

EIPA Briefing 2020/10

Brexit and Aviation: Flying High or Crashing Out?

*Alexander H. Türk, Professor of Law,
Dickson Poon School of Law, King's College London*

This Briefing will set out the current state of the Brexit negotiations in the field of air transport. The Briefing will show that, in addition to specific issues that arise in the field of air transport, such as which rights of access are to be granted or differences in the understanding of 'ownership and control' or 'fair competition', the issues that have more generally caused difficulties for both sides in the negotiations can also be found in the air transport area. These general stumbling blocks include the Union's 'level playing field provisions' and different approaches to dispute resolution. While the air transport specific issues can perhaps be bridged, the more general issues will require major concessions to avoid the damaging prospect of each party being denied access to the air space of the other.

Introduction

The United Kingdom left the European Union on 31 January 2020 and is currently bound by, and benefits from, EU law as part of the Withdrawal Agreement it concluded with the EU. This also includes provisions on aviation, which allow the UK to benefit from continuous access to the European Union. The transition period ends on 31 December 2020 and both sides will need to conclude an agreement in some form to continue accessing each other's aviation space. While the current negotiations on an agreement about the Future Relationship include provisions on aviation, the negotiation positions, as they are publicly known, are still some way apart and, more generally, there is the possibility that no agreement will be found by the end of the year.

This Briefing will set out the position under the transitional arrangements of the Withdrawal Agreement before proceeding to a discussion of the differences in the positions of the EU and the UK in the current negotiations. It will set out some thoughts as to how those differences could be bridged and conclude with some reflections on what will happen in case no agreement is struck.

Background

When the UK left the European Union on 31 January 2020 not much changed from a legal perspective, as, by and large, EU law continued to apply by virtue of the Withdrawal Agreement. This was also the case in the area of air transport, where the EU over time has developed a truly common aviation space. The UK enjoyed the same level of access to the EU-27 and vice-versa as before the exit date. With the end of the transition period approaching, the position can change dramatically at the end of 2020. If no arrangement is found, then, at least as a matter of principle, planes from the UK will not be allowed to fly over or land in the EU-27 and vice-versa. So where are we in the negotiations and what are the key remaining differences?

Key differences

When considering the negotiations positions, at least those that were made publicly available, one can discern a number of key differences.

Aviation as separate agreement or part of an overall agreement?

The first difference is that the EU version of the draft agreement is one single document, in which the rules on air transport can be found in [chapter one](#) (air transport) of Title XII (Transport). On the other hand, the UK approach was set out in the provisions on air transport separately, but alongside the main trade agreement in a [‘Comprehensive Air Transport Agreement’](#). The key difference in approach has been that the EU agreement would have to be accepted as a whole, while the UK approached envisaged that an air transport agreement could be adopted even if the negotiations about the main trade agreement failed.

Which ‘freedoms of the air’ are offered?

The second difference exists in respect of the main substantive provisions of the agreement: the air transport freedoms that are offered. Currently the EU offers a common aviation area without any limitations. This includes all nine ‘freedoms of the air’. The ambitions of both parties in the current negotiations are much more limited, but still differ. The EU seems to offer merely the first four ‘freedoms of the air’, including (1) the right to fly over a foreign country; (2) the right to refuel or carry out maintenance in a foreign country without embarking or disembarking passengers or cargo; (3) the right to fly from the home country and land in a foreign country; and (4) the right to fly from a foreign country and to land in the home country. In contrast the UK position offers those four rights but also the fifth ‘freedom’: that is, (5) to fly from the home country to a foreign country while stopping in another foreign country on the way.

Ownership and control

Another key substantive difference is the definition of ‘ownership and control’. This is a key concept that determines who is entitled to enjoy the rights set out in the agreement. The UK position is quite generous by merely requiring for an airline designated by the UK that the principal place of business of the airline is in the UK, that it is licenced in the UK and that the UK has effective regulatory control.

On the other hand, the EU uses a more traditional and much narrower definition by requiring, in addition to the requirements set out by the UK, also that the air carrier should be owned, directly or through majority ownership, and effectively controlled by the EU-27 (or the UK), its nationals or both. The issue of ownership is of crucial importance for the UK, as at this point it is unclear which of its air carriers, if any, would meet the requirement set out in the Union’s draft. It is, however, important to note that the EU draft leaves open the possibility for a progressive liberalisation of the ownership and control rules.

Fair competition

Differences also emerge in the understanding of fair competition. While both sides agree on 'fair competition', the understanding of the term is different. The UK's concept of fair competition is more loosely framed than that of the EU, in particular when it comes to defining anti-competitive conduct or prohibitions on state aid. While the EU has included its own well-established rules into its draft agreement, by replicating Treaty articles on competition rules and rules from the Merger Regulation, the UK uses more vaguely phrased terms. A similar intention, though less clear so far, of setting out precise rules can be suspected to govern the EU's position on state aid. In contrast, the UK state aid approach is more loosely phrased with a considerable number of exceptions.

Dispute resolution

Finally, the preferred mechanisms for resolving disputes also differs significantly between the parties. On the UK side, there is a clear preference for dispute resolution and arbitration. If a dispute cannot be resolved within the proposed Aviation Committee, the parties are entitled to request the matter be resolved by binding arbitration. On the EU side, a more complex arrangement is envisaged. The air transport provisions also provide for a dispute resolution mechanism but at the same time leave the powers of competition authorities and courts intact. All the same, the dispute resolution mechanism envisaged by the Union in Title II of Part Five differs from that of the UK. While the EU mechanism also provides for arbitration, the EU provisions insist that where a dispute raises a question of interpretation or application of a concept of Union law contained in or referred to in the draft agreement, the arbitration tribunal is required to request the Court of Justice of the European Union to give a ruling, which is binding on the arbitration tribunal.

Way ahead in the negotiations

The differences between the two sides concerning the 'freedoms of the air', on 'ownership and control' and, perhaps, even those on 'fair competition' are not too big to be unresolvable. But it is the EU's more general level playing field provisions and dispute resolution mechanism, with its compulsory involvement of the Court of Justice, that might ultimately prove to be too difficult to square with the UK's position.

Conclusion

The gaps in the negotiating positions make a no-deal scenario likely. For aviation this would be a damaging prospect as without an agreement planes are not allowed to access each other's airspace. In this case two options can be envisaged. The first option would see both parties agree a deal that is limited to air transport. This presupposes, of course, that the difficulties set out above can be overcome. But this cannot happen without either side making major concessions. The second option would see both parties adopt unilateral acts that grant the other side access to its airspace. We have already an [example](#) of what such unilateral action could look like on the EU side, and we can see that the access granted will be limited in time and on less generous grounds than foreseen in the EU draft agreement. Moreover, it is based on the UK reciprocating the arrangement.