



CLYDE&Co

# Brexit scenarios for business aviation

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For EBAA





# Foreword

by Brandon Mitchener, CEO, EBAA

On the 23 June 2016, the UK voted to leave the European Union. This decision will result in a new relationship between the twenty-seven remaining members of the European Union and the United Kingdom.

On the road to that new relationship numerous challenges must be overcome and agreed upon. This report aims to place the challenges of the Business Aviation sector firmly at the heart of discussions between the EU and the UK. It presents the current relationship between the EU and the UK before presenting six scenarios for a future one. It maps out the key topics of interest for the business aviation industry - traffic rights, ownership and control, Value Added Tax (VAT) / Customs duty and the future relationship with the European Aviation Safety Agency (EASA) – analysing how these topics would fare under a future scenario.

Following the publication of the Joint Report of the EU and UK Brexit negotiations on 8 December 2017, and the approval of the European Council to move to phase two of negotiations, negotiators must now agree a framework

for a future relationship. It is our hope and aspiration that this phase places the views and concerns of business aviation at its core.

Business aviation contributes a total of 192,000 jobs to the European economy directly, with an additional 182,000 estimated to be generated indirectly. The sector generates EUR 42bn in Output, EUR 15bn in Gross Value Add, benefiting a number of economies across the EU. Germany, the UK, Italy and France are key locations where business aircraft operate, and it is paramount that this business activity continues uninterrupted after Brexit.

The EBAA looks forward to working with negotiators in both Brussels and London to ensure the specific expectations of the business aviation sector are appreciated, and that any future agreement is mindful of the very direct consequences that could arise for our sector and the European businesses and citizens we serve.

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## Section 1

# Executive summary

Following the Joint Report of the EU and UK Brexit negotiators on 8 December 2017, the aviation industry might be forgiven for issuing a collective sigh of relief that, nearly nine months after the triggering of Article 50, discussions will finally move on to the future trading relationship between the EU and the UK.

However, there is of course a huge amount of work to be done, and three dangers for the business aviation sector. The first is that, on the basis of the EU's negotiating stance that "nothing is agreed until everything is agreed" the future relationship in respect of aviation will not be subject to any form of bespoke standalone arrangement but will need to be part of an overarching free trade agreement. The second is that negotiators may come to a deal relating to the airline industry without consideration of the needs of the business aviation sector, which are not necessarily the same. Regulation of the business aviation market has traditionally followed in the slipstream of the wider aviation industry, and there is now an opportunity to raise specifically the requirements of this unique sector.

The third danger is that liberalisation of the air transport sector in the EU, which by general consensus, and ironically, is one of the EU's finest achievements and has been of considerable benefit, may be partially or even wholly rolled back.

The purpose of this report is to examine what a future regulatory environment between the EU and the UK in relation to the business aviation market may look like, in order to arm EU and UK negotiators with the background information they may require. On the basis that negotiating strategy must be informed by (to use military parlance) selection and maintenance of the aim, this report focuses on six possible "Brexit

models" for aviation, which are:

1. Maintenance of the status quo.
2. The UK joins the European Economic Area (EEA).
3. Negotiation of UK-EU bilateral aviation agreement (Swiss model).
4. The UK joins the European Common Aviation Area (ECAA).
5. No "aviation deal": reversion to previously agreed bilateral air services agreements (ASAs).
6. Negotiation of a new ASAs with EU and / or individual Member States.

This report analyses the impact of each of these models in four main areas in particular:

1. Traffic rights / market access.
2. Ownership and control.
3. VAT / Customs duties.
4. European Aviation Safety Agency (EASA).

The wider impact of EU membership is not of course limited to European markets, as the EU has negotiated various multilateral Air Transport Agreements with third countries on behalf of the UK. Upon leaving the EU, the UK will automatically cease to be party to those multilateral agreements and will have to negotiate new arrangements with those third countries. This "external dimension" is

also discussed extensively in this report.

By way of brief summary we note some of the points and conclusions reached in this report in respect of these four areas:

#### **Traffic rights**

- Operating licence holders enjoy unfettered access to intra-EU routes
- This includes 7th freedom (e.g. UK operator: Amsterdam-Lyon) and 9th freedom (e.g. UK operator: Milan-Rome) routes
- Only models 1 (status quo) and 2 (EEA) would preserve the existing regime
- Model 3 (Swiss model) – does not include 8th and 9th freedoms ("cabotage")
- Model 4 (ECAA) – 3rd and 4th freedoms available immediately, intra-EU 5th freedom available at Stage 2, and full market access only at Stage 3
- Models 5 (revert to previous ASAs) and 6 (negotiate new ASAs) – likely up to 5th freedom only

The following should also be noted:

- 1956 Paris Agreement: this covers non-scheduled routes but only for 24 Contracting Parties (including the UK) and certain restrictions apply
- Private flights largely unaffected



## Ownership and control

EU liberalisation in air transport created the concept of the “Community air carrier”, which is relevant to EU business aircraft operators providing commercial air transport services i.e. chartering aircraft. Reg 1008 / 2008 requires a Community air carrier to be majority owned and effectively controlled by EU nationals.

The risk of Brexit is:

	Majority UK owned and controlled	Majority EU owned and controlled
<b>UK operators</b>	Risk of losing “Community air carrier” status vis-à-vis the EU.	Continuing status in the UK will depend on future UK rules.
<b>EU operators</b>	Risk of losing “Community air carrier” status in the EU.	Ability to fly to and within the UK will depend on future UK rules.

Only models 1 (*Status quo*), 2 (EEA), 3 (Switzerland) and 4 (ECAA – *final stage only*) apply common EU ownership and control rules.

## VAT / Customs duties

Current UK Government policy is that the UK will be leaving the EU Customs Union, and will likely therefore need to establish its own standalone customs zone, aligned in some way with the EU zone. Absent an agreement, post-Brexit importation of a business aircraft through the UK will not automatically provide “free circulation” in the rest of the EU (and vice versa).

