



AEROSPACE BREXIT UPDATE

In previous briefings¹ we have highlighted the central issues for the aviation and aerospace industries which will need resolution in the run up to the UK's departure from the EU.

As the months have progressed, whilst there is no doubt a great deal of work being done behind the scenes, the fruits of that are not yet apparent and industry grows increasingly nervous about the prospect of a "cliff-edge" or "no deal" Brexit. In this update, we look at where matters stand with regard to the primary Brexit considerations for aviation and the UK government's current proposals for the UK's future relationship with the EU.

¹ See our Brexit Considerations from February 2018 at <http://www.hfw.com/Aviation-Brexit-considerations>

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Issues for aviation and “no deal”

The principal Brexit issues for aviation remain as they always have been since the referendum result in June 2016:

- traffic rights and the extent to which air traffic between the UK and the remaining EU27 will be able to continue unaffected;
- the need to secure ongoing rights to fly between the UK and other key destinations, including the US, in relation to which traffic rights are governed not by a bilateral treaty but by an EU-level treaty, thereby jeopardising the UK's rights derived from such treaties once it is no longer an EU Member State;
- safety regulation and the extent of the UK's ongoing relationship with the European Aviation Safety Agency, including whether the UK will remain part of a uniform system of safety regulation, concerns as to the effect of Brexit on continued reciprocal recognition across the EU of licensing and approvals of aircraft, products, organisations (such as aerospace manufacturers and maintenance organisations) and of personnel, and whether, in the event of “no deal Brexit”, it would be practicable to revert effectively to a purely national regulatory framework, either at all or within any feasible timescale;
- the ability for aerospace companies to easily move people and products cross-border with minimum delays and bureaucracy and the continued viability of UK bases of operation – concerns highlighted,

for example, in widely reported comments by Airbus in relation to its own Brexit-related risk assessments.

On a “no deal” Brexit, all the above considerations are well and truly in play and the potential impact on the industry is fundamental in terms of its basic ability to function in the UK without widespread disruption and interruption of business.

UK Government “No Deal” Technical Notices

The UK Government has issued a number of technical notices explaining to the public and to industry in broad terms the effect of “no deal” in a variety of sectors and, on 24 September 2018, issued such notices in relation to flights to and from the UK and aviation safety. The notices acknowledge the issues highlighted above. In relation to traffic rights between the UK and the EU, the UK Government notice states a preference, in a “no deal” scenario, for a multilateral “bare bones” agreement with the EU on traffic rights, a course of action identified previously by the European Commission as being desirable. The Notice also however highlights the need, in those circumstances, for certain additional approvals to enable both UK and EU carriers to continue flights between the UK and EU Member States including foreign carrier permits and third country operator approvals. Aside from the increased bureaucracy, the concern will be whether the timing will allow for (1) a bare bones aviation agreement to be put in place and (2) whether the necessary permissions can be processed and issued by the end of March 2019.

In relation to safety regulation, the UK Government Notice acknowledges the likely loss of reciprocal recognition for licences and approvals issued by the UK CAA pursuant to the EASA regime, such that they would not automatically be valid in relation to aircraft registered in the EU. That has the potential to affect the licences currently held across the industry, including by pilots, cabin crew, maintenance engineers, as well as the ability to install UK manufactured aircraft components into EU registered aircraft.

So how likely is “no deal” and where are we currently?

The two key dates for the UK's withdrawal from the EU, the shape of the future trading and regulatory relationship between the UK and the EU, and the risk of no deal, are 29 March 2019 (the expiry of the two year period since the UK triggered Article 50) and 31 December 2020 (the end of the transition period which has been agreed in principle between the UK and the EU during withdrawal negotiations). Should withdrawal negotiations break down without agreement (potentially over the failure to reach a resolution to address the complexities of the border between Ireland and Northern Ireland), there is a risk of the hardest of Brexits being triggered immediately after 29 March 2019, hence the serious concerns being expressed by a number of industry sectors, including aviation, as to the need for far more clarity over their future than is currently available. If there is sufficient agreement by March 2019 for the transition period to come into effect, the crunch date moves to 31 December 2020 for agreement on the UK/EU future trading relationship. That would provide some limited breathing space but industry will still need a great deal more certainty as to the shape of their future operations.

Airlines need to fix their schedules and sell tickets many months in advance, and companies need to look ahead to fill their order books as best they can and plan their operations and investments. The current uncertainty as to what the regulatory regime will be just 5 months ahead is unhelpful, unsettling and potentially

destabilising. Many in the industry will be engaged in extensive contingency planning and risk assessment. As we have noted in previous briefings, some airlines have already taken steps to protect their European operations by establishing themselves in other EU countries, and the introduction of Brexit-related clauses in some airlines' conditions of carriage seeks to give protection in the event the flight for which a ticket has been purchased cannot in the event be operated. Ultimately steps like these and extensive contingency planning may prove to have been unnecessary in the event of a "soft Brexit" deal on aviation which has limited impact on trade, movement of people and products, traffic rights and licensing. However, in the current vacuum, industry has no option but to continue to incur management time and significant expense on those workstreams.

