

# ANALYSIS: Brexit Process Heralds Complex Aviation Challenges

*Rigas Doganis, chairman of the European Aviation Club in Brussels and visiting professor at Cranfield University, explores the process ahead for the UK as it attempts to forge a new aviation relationship with the EU*

And so it begins. Brexit is becoming a reality. The UK has launched the process of leaving the European Union. For air transport, uncertainty prevails. Here, as in other sectors, new arrangements have to be agreed.

One of the successes of the EU has been the creation of the internal aviation market encompassing 28 member states plus Norway, Switzerland and Iceland. Airfares within Europe have dropped dramatically, traffic has grown steadily, and hundreds of new direct air links have been launched, many from new or previously underserved airports. Common rules on safety, security and the environment have been agreed. British consumers and airlines have benefited enormously.

Much is now at risk. Negotiating a new aviation relationship between the UK and the EU will be difficult and complex. It involves much more than traffic rights and airline ownership rules, although these are key issues. Any negotiations will also impact on the UK's air links with many more countries and airlines than just those in the EU.

There are several key areas for renegotiation.

First, a series of EU "liberalisation packages" have created an open-skies market within which member-state airlines can fly between any two points with no controls on fares or capacity.

So the UK's EasyJet can set up a base with 15 or so aircraft in Milan with Italian crews and fly to anywhere in Europe. Ryanair, an Irish airline, has by far its largest base at London Stansted. EU citizens or companies can set up and manage an airline in any of the member states, in addition to their own, provided more than 50% of ownership is in EU hands. How far can the UK continue to enjoy Europe's open skies?

If the UK ends up outside the European aviation market then EasyJet would have to set up an EU subsidiary, with more than 50% held by EU citizens or companies, in order to operate its extensive European network outside the UK. Conversely, Ryanair might find that, with its large British shareholders no longer qualifying as EU citizens, it might no longer be defined as an EU airline, given that it already has a large US shareholder base. It may also lose its rights to fly from its numerous UK bases to points in the EU other than Ireland.

## **REGULATION QUESTIONS**

Second, in parallel to the "liberalisation packages", there are more than 250 EU regulations and directives which take effect in UK laws. Some are very aviation specific; for instance, those dealing with passenger rights or airport charges. Others are more general but have a direct impact on aviation, such as those related to competition law, including control of mergers.

Third, the UK benefits from a series of air transport agreements signed by the EU with countries such as Morocco and Jordan, regulating air services between them and EU member states.

The Commission has a mandate to negotiate further agreements with the United Arab Emirates and the ASEAN countries. The most significant to date is the EU-US open-skies agreement. This permits any EU airline to fly from anywhere in the EU to any point in the US without price or capacity limitations. US airlines can do the reverse. This enables a British Airways subsidiary to operate from Paris to New York and Norwegian to fly from London Gatwick to

Boston. It also allows for joint-venture agreements between US and EU airlines. There are restrictions on ownership, although they differ either side of the Atlantic.

There is a similar open-skies agreement between the EU and Canada. Outside the EU, the UK will no longer be party to these agreements.

Finally, the UK is directly involved in several European aviation initiatives such as the European Aviation Safety Agency, the Single European Sky project for improving air traffic control, and the European Investment Bank which, among other things, funds airport development.

What are the options open to the UK if it wishes to maximise the benefits of access to the European internal aviation market?

The UK could become a member of the European Economic Area, as Norway and Iceland have done without being members of the EU. This would give the UK access to the European free trade area and also full access to the European aviation market. Westminster has expressed a reluctance to join the EEA, especially if it has to pay a substantial annual fee as Norway does. Norway also implements all EU aviation regulations without having any say or voting rights, and is required to accept both free movement of people and the decisions of the European Court of Justice (ECJ).

An alternative might be the Swiss model, a bilateral agreement with the EU covering aviation. In 2002, Switzerland, not an EU member, adopted and applied all the then-existing EU aviation rules or "acquis" on market access, pricing and so on, and thereby joined the European Common Aviation Area. But unlike Norway, Switzerland was not obliged to adopt any subsequent EU aviation directives or the decisions of the ECJ, although it tends to do so. Like Norway, it accepted free movement of people. A 2014 referendum vote rejected further free movement, but the Swiss government has still to implement this.

However, since the UK's Conservative government wants to impose controls on immigration and intends to withdraw from the ECJ, both the Norwegian and Swiss models are nonstarters.

A third and simpler option would be for the UK to apply to join the European Common Aviation Area, as several non-EU and even non-European countries have done, including Serbia, Morocco and Jordan. These countries gain progressively more access and rights to the European markets as they accept and enforce more and more of the EU's aviation regulations. As the UK has already accepted all of these, it should be able to gain full access to the ECAA, including the right of establishment. Free movement of people may not be a requirement. But the UK would have no say in future regulations, which it would have to accept. It would become a minor player with little influence on future European aviation policies.

The last, and least attractive, option would be to negotiate separate bilateral air services agreements with each of the EU member states, which would take many years. Or the UK could revert to the pre-existing bilateral agreements. But most of these were rather restrictive.

None of these options appears ideal. The solution could be a bespoke bilateral agreement between the UK and the EU similar to the EU-US open-skies agreement. It could, like the US agreement, contain certain restrictions agreed to by both sides. It could also have a dispute resolution mechanism which was separate from the ECJ.

## **SHORT-TERM FIX**

The UK negotiators also need to decide how to deal with the 250-plus aviation-related EU regulations. The government has stated that the "great repeal bill" will transpose all EU legislation into UK domestic law. But that can only be a short-term measure. Parliament will then amend, repeal and improve these laws as necessary. But this will be a very slow legislative

nightmare. Inevitably, the rules governing aviation on both sides of the Channel will diverge.

Half of all passengers departing the UK land at EU airports where they, and British airlines carrying them, will continue to be subject both to current and future EU regulations and any decisions by the ECJ. Yet one of the UK government's stated objectives with Brexit is to escape the jurisdiction of the ECJ.

The EU's agreements with third countries create another negotiating nightmare. When the UK leaves the EU, the latter's agreements with countries such as Morocco, Jordan, Canada and the USA would no longer cover air services between those countries and the UK.

Does the UK government start negotiating new bilateral agreements or does it, at least in the short term, revert to the pre-EU bilaterals with these countries? The old US-UK bilateral air services agreement, still in force for services between the USA and British Caribbean territories, contains many illiberal rules. For instance, under this pre-existing bilateral, Delta Air Lines would not have access to Heathrow. The joint venture between American and British Airways would be in jeopardy. Norwegian's ability to fly from London Gatwick and Edinburgh to the USA might also be questioned.

The final challenge will be to agree on the UK's future role in EASA, the European Investment Bank and many other EU institutions.

For UK consumers and airlines, safeguarding the benefits of European open skies will be a priority. But the 27 EU member states and their airlines may not necessarily have the same objectives. Carsten Spohr, chief executive of Lufthansa, in late March said he expected France and Germany to take a hard line on aviation issues.

Unfortunately, progress in aviation is dependent on resolving other key issues, notably those involving trade relations and the free movement of people.

Trade is the big unknown, and resolving the UK's future trade links with the EU will take time.

The UK as a tourist destination may well favour visa-free travel for EU nationals while maintaining restrictions on inward migration for work. But will the EU and member states be prepared to accept any such restrictions in order to keep the UK within the European internal aviation market? This could be a major stumbling block.

Negotiations on so many air transport issues will be complex and time-consuming. They will affect not only British and European airlines but many others too. It is impossible to believe that all these issues can be sorted out and agreed within two years. Transitional arrangements seem inevitable.

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