## EASA

EASA is an agency of the EU under Basic Regulation 216 / 2008. There is no appetite for the UK not being in the EASA regime – it would be expensive and time-consuming to build up an alternative infrastructure, with considerable risk of divergence. Norway, Iceland, Lichtenstein and Switzerland have been granted participation under Article 66 of the Basic Regulation and are members of the Management Board without voting rights, and EASA allows for numerous “Working Relationships” (e.g. Turkey.) It is likely that the UK would follow one of these models, but would thereby lose influence over the legislative process. A specific issue for non-commercial business aircraft operations is whether or not Reg 965 / 2012 Part-NCC will continue to apply to the UK post-Brexit.

## “Hard Brexit” scenario

The risks of a “no deal” (or “cliff edge”) scenario are:

- WTO rules do not provide a fall-back position for aviation.
- UK operators would lose “Community air carrier” status and therefore intra-EU traffic rights (including 7th and 9th freedoms).
- EU operators with significant UK shareholdings may fail Reg 1008 / 2008 ownership and control test.
- If the UK re-introduces a UK O&C requirement, UK operators with large EU shareholding could be at risk.
- EU aviation legislation would no longer apply to the UK (unless specifically re-enacted).
- The UK may cease to be a member of EASA.
- The UK will cease to benefit from third country aviation agreements concluded by the EU (e.g. US Open Skies Agreement).

## Summary tables

The tables in Annex 9 summarise the conclusions of this report.



## Section 2

# Overview

## 1. Introduction

Following the United Kingdom's exit from the European Union in March 2019, EU law will (subject to any agreed transition period) no longer automatically apply to the UK, leaving much uncertainty for the future of air transport, including the business aviation market. In order to ensure continued access to liberalised air transport markets and a familiar regulatory environment, some form of arrangement between the UK and the EU will be necessary to provide a suitable legal framework post-Brexit.

There has been much commentary in the media on the potential impact of Brexit on airlines. By contrast, this report focusses on the current regulatory environment applicable to business aviation operators, and the potential impact of Brexit on such operators.

This report consists of the main body and eight annexes.

In the main part of the report, we set out what we consider to be the six possible "Brexit models" for aviation, and analyse the impact of each of these models on business aviation, and in particular on the eight topics summarised below.

The eight annexes set out background material and further detail in relation to the following aspects of business aviation which will be particularly impacted by Brexit, five of which are also discussed in this overview:

Topic	Section 2 - Overview	Annex
Key types of aircraft operations	Para 4	1
Traffic rights	Para 5	2
Ownership and control	Para 6	3
Customs duties / VAT	Para 7	4
EASA (including licensing)	Para 8	5
Air traffic management / Single European Sky ATM Research		6
The Cape Town Convention		7
Other relevant EU law		8

## 2. Current UK aviation relationships

The UK's current air services relationships, which will need to be addressed post-Brexit are as follows:

	Number of countries that UK has an air services relationship with through each type of arrangement
Traditional bilateral Air Services Agreement (ASA)	111
EU internal aviation market (EU Member States)	27
EU internal aviation market (EEA Member States) (Norway, Iceland, Liechtenstein)	3
EU internal aviation market (Switzerland)	1
EU internal aviation market (ECAA Agreement) (Albania, Bosnia & Herzegovina, Macedonia, Montenegro, Serbia, Kosovo)	6
EU comprehensive Air Transport Agreements with third countries (USA, Canada, Georgia, Israel, Jordan, Moldova, Morocco)	7

Source: UK Department of Transport.



### 3. Brexit models

In our view, there are six possible post-Brexit models for the UK in relation to European aviation generally which will be discussed further in Section 3 of this report in the context of business aviation:

- I. **Status quo:** A deal is reached agreeing to full continuation of the present status quo for aviation including business aviation.
- II. **EEA:** The UK joins the European Economic Area ("EEA").
- III. **Switzerland model:** The UK enters into a Swiss-style "packages agreement" with aviation as one of the packages.
- IV. **ECAA:** The UK joins the European Common Aviation Area ("ECAA").
- V. **No deal:** There is no special deal for aviation and the UK reverts to previously agreed bilateral Air Services Agreements (i.e. before EU liberalisation), the main result of which is that, to the extent they are relevant, old bilateral regimes will revive.
- VI. **New arrangements:** The UK negotiates a new Air Services Agreement with the EU (not Swiss style i.e. not part of a 'package agreement') (it being acknowledged that separate bilateral Air Services Agreements with individual Member States are unlikely to be permitted by the Council).

Certain of these options (for example, joining the EEA) appear to have already been dismissed by UK Government policy, as set out in Prime Minister Theresa May's speech in Florence on 22 September 2017. For completeness we shall in this report consider them all, nevertheless, as each example is instructive and can inform debate as to what each of the UK and the EU might aim for from a future relationship in relation to aviation.

We also discuss in this report the possible impact of Brexit on non-scheduled commercial traffic from the UK to the US (and vice versa) and to other non-EU countries.

In this context we shall also discuss:

- I. **Transitional arrangements:** under these it would be envisaged that the present status quo would continue for a limited period pending negotiation and agreement of a long-term deal. This appears to be the UK Government's current preferred position for the first two years after March 2019, but is not a solution or model for aviation as such.
- II. **Comity and reciprocity:** the legal principle of "comity and reciprocity" could be relied on to bridge the gap while an agreement is reached.
- III. **Separate deal:** whether a separate deal for business aviation might be achievable.

#### 4. Types of business aircraft operations

There are four principal types of business aircraft operations:

- I. Commercial air transport (Part-CAT).
- II. Non-commercial operations with complex aircraft (Part-NCC).
- III. Non-commercial operations with aircraft other than complex (Part-NCO).
- IV. Specialised operations (Part-SPO).

These are described in detail in Annex 1 (Business aviation: key types of aircraft operations) below.

