also be required to continue to adhere to fundamental EC Treaty principles, including the politically fraught principle of freedom of movement.

3.2 The UK leaves the EU but joins EFTA

If the UK, rather than taking the EEA/ECAA route, instead joins EFTA for other trading purposes, it would nevertheless require a specific bilateral air transport agreement with the EU. The existing model for this approach is that which was put in place between Switzerland and the EU in 2002. Pursuant to the Swiss-EU air transport agreement, Switzerland has access to the single market for aviation – and also is required to apply the raft of EU regulations governing aviation, including those relating to safety, security, consumer protection, air traffic management, the environment and competition. The Swiss model is a potential option for UK aviation post-Brexit but, again, there are warnings as to its feasibility. The Swiss Air Transport Agreement did not immediately upon coming into effect afford unlimited traffic rights for Swiss carriers to operate between two different Member States (as opposed from operating between the EU and Switzerland), nor did it give the immediate right for Swiss carriers to operate cabotage, ie routes within an EU Member State. If the UK chose to adopt a Swiss-type model for its bilateral aviation arrangements with the EU, those wider traffic rights would probably need to be addressed from the outset. Furthermore, the Swiss agreement is one of seven linked agreements with the EU which all came into force at the same time – the others relate to abolition of technical barriers to trade, free movement of persons, agriculture, overland transport, public procurement, and research. The agreements are linked by a guillotine clause, such that, should one cease to apply, the other six also cease to apply after six months. This is a live issue currently for the Swiss agreements, following a referendum in Switzerland in 2014 which voted in favour of certain restrictions of freedom of movement.

3.3 The UK leaves the EU and trades with the EU

In the event of the UK leaving the EU and trading with the EU pursuant to a bi-lateral trade agreement, an enormous amount of work would be required. Traffic rights between the UK and each EU Member State would revert to having to be negotiated on a bilateral basis, so 27 new air services agreements would be required. All EU regulations which currently govern the UK aviation industry would also cease to apply with the UK's exit from the EU and the repeal of the European Communities Act 1972. It is also questionable, in the absence of an agreement with the EU, whether the UK would remain a member of EASA (in any capacity), although, as there is no precedent for the current circumstances, that is uncertain. However, the likely consequence is that new UK legislation would need to be put in place to cover a large number of issues, including: airline licensing and certification, certification of aerospace manufacturers and products, certification of maintenance organisations, flight crew licensing, consumer protection, noise and other environmental matters, aerodrome licensing. The UK government would need to decide to what extent it wished to model new legislation on the corresponding EU regulations.

The responsibility for regulating UK aviation and issuing approvals and certification would fall entirely to the UK Civil Aviation Authority (which currently carries out a number of functions effectively as agent for EASA) such that additional expertise and manpower would be required.

Other changes required and other potential consequences

Open Skies Agreements between the EU and Third Countries

As noted earlier in this chapter, the EU has over the years negotiated a number of open skies agreements with third countries, including with the USA and Canada. Those agreements are of importance to the third countries involved as

well as to the EU. From a UK perspective, the EU-US open skies agreement for example, gave greater access for US airlines to Heathrow. A solution will be required to preserve the ability of UK airlines to operate routes to the USA and for US airlines to operate to the UK once the UK leaves the EU and the EU-US agreements cease to apply to the UK. The most straightforward solution will be for an agreement allowing the UK to remain a party by reason of EEA membership. If that cannot be achieved, traffic rights between the UK and USA (and indeed between the UK and any other country with which traffic rights are currently agreed at EU level) will have to be renegotiated in new bilateral agreements between the UK and each third country. In its recent strategy statement in December 2015, the European Union advocates and seeks authorisation to negotiate comprehensive air services agreements with a number of other countries. The UK's participation in those negotiations and in any agreements which result is obviously thrown into doubt by Brexit and will need to be taken into account in withdrawal negotiations.

UK Bilateral Air Services Agreements
As previously noted, although there has been an increasing focus on air service agreements being negotiated at EU level with third countries, in the majority of cases traffic rights between the UK and non-EU states are still contained in bilateral agreements. In large part, those are not affected by Brexit, but there are two considerations.

First, such agreements historically only allowed for designation of airlines from each party which are majority-owned and controlled by nationals of each respective party – so only UK-owned and controlled airlines could be designated to operate. The same nationality principles apply to bilateral air service agreements between other EU Member States and third countries. However, following a legal challenge and in order to avoid offending against the principle of freedom of establishment, amendments have been made steadily to a host of these bilaterals to replace the nationality clauses with EU designation clauses. The effect of the change is that designation can be granted to any airline established in the EU State that is party to such agreements which is majority owned and controlled by EU nationals. Post Brexit, it is possible that the UK's bilateral air service agreements will need adjusting in order to revert to the original UK designation clause. That will, however, depend on the terms of the agreement reached with the EU on traffic rights generally and to what extent EC treaty rights of establishment continue to apply in the UK.

Secondly, it is not uncommon for the airlines of non-EU countries operating to the UK pursuant to traffic rights granted under bilateral agreements to have code-sharing arrangements with a UK airline for onward carriage to other EU destinations. Those commercial arrangements are potentially threatened, depending on what arrangement is put in place to preserve the ability of UK airlines to continue to operate freely into the EU.

Eurocontrol
Eurocontrol is currently the European air traffic control organisation that administers charges for over-flight in Europe. In financings it is common to ask the borrower/lessee to provide a letter to Eurocontrol authorising them to disclose payment records. This arrangement may change after Brexit, with NATS (the UK's air traffic control organisation) needing to assume more control over matters which would otherwise have been covered by Eurocontrol. This may require new procedures to ensure that NATS gives financiers and lessors the same transparency they currently benefit from with Eurocontrol.

Brexit could also affect the way the UK Civil Aviation Authority may choose to apply its notorious "fleet lien" under section 83 of the Transport Act 2000, which currently includes detention for non-payment of Eurocontrol charges but could potentially be changed to exclude those post Brexit.

ExIm and ECA Financing
Currently, UK-based airlines cannot benefit from ExIm-backed financing or European ECA financing. This may change post Brexit. First, once the UK leaves the EU, Airbus aircraft sold to UK entities would be exported out of the EU and therefore qualify for export credit support, at least for that portion of the aircraft not manufactured in the UK. Secondly, should Airbus act upon their tacit threat and remove their manufacturing facilities from the UK, the UK would stop being an Airbus manufacturing country, and therefore ExIm would no longer be prohibited from providing export support to UK-based airlines.

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