

Brexit: legal implications for the aviation industry

ERA's Legal Counsel Sean Gates looks into some of the key legal challenges presented by the UK's exit from the European Union

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Much has been made, in a jingoistic way, of the desire and need for the EU to ‘punish’ the Brits as an example and a warning to other reluctant EU members. The tabloid press in the UK has cheerfully taken up that proposition as a call to arms. However, cooler heads appear to be beginning to prevail. Most recently, the UK Chancellor Philip Hammond has said there is “broad acceptance” in the UK Government of the need to strike a transition deal in Brexit talks. The need for such a deal is self-evident when one considers the multiple, purely aviation, issues that must be resolved. Encouragingly, recognising the potential for mutual assured destruction, Michel Barnier, EU Chief Negotiator for Brexit at the EU Committee of the Regions, has said: “Brexit will not be neutral and will not result in status quo. It constitutes an ‘exceptional situation’ which will have human, economic, financial, legal and political consequences.... We must be mindful that the absence of agreement with the UK would have – for both sides – even more grave consequences.”

Market access

The first, and arguably most, important issue for legal consideration is that of access to the EU by UK operators and to the UK by EU operators. The single European aviation market presently permits flights to, from and within Europe by European operators which can be defined for this purpose as operators situated within the EU; and within the territory of those states which have entered into agreements with the EU being Norway, Iceland and Liechtenstein under the EEA agreement; and Albania, Bosnia and Herzegovina, Croatia, Kosovo, the former Yugoslav Republic of Macedonia, Montenegro and Serbia under the European Common Aviation Area (ECAA) agreement (to which also Norway and Iceland are parties). Switzerland has its own direct agreement for this with the EU. These agreements and the EU itself restrict rights to airlines which are majority owned by nationals of the EU or those other states.

Access needed

There are significant legal difficulties in the way of airlines planning to operate in the EU arising from these ownership and control rules. Assuming, though this is not necessarily the case, that the UK will introduce a majority UK ownership rule, post Brexit UK airlines will require EU permission to operate to the EU and EU airlines will require reciprocal permissions, and if the parties wish to operate within each others’ territories, this too will call for a special agreement.



Sean Gates, ERA's Legal Counsel

Insurmountable difficulties would arise for the current operations of some airlines including easyJet, Ryanair and British Airways in the event there is no agreement, but historically such agreements are many years in the making. This is why some airlines have created headquarters in other territories recently. The interests of both parties should be vested in maintaining a high level of access. This could be afforded through UK membership of the European Common Aviation Area (ECAA) or by its entering into a separate agreement, as Switzerland has done. Failure to do so would have significant costs to UK operators and, among others, the European holiday destinations of UK and EU travellers with consequent economic consequences for the tourism industries of the countries involved.

Such a solution will not, however, confer on the UK the agreements made by the EU on behalf of its members with third countries such as the US. ‘Shadow’ discussions are already in progress between the UK and the US concerning post-Brexit relations which will undoubtedly include traffic rights, but again time is a significant factor and transitional arrangements need to be made between the parties if a final agreement cannot be reached by 31 March 2019. The alternative would seem to be reverting to the Bermuda 2 agreement with the US which would debar Delta from operating to the UK and about which, presumably, the US would be unimpressed! Agreements will need to be reached with each of the other countries which have agreements with the UK via the EU.

Safety regulations

Of equal importance in terms of issues requiring a legal resolution is the status of the European Aviation Safety Agency (EASA) post Brexit. The UK has made a very

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substantial contribution to the workings of EASA along with other nations. In the event of departure from the EU, the UK would need a special agreement with the EU to continue to participate, although probably to a lesser extent, in EASA's processes, since non-EU states do not have the power to influence the final form of regulations as they go through the EU legislative process. Without an agreement, the UK will have to duplicate the activities undertaken by the regulatory authorities whilst continuing to comply in relation to relevant operations to the regulations of other authorities until and unless there is a reciprocal recognition of regulations. One can hope for an agreement which recognises the contribution made and to be made by the UK to the regulatory process, which would axiomatically be in the interests of both parties, but it must be recognised that the most likely outcome, whereby EASA continues its present functions, will derogate from the current significance of the UK in this area and that the workings of EASA will be correspondingly diminished.

Consumer rights

The area of consumer protection is one in which EU regulations have won fewer plaudits from airlines, though undoubtedly, EU Regulation 261 has been embraced with delight by European consumers. The approach of the ECJ to interpretation of the regulation has, by some, been seen as a microcosmic illustration of the reasons why the ECJ is and continues to be so unpopular with those concerned with the integrity of the judicial process. In the best of all possible worlds, one can anticipate the continued UK application of rules similar to the regulation, but with its interpretation by UK courts shorn of the political mandate of the ECJ to interpret EU law with a view to advance the interests of the single market.

Numerous other issues of legal import arise for consideration, including emissions and other environmental rules, customs laws on goods transported between the UK and EU, aviation safety and slot rules, but space limitations preclude their detailed discussion here.

In October 1939, Winston Churchill said in a radio broadcast "I cannot forecast to you the action of Russia. It is a riddle, wrapped in a mystery, inside an enigma; but perhaps there is a key. That key is Russian national interest". The outcome of the present discussions is similarly unpredictable but one can only hope that the evident self interest of both parties prevails over less desirable political point scoring. ■