The characterisation and rules summarised above derive principally from EASA. Their applicability to the UK post-Brexit will depend on the UK's relationship with EASA, which is discussed in detail in this report, primarily in Annex 5. For example, Part-NCC applies to EU operators of certain types of business aircraft, and to EU registered aircraft operated by foreign operators. Clearly, if post-Brexit there is no agreement in place applying Part-NCC to UK operators and UK registered aircraft then Part-NCC would no longer be applicable in the UK.

This report concentrates primarily on commercial air transport (i.e. (i) above). In this context, the report examines non-scheduled flights, the unscheduled nature of such flights being the principal characteristic of business aircraft operations from a traffic rights

perspective. The reason for this focus is because the main impact of Brexit will be on the traffic rights available to commercial business aircraft operators, as opposed to operators / managers who conduct only private flights.

In our view Brexit will have very little impact on the (fairly unrestricted) traffic rights available to business aircraft managers who conduct private flights only. This would include for example operators who manage aircraft on behalf of the aircraft's owner without that aircraft being available for charter or hire by third parties, or in-house company flight departments operating aircraft for the wider group company of which it is part and is cross-charging internally for the service. As discussed in detail in this report, the main impact on such operations will depend on whether the UK remains subject to EASA rules or not, and the applicable regime if not (for example, would Part-NCC or an equivalent apply post-Brexit?). The extensive discussion on traffic rights in this report will be largely irrelevant to non-commercial operations.

## 5. Traffic rights

### UK and EU business aircraft operators

The adjacent table (Figure 1) is a summary of the possible impact of each of the “Brexit scenarios” on both UK and EU business aircraft operators with respect to traffic rights.

### Non-EU Operators

The position for non-EU operators is described below in Annex 2 (Traffic rights), noting that UK operators themselves may become “third country operators” for these purposes in the event of a scenario where no deal is reached for aviation (and conversely EU operators may become “third party operators” in relation to flights from the EU to the UK).

Please note the following which may apply unless superseded by a new agreement:

#### – The Chicago Convention 1944

Non-commercial non-scheduled operations have a right to operate 3rd (i.e. set down traffic) and 4th (i.e. pick up traffic) freedom flights to Contracting States under the Convention on International Civil Aviation of 1944 (the “**Chicago Convention**” or “**Convention**”),<sup>1</sup> subject only to an advanced notice requirement.

#### – 1956 Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe

This Agreement (also known as the “**Paris Agreement**”) operates independently of the EU legal framework and liberalises traffic rights for certain categories of non-scheduled flights. Due to the liberalisation of the EU air transport market within the EU in the 1990s and between the EU and its key aviation partners, the 1956 Agreement has gradually become obsolete, although it may provide a legal framework for the operation of certain non-scheduled air services if no specific arrangement is put in place by the time UK leaves the EU. It is, however, limited in scope, in particular it only applies to civil aircraft registered in a Member State of the European Civil Aviation Conference (“**ECAC**”).

This Agreement is discussed in detail in Annex 2 (Traffic rights).

<sup>1</sup>The Convention on International Civil Aviation (the “Chicago Convention”), 7 December 1944, (1994) 15 U.N.T.S. 295



Figure 1

Access to routes				
Possible models	Likelihood	Implications	Impact on UK operators	Impact on other EU operators
<b>Maintain status quo</b>	<ul style="list-style-type: none"> <li>– Unlikely scenario, considering that the other EU Member States would have to unanimously consent to this outcome.</li> <li>– Contrary to the UK negotiating position.</li> </ul>	<ul style="list-style-type: none"> <li>– No foreseeable change from the arrangements applicable as of Brexit date (30 March 2019) until a deal is reached.</li> <li>– Uncertainty over the applicable dispute resolution mechanism.</li> </ul>	<ul style="list-style-type: none"> <li>– No foreseeable change from the arrangements applicable as of Brexit date (30 March 2019).</li> </ul>	<ul style="list-style-type: none"> <li>– No foreseeable change from the arrangements applicable as of Brexit date (30 March 2019).</li> </ul>
<b>Join the European Economic Area</b> (e.g. Norway)	<ul style="list-style-type: none"> <li>– Framework for aviation is likely to be dictated by agreements in other areas, in line with the EU's negotiating position i.e. negotiations are to be conducted as "a single package": "individual items cannot be settled separately" – no sector-by-sector participation in the Single Market.</li> <li>– Contrary to the UK negotiating position: UK would have to keep all four "freedoms" without any restrictions, including free movement of persons.</li> </ul>	<ul style="list-style-type: none"> <li>– Highly desirable for both UK and EU operators; preserves full market access.</li> <li>– EEA EFTA Member States adopt majority of "EEA relevant" EU law without having any influence over the legislative process (creates sovereignty issues).</li> </ul>	<ul style="list-style-type: none"> <li>– Continued access to the liberalised Single Aviation Market based on Reg. 1008 / 2008 (all nine freedoms available).</li> <li>– UK non-scheduled commercial operators treated like Community operators with full access.</li> </ul>	<ul style="list-style-type: none"> <li>– Continued access to the UK and its internal market based on Reg. 1008 / 2008 (all nine freedoms available).</li> <li>– EU non-scheduled commercial operators treated the same as UK operators.</li> </ul>
<b>Negotiate a UK-EU bilateral aviation agreement</b> (e.g. Switzerland)	<ul style="list-style-type: none"> <li>– UK-EU bilateral aviation agreement will likely be negotiated as part of a larger package; standalone agreement is unlikely.</li> <li>– Aviation regulated by one of seven inter-linked bilaterals, most likely including free movement of persons - contrary to the UK negotiating position.</li> <li>– Swiss-style bilateral allows for separate regulation and no CJEU oversight.</li> </ul>	<ul style="list-style-type: none"> <li>– Good option for securing 1st to 7th freedom rights, but notable lack of "cabotage" rights (i.e. 8th and 9th freedoms).</li> <li>– Applies aviation <i>acquis</i> interpreted in line with CJEU decisions delivered prior to the adoption of the agreement.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: Swiss-style bilateral covers 3rd and 4th freedoms.</li> <li>– Flights within the EU: Swiss-style bilateral covers 5th and 7th freedoms.</li> <li>– Flights within an EU Member State: Swiss-style bilateral does not cover 8th or 9th "cabotage" freedoms.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: Swiss-style bilateral covers 3rd and 4th freedoms.</li> <li>– Flights within the UK: Swiss-style bilateral does not cover 8th or 9th "cabotage" freedoms – UK unlikely to grant rights for commercial non-scheduled flights without reciprocity.</li> </ul>

Figure 1 cont.

