

On 29 March 2017, the UK triggered Article 50 of the Treaty on European Union (TEU), meaning that the UK will cease to be a member state of the EU two years later, i.e. on 30 March 2019, unless such period is extended pursuant to Article 50 (3) TEU upon application of the UK by unanimous resolution of the remaining 27 member states (EU27) within the European Council or a Withdrawal Agreement is entered into between the UK and the EU (Withdrawal Agreement) that provides pursuant to Article 50 (3) TEU for a different date.

Upon ceasing to be a member state of the EU, the UK ceases to be a beneficiary not only of the Customs Union and the Single Market, but also (i) the European Single Sky; (ii) the European Common Aviation Area Agreement; (iii) all Comprehensive Air Transport Agreements the EU has entered into with a number of other countries like the US and Canada, as well as (iv) all Horizontal Air Transport Agreements the EU has entered into with other countries around the world.

As things currently stand, on 30 March 2019 there will no longer be an Open Sky for the UK other than to the extent provided in pre-existing "old" bilateral Air Services Agreements that the UK entered into and which may remain in force or any newly agreed bilateral Air Service Agreements, and other than as agreed in the Withdrawal Agreement (if any) or otherwise agreed with the EU and the other participating states in the European Common Aviation Area.

Single European Sky

The EU provides comprehensive legislation on various aspects of aviation. Such EU legislation has largely replaced domestic legislation in EU member states, starting more than 25 years ago, when passenger numbers passing through EU airports were approximately a third of what they are today. EU aviation legislation relates to, for example, licensing of air carriers, traffic rights, aviation safety, aviation security, insurance requirements, air traffic management, environment, social and employment aspects and consumer protection.

Insofar as traffic rights are concerned, Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community (Recast) provides that any Community air carrier (i.e. any carrier which is majority owned and controlled by EU nationals) can fly freely from any point within the EU to any other point in the EU ("EU Open Sky"). Subject to agreement to the contrary, the UK and UK majority-owned and controlled air carriers will cease to be beneficiaries of such rights as set out above upon Brexit becoming effective.

EU Open Sky has been extended to a large extent to other European countries through the so-called Multilateral Agreement between the European Community and its member states and various other states, including, *inter alia*, the Republic of Albania, Bosnia-Herzegovina, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Kosovo and Serbia on the establishment of a European Common Aviation Area (ECAA) of 2006. Since the UK is a party to the ECAA only in its capacity as an EU member state, the UK will cease to be a beneficiary of the rights under ECAA rules as set out above upon Brexit becoming effective.

Current Status of Negotiations Between the EU and the UK

Negotiations between the EU and the UK currently focus on the issues of EU and UK citizens' rights within the UK and the EU, the so-called divorce bill and the future relationship between Ireland and Northern Ireland. Only once sufficient progress is achieved, will negotiations on the future trade relationship between the EU and the UK start. It is not expected that such negotiations will start earlier than the last quarter of 2017. Aspects of Aviation and Open Skies do not appear to be a priority on the side of the UK or the EU. Statements which David Davis, the UK Secretary of State for Exiting the European Union, made during an evidence session on 11 July 2017 of the Select Committee on the European Union of the House of Lords indicate that the UK will not undertake separate negotiations with the EU on aviation, but that aviation is expected to form part of the negotiations relating to a comprehensive trade agreement between the UK and the EU. In any event, any such negotiation of aviation aspects between the EU and the UK only apply to the relationship between the EU and the UK, but do not extend to re-open the sky for the UK under the ECAA and the comprehensive Air Transport Agreements which the EU has entered into with other countries around the world, thus necessitating that the UK also enters into aviation related negotiations with all relevant other countries outside of the EU.

Options for Passengers From America, Asia, Australia, Africa and the UK

Airlines and the travel industry are closely monitoring the developments in relation to Brexit. Since routes and flights are regularly planned a year ahead, it is not entirely inconceivable that sales of tickets and tours on or after 30 March 2019 may become subject to conditionality. There are a number of options for the UK and the EU to avoid flights being materially restricted by Brexit. However, the likelihood of any such options being taken is unclear:

1. The UK could withdraw the Brexit notice. Whether this is legally possible under Article 50 TEU is an open question and there is currently zero inclination in the UK government or British Parliament to do this.¹

¹ <http://www.brexitlegal.com/2016/11/brexit-exit-from-brexit-and-the-loss-of-british-privileges-as-a-legal-consequence/#more-1038>

2. The UK and the EU could agree on a longer transition phase by providing that the Withdrawal Agreement (if any) to be entered into between the UK and the EU only comes into force well beyond 30 March 2019. In such case, the UK would remain a member state of the EU until the Withdrawal Agreement comes into force² and the current Open Skies under the ECAA Agreement and other Comprehensive Air Transport Agreements would not be affected until such date.
3. The UK and the EU could agree on a transition phase, which comes into force immediately upon Brexit becoming effective on 30 March 2019. Such transition phase could uphold the EU Open Sky during the transition phase, but would not have the effect that the Open Skies under the ECAA Agreement or any other Comprehensive Air Transport Agreements to which the EU is a party would continue to exist.
4. The UK could negotiate a Comprehensive Air Transport Agreement with the EU prior to 30 March 2019, but there are doubts that the remaining 20 months until 30 March 2019 are sufficient time for such negotiations, taking into account that any such negotiations could only start within Phase 2 after the Phase 1 Brexit negotiations have been concluded, and, in addition, Aviation is currently not a priority in the negotiations.
5. The UK could seek to agree on bilateral air services agreements with specific Member States of EU27, but this option does not seem likely in the light of the EU's Open Skies Policy.
6. The UK could seek to negotiate a minimal third and fourth freedom agreement with the EU in the Brexit Phase 2 negotiations. Time for such a minimal agreement might be sufficient.
7. The UK could seek to (re-)join the ECAA Agreement. However, there are at least two impediments for the UK (re-)joining the ECAA:
 - i. Article 32 of the ECAA Agreement provides that a state may be invited by the EU to join the ECAA if the EU has established or is establishing a framework of close economic cooperation, such as an Association Agreement. Since the current view is that there will be no Association Agreement between the UK and the EU after Brexit becoming effective and that there might even be a "hard" Brexit on WTO terms and without any trade agreement at all between the UK and the EU, the requirements of Article 32 would technically not be met and accordingly the consent of all parties to the ECAA Agreement would be required to let the UK (re-)join to the ECAA.
 - ii. Article 20 (3) of the ECAA Agreement on Dispute Resolution provides for a competence of the ECJ as ultimate arbiter. However, one of the UK government's Brexit "red lines" is no longer to be subject to the jurisprudence of the ECJ. It is possible that the UK may accept ECJ jurisdiction in order to be able to join the ECAA.

Ultimately, it is difficult to imagine that the UK government will allow itself in the position on 30 March 2019 where aviation is seriously compromised and flights to and from the UK need to be cancelled. On the other hand, no country has ever attempted to extricate itself from such a legal framework.

² <http://www.brexitlegal.com/2017/05/brexit-squaring-the-circle-and-involving-the-european-court-of-justice/#more-1081>

Different stakeholders in the aviation sector will be affected in different ways depending on which position the UK, EU and third countries ultimately agree. It is, therefore, imperative for businesses to ensure that they are fully aware of the legal issues, prepared for a range of eventualities and are in a position to engage with governments on the public policy issues.

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