Chequers White Paper

The UK government's blueprint for the UK's future relationship with the EU offered comfort to the aviation and aerospace industry, at least in terms of demonstrating that its concerns and needs have been taken on board. The Chequers White Paper (The Future Relationship Between the United Kingdom and the European Union, July 2018) recognises that in areas such as transport, the close integration between the UK and the rest of the EU reflects Member States' participation in the single market and also therefore expressly recognises that new arrangements will not be able to replicate the current ones completely once the UK leaves the single market. The UK Government's stated aim however is to draw upon examples that exist outside of the single market of close cooperation in order to help frame the new relationship. In the context of aviation specifically, the White Paper states that this will mean proposals for *"an Air Transport Agreement which seeks to maintain reciprocal liberalised aviation access between and within the territory of the UK and the EU, alongside UK participation in EASA"* (Chapter 1, paragraph 128) and includes the aspiration that a new air transport agreement *"could be supported through an approach to ownership and control that avoids introducing*

additional barriers to businesses" (Chapter 1, paragraph 130).

A continuation of traffic rights between the UK and the EU would certainly be of benefit to both UK and EU airlines so, as a starting point, the proposals outlined in the White Paper will be welcome to the aviation industry. Whether the EU will be amenable to an agreement which effectively gives the UK the same access to EU open skies that it currently enjoys but without acceptance of EU Treaty freedoms or CJEU jurisdiction (some of the UK Government's often-stated "red lines") is of course very uncertain, and the European Commission has noted that the extent of market access for the UK in the context of the future aviation relationship between the UK and the EU is likely to depend upon the extent of regulatory convergence and alignment.

EASA Membership

In relation to EASA, again the intention that the UK will seek membership of EASA as a third country will be welcome and would remove a great deal of the uncertainty surrounding the future safety regulatory regime that will apply. Industry could continue to operate safe in the knowledge that their existing licences and approvals will remain valid and continued to be widely recognised. EASA's procedures allow for non-EU members (Norway, Switzerland, Iceland and Liechtenstein are members) and the White Paper recognises that such membership is likely to require a financial contribution (Chapter 4 paragraph 38). In this event, other EASA members would need to agree to the UK's membership. Whilst one would hope this might be a given in light of the considerable expertise the UK has contributed to EASA since its inception, there is of course the possibility for wider politics to intervene. Time will tell as to whether the UK's aims in relation to EASA membership might nevertheless become mired in the broad UK/EU negotiations and the UK Government's "red lines". For instance, membership of EASA would be expected to assume an acceptance of the jurisdiction of the Court of Justice of

the European Union to the extent it rules upon matters pertaining to EASA regulations. In the context of membership of EU institutions including EASA, the Chequers White Paper is ambiguous (at best) as to what the UK Government's intentions and expectations are in relation to CJEU jurisdiction.

Assuming the UK does ultimately become a third country member of EASA, it should be noted that typically, non-EU members do not have voting rights, putting the UK potentially in the position of rule-taker, not rule-maker in terms of future aviation safety regulations which will apply to the UK industry – a status which is politically controversial as between advocates of hard, as opposed to soft, Brexit.

Free movement of goods

The White Paper also seeks to address how Brexit will affect the movement of goods by proposing a free trade area for goods and facilitated customs arrangement, the aim of which would be to secure "frictionless trade" and avoid customs and regulatory checks which potentially threaten integrated supply chains and just-in-time production processes. In an aerospace context, these were among the concerns expressed in forthright terms by Airbus in its published risk assessment. Again, the proposals – or at least the aims behind them – are welcome to the aerospace industry.

Bare bones and bureaucracy?

However, very considerable uncertainty surrounds the Chequers proposals due both to the Government's ongoing difficulties in "selling" its proposals to all wings of the Conservative Party and to Parliament as a whole, and the lukewarm reception the proposals have received from the EU negotiators. Despite the EU's publicly stated opposition to "cherry picking" in relation to specific industry sectors with regard to its relationship with the UK post-Brexit, there also remains a possibility of a discrete aviation agreement between the UK and the EU.

If agreement on the terms of withdrawal can ultimately be

reached between the UK and the EU, focus will move to whether the transition period which ends on 31 December 2020 is long enough for any new relationship agreed to be implemented and whether industry will have time to tailor its own operations and investment decisions accordingly. Freedom of movement and border controls may also continue to cause concern for the aerospace industry, some of which relies upon the straightforward movement of its personnel across the EU – Airbus for example indicated that its personnel make 80,000 business trips between the EU and the UK each year.

Overall, Chequers represents a significant step in the right direction for aviation and aerospace, in that it acknowledges the issues which need to be addressed and seeks to resolve them by way of the softest of Brexits, the measures proposed essentially amounting to maintaining the status quo as far as that can be consistent with the UK leaving the EU. The coming months will provide some indication as to whether that position can be sustained during the continuing negotiations.

Should the White Paper, or any deal negotiated with the EU on the back of it, be rejected by Parliament, thereby pitching the UK into “no deal” territory, the UK and EU are likely then to have to revert to putting in place the separate bare bones aviation agreement that both recognise will be needed. That will bring with it increased bureaucracy and permit requirements, such that disruption to operations may be very difficult to avoid, and is not likely to resolve issues around the loss of reciprocal recognition of licensing issued pursuant to EASA regulations. The uncertainty for industry appears set to continue for some time further.

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