Access to routes				
Possible models	Likelihood	Implications	Impact on UK operators	Impact on other EU operators
<b>Join the European Common Aviation Area</b> (e.g. Serbia)	<ul style="list-style-type: none"> <li>Contrary to the aims of Brexit – allows for a gradual grant of market access in parallel with increasing regulatory convergence; requires acceptance of EU aviation law across all areas (NB importance of ‘sovereignty’ issues in Brexit debate).</li> <li>No automatic right to join, other EU Member States may oppose UK’s joining.</li> <li>ECAA generally aimed at States increasing (not decreasing) the level of association with the EU.</li> </ul>	<ul style="list-style-type: none"> <li>Supported by the industry.</li> <li>Viable option; UK already applies full EU aviation <i>acquis</i> and could potentially be fast-tracked to 3rd stage under the ECAA Agreement (i.e. full access to the Single Aviation Market) – effectively maintaining status quo.</li> <li>Securing 7th freedom and / or “cabotage” rights will be challenging.</li> <li>UK would have no ability to shape EU legislation it is required to adopt.</li> <li>ECAA Agreement entered into force on 1 December 2017.</li> </ul>	<ul style="list-style-type: none"> <li>Flights to and from the UK: ECAA Agreement covers 3rd and 4th freedoms from the onset.</li> <li>Flights within the EU: intra-EU 5th freedom rights available in the 2nd stage and 7th freedom rights available at the final stage.</li> <li>Flights within an EU Member State: full market access (including “cabotage”) and right of establishment only at the final stage.</li> </ul>	<ul style="list-style-type: none"> <li>Flights to and from the UK: ECAA Agreement covers 3rd and 4th freedoms from the onset.</li> <li>EU carriers able to operate between the UK and any airport in the EU (including to / from other EU Member States).</li> <li>Flights within UK: ECAA Agreement covers 8th or 9th “cabotage” freedoms, but only at the final stage.</li> </ul>
<b>Revert to / renegotiate bilateral Air Service Agreements</b>	<ul style="list-style-type: none"> <li>Simple fall back option that can be almost immediately implemented, but not all existing bilateral agreements may be revived.</li> <li>Counterparties may bargain for the exchange of 5th, 7th or 9th freedom rights.</li> <li>Reversion is unlikely scenario given the regression from the liberalised regime currently in force (but not impossible if no deal is put in place), success of renegotiation is uncertain.</li> </ul>	<ul style="list-style-type: none"> <li>Depends on whether previous bilateral agreements have been suspended or revoked.</li> <li>Stable framework providing legal certainty for the continuation of air services.</li> <li>Most existing bilateral agreements are likely to contain restrictions on designation, routes, capacity, frequency and pricing – a significant step back from current liberalised regime.</li> <li>UK-US Bermuda II Agreement is particularly restrictive, providing for single designation per route on most transatlantic routes, and restricted services to London Heathrow to two US and two UK airlines and limited 5th freedom services.</li> </ul>	<ul style="list-style-type: none"> <li>Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>Flights within the EU: existing bilateral agreements unlikely to exchange 5th and 7th freedoms.</li> <li>Flights within the EU: existing bilateral agreements do not exchange 8th and 9th freedoms.</li> </ul>	<ul style="list-style-type: none"> <li>Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>Flights within the UK: existing bilateral agreements do not cover 8th or 9th freedoms – UK unlikely to grant “cabotage” rights for commercial non-scheduled flights without reciprocity.</li> </ul>

Figure 1 cont.

Access to routes				
Possible models	Likelihood	Implications	Impact on UK Operators	Impact on other EU operators
<b>Negotiate completely new bilateral(s) with the EU and / or individual Member States</b>	– UK-EU bilateral aviation agreement will likely be negotiated as part of a larger package; standalone agreement is unlikely.	– The suitability of this arrangement is entirely dependent on what rights can be negotiated, and with how many States.	– Flights to and from the UK: exchange of 3rd and 4th freedoms is standard practice.	– Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.
	– Likelihood wholly dependent upon willingness of EU Member States and third countries to enter into new bilateral agreements.	– EU Member States would probably be precluded from negotiating directly with the UK whilst the EU's current Brexit mandate remains in force.	– Flights within the EU: exchange of 5th and 7th freedoms could be possible under a comprehensive agreement such as the EU-US Open Skies Agreement.	– Flights within the UK: existing bilateral agreements do not cover 8th or 9th freedoms – UK unlikely to grant “cabotage” rights for commercial non-scheduled flights without reciprocity.
	– European Commission could be granted a mandate to negotiate on behalf of the EU, precluding separate agreements with individual Member States.	– Negotiation is not a quick process.	– Flights within the EU: existing bilateral agreements do not exchange 8th and 9th freedoms.	
	– UK may be prevented from renegotiating agreements prior to formal exit from the EU making it more difficult to implement new agreement prior to exit.			

## 6. Ownership and control

The ownership and control rules are discussed in detail in Annex 3 (Ownership and control) below. These apply to 'Community air carriers' i.e. in the business aviation context an EU business aircraft operator which is providing commercial air transport services. The principal place of business of a 'community air carrier' must be the Member State which granted that carrier its Air Operator Certificate ("AOC"). Further, one of the criteria for being a 'Community air carrier' (and holding an EU operating licence) is that, under Regulation (EC) No 1008 / 2008 ("**Regulation 1008 / 2008**"),<sup>2</sup> Member States and / or nationals of Member States must (i) own more than 50% of the carrier and (ii) effectively control it.

Following a scenario where the UK leaves the EU with no new agreed arrangements being in place, a UK business aircraft operator will not be entitled to remain or become a 'Community air carrier', as its principal place of business will be in the UK (and therefore outside the EU) and its AOC will have been issued by a country which is not an EU Member State. That operator could endeavour to set up a principal place of business in the EU, and obtain an AOC from the relevant Member

State, but would still not be entitled to be issued an EU operating licence if it is not majority owned and effectively controlled by Member States and / or nationals of Member States. In the case of a UK business aircraft operator which is owned and controlled by EU nationals at present, its continuing status in the UK would depend on UK rules going forwards, which some commentators are suggesting may be more liberal than is currently the case under Regulation 1008 / 2008.

Conversely, it follows that an EU business aircraft operator which is majority owned and effectively controlled by UK nationals could lose its status as a 'Community air carrier' under Regulation 1008 / 2008.

The principal disadvantage of losing status as a 'Community air carrier' is losing access to the liberalised commercial air transport market in the EU, as discussed in detail in Annex 2 (Traffic rights).

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<sup>2</sup> Regulation (EC) No 1008 / 2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community (Recast) (OJ L 293, 31.10.2008, p. 3)

## 7. VAT / Customs duty

It is current UK Government policy that the UK will be leaving the EU Customs Union. In summary this will have the following consequences in relation to VAT and customs duty as applying to business aviation:

- I. The rules in relation to VAT / Customs duty above will continue to apply in the UK (and in The Isle of Man) post-Brexit, at least during an interim period pending any amendment.
- II. However, these rules would apply to a standalone separate UK customs zone.
- III. The interpretation of and development of these rules would no longer be subject to the jurisdiction of the Court of Justice of the European Union (the “CJEU”). The applicability of pre-Brexit CJEU judgments would be a matter for the UK legislature / courts.
- IV. Going forwards, it would be open to the UK to amend the rules or adopt new rules.
- V. An importation of a business aircraft through the UK / Isle of Man would not therefore automatically provide “free circulation” in the remainder of the EU – without a form of agreement being in place between the UK and the EU to allow for this.
- VI. The temporary admission rules applicable in the EU will in principle apply to UK registered business aircraft – as these will no longer be EU registered aircraft. Again, this is provided that there is no agreement in place between the UK and the EU providing for an alternative.

The current applicable VAT / Customs duty regime and the possible impact to Brexit is discussed in detail in Annex 4 (Customs duties / VAT) below.

## 8. European Aviation Safety Agency (EASA)

When the UK ceases to be a Member State of the EU, absent a special arrangement, it will no longer be a member of EASA. To what extent UK operators of UK-registered aircraft would be affected will largely depend on the UK’s membership of or relationship with EASA.

EASA is discussed in detail in Annex 5 (European Aviation Safety Agency).

## 9. Other

In this report we shall also discuss the impact of Brexit on:

- i. Air traffic management and EUROCONTROL – see Annex 6.
- ii. The Cape Town Convention – see Annex 7.
- iii. Other relevant aviation law – see Annex 8.

Figure 1

Access to routes			
Possible models	Ownership and control rules	Customs duties / VAT	European Aviation Safety Agency
<b>Join the European Economic Area</b> (e.g. Norway)	<ul style="list-style-type: none"> <li>– The EEA Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li> <li>– Norway, Iceland and Liechtenstein considered as EU Member States and their nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008.</li> </ul>	<ul style="list-style-type: none"> <li>– EEA EFTA States are not part of the EU Customs Union and EEA is not a customs union.</li> <li>– EEA Agreement establishes a free trade area: no tariffs on trade between the Contracting Parties (except for agricultural and fishery products).</li> <li>– Ability to negotiate free trade deals with non-EU countries.</li> <li>– Complicated “rules of origin” apply.</li> </ul>	<ul style="list-style-type: none"> <li>– Member of EASA's Management Board without voting rights.</li> <li>– “Loss of democratic control”: UK applying EU safety regulations notwithstanding lack of control over the legislative process.</li> </ul>
<b>Negotiate a UK-EU bilateral aviation agreement</b> (e.g. Switzerland)	<ul style="list-style-type: none"> <li>– The EU-Switzerland Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li> <li>– Switzerland treated as an EU Member State and its nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008.</li> </ul>	<ul style="list-style-type: none"> <li>– Switzerland is not part of the EU Customs Union.</li> <li>– The EFTA Agreement supplemented by a series of bilateral agreements establishes a free trade area in certain goods and services (i.e. limited access to the single market).</li> </ul>	<ul style="list-style-type: none"> <li>– Member of EASA's Management Board without voting rights;</li> <li>– UK would have to apply EU safety regulations without the ability to influence their contents and to vote on the proposed measures.</li> </ul>
<b>Join the European Common Aviation Area</b> (e.g. Serbia)	<ul style="list-style-type: none"> <li>– ECAA State Parties have to adopt the EU aviation <i>acquis</i>, including Reg. 1008 / 2008.</li> <li>– Full implementation of the air carrier licensing rules and access to air routes in suspension until the end of the 2nd transitional period.</li> <li>– National ownership and control rules apply until full implementation of the ECAA Agreement.</li> </ul>	<ul style="list-style-type: none"> <li>– ECAA States not part of the EU Customs Union.</li> <li>– ECAA Agreement does not contain provisions on customs duties and VAT.</li> <li>– In preparation for their accession to the EU, ECAA State Parties align their legislation with the <i>acquis</i>.</li> </ul>	<ul style="list-style-type: none"> <li>– ECAA State Parties in the 1st transitional period may sit on the Management Board as non-voting observers.</li> <li>– As they progress to the 2nd transitional period, the ECAA Joint Committee determines their precise status and conditions for participation.</li> </ul>

Figure 1 cont.

Access to routes			
Possible models	Ownership and control rules	Customs duties / VAT	European Aviation Safety Agency
<b>Revert to / renegotiate bilateral Air Service Agreements</b>	<ul style="list-style-type: none"> <li>– Almost all bilaterals impose “national” ownership and control requirements.</li> <li>– UK would have to adopt its own rules on ownership and control.</li> <li>– UK commercial non-scheduled operators would have to comply with nationality and ownership requirements under the relevant bilaterals, which could pose a challenge to non-UK majority owned and effectively controlled air carriers.</li> <li>– Scheduled UK operators would no longer benefit from EU designation under bilateral agreements of other EU Member States; the extent to which this would affect non-scheduled operators would need to be analysed on a case-by-case basis.</li> </ul>	<ul style="list-style-type: none"> <li>– Bilateral Air Service Agreements may contain separate provisions on customs duties (see for example Article 9 of the original UK-US 1977 Bermuda II Agreement).</li> </ul>	<ul style="list-style-type: none"> <li>– Bilaterals do not usually contain provisions on EASA membership.</li> <li>– UK would have to renegotiate its participation in EASA.</li> <li>– Possible cooperation on the basis of a Working Arrangement, separate from the bilateral.</li> </ul>





## Section 3

# Brexit: Impact of six possible models

In this section of the report we will examine and analyse the impact of six possible models that may be applicable to the UK for aviation generally, and for business aviation, following the UK leaving the EU.

Background material to the discussion in this section of the report is contained in the annexes.

## 1. Model 1: Maintain status quo

### 1.1. Commentary

The first possibility is maintenance of the existing relationship between the UK and the EU in respect of aviation generally, including business aviation, on a permanent basis following the UK's departure from the EU. This assumes that agreement is reached between the UK and the EU on the same basis as the existing rules by the deadline for the UK's exit from the EU (whether 30 March 2019 or later, if the Article 50 negotiations are extended). It should be noted that Article 50 only requires that after the end of the two-year negotiation period there will be an agreement on "arrangements for [the departing Member State's] withdrawal, taking account of the framework for its future relationship with the Union". It is therefore possible for any deal maintaining (or, more accurately in such context, reverting to) the status quo to be agreed and implemented later, possibly much later, with no deal or a transitional arrangement in place in the interim period.

The UK-EU Withdrawal Agreement (or however it will be described) will need to set out the arrangements in three distinct areas: (i) an exit deal – setting out the terms of the UK's withdrawal, (ii) a new deal setting out an agreement on the future UK-EU relationship or some framework for that relationship, and (iii) the rules for a transition / implementation period, if any. The European Council summit in Brussels on 22-23 March 2018 will assess what kind of trade deal can be expected. A final treaty on withdrawal and transition (and trade)

will need to be ready by October 2018 for there to be sufficient time for ratification before the end of the two-year Article 50 deadline. The UK Government has repeatedly made clear that it wants the full outline of a trade deal to be agreed in order to turn the transition phase into an implementation period that sees the UK's future trade relationship (based on a "deep and special partnership") take shape rapidly after March 2019. The EU takes a different view: Mr Tusk in his suggested guidelines to EU States spoke only of holding "preliminary and preparatory" discussions on the future relationship. If the EU gets its way and forces the UK to negotiate a classic Free Trade Agreement from scratch it could easily take five to eight years, according to experts. The EU-Canada FTA runs for 2,000 pages and took 10 years to negotiate. The answer will in part depend on whether the UK seeks a high alignment model – in which the UK agrees to stay very close to EU rules and regulations – or opts to embrace an independent trade policy for the UK. As mentioned elsewhere in this report, the EU's approach (reiterated in the Joint Report of 8 December 2017) is that "nothing is agreed until everything is agreed" so it is unlikely that there will be a special deal for the aviation sector, let alone the business aviation sector, in the absence of an overarching trade deal – the UK will not be permitted to "cherry pick".

The final agreement will need to be agreed by both parties: the EU side and the UK as departing Member State. The major policies set out in the Withdrawal Agreement will be directly implemented into domestic law in the UK by primary legislation – not by secondary legislation under the EU (Withdrawal) Bill. This will allow for Parliamentary scrutiny and

oversight of the process. The Withdrawal Agreement will need to be ratified by the UK Parliament.

On the EU side, ratification will require an enhanced qualified majority among the remaining Member States. This means that no single Member State could veto the deal, but that it would need to reach a critical level of support. (Specifically, it would need to be agreed by 20 out of 27 Member States, representing 65 per cent of the EU population). In some cases approval by the Member States requires approval of regional parliaments as well as national parliaments: the deal will need to be ratified by a total of 38 European parliaments, each effectively having a veto. The European Parliament will also need to approve the deal. This will require a simple majority of its 751 MEPs (MEPs from the UK would probably be allowed to vote, because at this stage the UK would still formally be part of the EU).

We do not discuss the impact on business aviation operations in Europe of maintaining the status quo as clearly the current regime would continue to be applicable post-Brexit. Extensive relevant aviation legislation would clearly need to be amended or supplemented: to take but one example, the reference in the ownership and control clause of Regulation 1008 / 2008 would need to be amended or supplemented so as to refer to nationals of a Member State and / or the UK.

However, it should be noted that it may be the case that the status quo is maintained between the EU and the UK in respect of the liberalised aviation regime now largely formulated in Regulation 1008 / 2008 (licensing and market access) but that the UK leaves

the Customs Union and / or EASA. We discuss in detail below the implications of the UK leaving the Customs Union and / or EASA (please see Model 5: Revert to previously agreed bilateral ASAs (no “aviation deal”) below). It should be recalled that it is current UK Government policy that the UK aims to maintain full liberalised market access to the UK Single Aviation Market when the UK leaves the EU but will leave the Customs Union.

## 1.2. External dimension

There is also, however, an external dimension.

First, separate arrangements will need to be agreed between the UK and the EEA States (Norway, Iceland and Liechtenstein) as the UK will no longer be automatically party to the EEA Agreement (or else the old bilaterals with these States may be revived and applied).

Secondly, a separate arrangement will need to be put in place with Switzerland as the UK will no longer be party to the EU – Switzerland Agreement (or else the old UK- Switzerland bilateral may be revived and applied).

Thirdly, the same applies to the relationship between the UK and the six parties to the ECAA Agreement (Albania, Bosnia & Herzegovina, Macedonia, Montenegro, Serbia and Kosovo).

Fourthly, as the UK will no longer be an EU Member State it will no longer be a party to the EU-US Open Skies Agreement, nor will it be a party to the other six agreements that the EU has reached with other countries to which the UK is a party by virtue of its membership of the EU (Canada, Georgia, Israel, Jordan, Moldova and Morocco). It would be open to the UK to join these agreements as a non-EU State (similarly to Norway which has acceded to the EU-US Open Skies Agreement), with the consent, of course, of the other parties. The US-EU Open Skies contemplates the

accession by further parties and provides a procedure for this in the agreement itself.

The implications of this external dimension for UK business aircraft operators are discussed further below in Model 5: Revert to previously agreed bilateral ASAs (no “aviation deal”) below.

There is a difficult timing issue for the UK on all arrangements with third parties which is that according to the EU the UK may not legally enter into negotiations with third countries until after it has left the EU.

## 2. Model 2: Join the European Economic Area

The second option for the UK to follow would be to join the European Economic Area (EEA), thus following the model of Norway, Iceland and Liechtenstein.

### 2.1. Traffic rights

The main advantage of this model is that the UK would continue to have full access to the liberalised Single Aviation Market, including all 9 freedoms of the air (as to which see Annex 2 (Traffic rights), through the application of Regulation 1008 / 2008.

This would mean that the existing regime will continue to apply, such that UK business aircraft operators would be treated the same as EU operators, and would continue to have the same rights. Since all nine freedoms of the air would apply a UK charter operator would therefore continue to be able to fly a 7th freedom route (for example Paris to Rome) as well as 9th freedom routes (for example Paris to Nice). Conversely, EU non-scheduled commercial operators would continue to have the right to continue to fly on 7th freedom routes into the UK (e.g. an Italian business aircraft operator flying for charter from Paris to London Luton) or out of the UK, as well as 9th freedom routes within the UK (e.g. a Maltese charter operator flying from Farnborough to Edinburgh).

### 2.2. Ownership and control

The EEA Agreement incorporates Regulation 1008 / 2008 and therefore preserves the current ownership and control rules. Going forwards post-Brexit, if the UK were to join the EEA that would mean that the UK will be treated as an EU Member State and its nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008. This would therefore mean that (a) a UK operator would continue to be entitled to the status of a “Community air carrier”, regardless of whether it is owned and effectively controlled by UK or EEA interests, and (b) an EEA operator that is owned and controlled by UK interests would continue to be entitled to be a “Community air carrier”.

### 2.3. VAT / Customs duties

The EEA is not a customs union and the EEA EFTA States are not part of the EU Customs Union. As described in Annex 4 (Customs duties / VAT), the UK would therefore form its own separate customs zone and an aircraft imported through the Isle of Man/UK would not (without any further agreement between the UK and the EU) have “free circulation” status within the EU. Conversely, an aircraft imported into the EU for “free circulation” in the EU would not have that status upon entry into the UK. A UK registered aircraft would have “foreign carrier” status for the purposes of the EU temporary admission regime, so the EU temporary admission rules would need to be analysed in relation to any UK registered aircraft entering the EU with no intention to effect a full importation for free circulation within the EU. (It should be recalled that it is open to a “foreign carrier” to effect a full importation into the EU). Conversely, an EU registered aircraft entering the UK could do so under the UK’s temporary admission regime rather than being fully imported into the UK, pursuant to whatever applicable rules the UK will adopt post-Brexit. We note in this regard that, as described in Annex 4 (Customs

duties / VAT), when the UK leaves the EU it is the UK Government's intention that the existing rules will be codified in domestic UK legislation without amendment, but they would be subject to amendment and repeal going forwards.

#### 2.4. EASA

As a member state of the EEA the UK would remain a member of EASA. However, the EEA States are members of EASA's Management Board without voting rights: it would therefore be necessary for the UK to apply EU safety regulations notwithstanding a lack of control over the legislative process. It may be unpalatable for the UK to suffer such a "loss of democratic control".

#### 2.5. External dimension

As an EEA Member the UK would be party to the ECAA Agreement but, because it would no longer be an EU Member State, the UK would need to enter into arrangements with Switzerland and with the seven countries with which the UK's current aviation relationship is governed by an EU agreement (USA, Canada, Georgia, Israel, Jordan, Moldova and Morocco). Absent any such agreement the "no deal" scenario would apply to the relationship between the UK and these states, as discussed further in Model 5: Revert to previously agreed bilateral ASAs (no "aviation deal").

#### 2.6. Commentary

The EEA envisages a high level of integration between the Member States, as the principal objective of the EEA Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Parties, with a view to creating a homogeneous economic zone.

The EEA Agreement does not provide for gradual liberalisation, as envisaged by the ECAA or the EMEA Agreements, which means that if any part of EU aviation legislation required under Annex XIII to the Agreement is not adopted, no benefit under the Agreement is obtained. In other words, it would be necessary to apply EU aviation legislation in full.

For the UK to join the European Economic Area, it would have to apply not only EU aviation legislation, but most other EU legislation, including that relating to the free movement of goods, persons, services and capital, without having a say on the adoption of this legislation. About 11,500 pieces of "EEA relevant" EU legislation have been adopted by the EEA, including 260+ in the area of air transport. This may not be politically acceptable in the UK given that three of the objectives of withdrawal from the EU and "red lines" are greater control over immigration, disapplying the jurisdiction of the CJEU and recovery of sovereign powers more generally.

The option of joining the EEA appears to have already been discounted by the UK Government, as set out in Prime Minister Theresa May's speech in Florence on 22 September 2017. In this speech Prime Minister May declared: "One way of approaching this question [of the future UK-EU relationship] is to put forward a stark and unimaginative choice between two models: either something based on European Economic Area membership; or a traditional Free Trade Agreement, such as that the EU has recently negotiated with Canada. I don't believe either of these options would be best for the UK or best for the European Union."

By way of summary, the impact of the UK joining the EEA on the four principal areas that we have been analysing is:

## Model 2

## Join the European Economic Area

	UK operators	EU operators	Comment
<b>Traffic rights</b>	<ul style="list-style-type: none"> <li>– Continued access to the liberalised Single Aviation Market based on Reg. 1008 / 2008 (all nine freedoms available).</li> <li>– UK non-scheduled commercial operators treated like Community operators with full access.</li> </ul>	<ul style="list-style-type: none"> <li>– Continued access to the UK and its internal market based on Reg. 1008 / 2008 (all 9 freedoms available).</li> <li>– EU non-scheduled commercial operators treated the same as UK operators.</li> </ul>	<ul style="list-style-type: none"> <li>– Highly desirable for both UK and EU operators; preserves full market access.</li> <li>– EEA EFTA Member States adopt majority of “EEA relevant” EU law without having any influence over the legislative process (creates sovereignty issues).</li> </ul>
<b>Ownership and control</b>	<ul style="list-style-type: none"> <li>– The EEA Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li> <li>– UK treated as an EU Member State and its nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008.</li> </ul>	<ul style="list-style-type: none"> <li>– The EEA Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li> <li>– Community air carriers treated the same as UK operators.</li> </ul>	
<b>VAT / Customs rules</b>	<ul style="list-style-type: none"> <li>– EEA EFTA States are not part of the EU Customs Union and EEA is not a customs union.</li> <li>– EEA Agreement establishes a free trade area: no tariffs on trade between the Contracting Parties (except for agricultural and fishery products).</li> <li>– Ability to negotiate free trade deals with non-EU countries.</li> <li>– Complicated “rules of origin” apply.</li> </ul>	<ul style="list-style-type: none"> <li>– UK outside of the EU Customs Union; but part of the free trade area – no tariffs between the Contracting Parties.</li> </ul>	
<b>EASA</b>	<ul style="list-style-type: none"> <li>– Member of EASA’s Management Board without voting rights.</li> <li>– “Loss of democratic control”: UK applying EU safety regulations notwithstanding lack of control over the legislative process.</li> </ul>	<ul style="list-style-type: none"> <li>– EU Member States are members of the EASA Management Board with full voting rights.</li> </ul>	

### 3. Model 3: Negotiate a UK-EU bilateral aviation agreement on the Swiss model

The 1999 Air Transport Agreement between Switzerland and the EU could provide a model to be adopted by the UK.

#### 3.1. Traffic rights

The benefit of this model is that it would allow UK operators to enjoy access to the EU internal air transport market without requiring a high level of integration with the EU (though the EU-Switzerland Agreement does apply the whole of the EU aviation *acquis* to Switzerland, to be interpreted in line with CJEU judgments prior to 1999).

However, in the case of Switzerland, 8th and 9th freedoms of the air are not exchanged (and 5th and 7th freedom rights have only been exchanged since 2004). It is not therefore automatically permitted for a Swiss business aircraft operator to fly on a commercial route between (for example) Milan and Rome, nor is it permitted for an EU business aircraft operator to fly commercially between (for example) Zurich and Geneva. A similar restriction could therefore apply post-Brexit to UK operators (in respect of any route within an EU Member State) and EU operators (in respect of any route within the UK). This would be a considerable restriction for the UK operator in particular.

Of course 8th and 9th freedom rights could be exchanged on a reciprocal basis in a UK-EU Swiss-style agreement, but trade-offs in other areas would seem likely.

#### 3.2. Ownership and control

The EU-Switzerland aviation bilateral incorporates Regulation 1008 / 2008 and therefore preserves the current ownership and control rules. Going forwards post-Brexit, if the UK were to negotiate a similar bilateral with the EU that would therefore mean that (a) a UK operator would continue to be entitled to the status of a “Community air carrier”,

regardless of whether it is owned and controlled by UK or EU / EEA interests, and (b) an EU / EEA operator that is owned and controlled by UK interests would continue to be entitled to retain the status of a “Community air carrier”.

#### 3.3. VAT / Customs duties

Switzerland is not part of the EU Customs Union. Following the Swiss model would entail the UK leaving the Customs Union (as noted above this is consistent with current UK Government policy), with the consequences, described above in the EEA context.

#### 3.4. EASA

Switzerland is within the remit of EASA. However, Switzerland is a member of EASA's Management Board without voting rights. With the same status it would be necessary for the UK to apply EU safety regulations notwithstanding a lack of control over the legislative process. It may be unpalatable for the UK to suffer such a “loss of democratic control”. We understand that it is the UK Government's intention to secure full membership in EASA including voting rights (not provided for in the EU-Swiss Agreement) so that it has a say in the adoption of technical and safety regulations, not least as it takes part in the manufacture of Airbus aircraft and component parts.

#### 3.5. External dimension

Assuming that the Swiss-style bilateral will be between the UK and the EU the UK would need to negotiate and arrange its relationships with the EEA States, Switzerland, the EFTA states and the seven countries with which the UK's current aviation relationship is governed by an EU agreement (USA, Canada, Georgia, Israel, Jordan, Moldova and Morocco). As discussed in this report, these are all countries with which the UK's current aviation relationship is pursuant to agreements reached by the EU. The consequences of failing to

regularise these relationships post-Brexit are discussed further in Model 5 below in relation to the “no deal” scenario.

#### 3.6. Commentary

It is questionable whether a Swiss-style air transport agreement with the EU is achievable. Switzerland entered into seven agreements each covering a specific sector (including freedom of movement of people, which has subsequently been rejected in a Swiss referendum in February 2014), and all of which are to be terminated if anyone is breached (the so-called “guillotine provision”). It seems relatively likely that a UK-EU air transport agreement would not be negotiated on its own, but as part of a larger package: as is well known, the negotiation position of the EU is that nothing is to be agreed until everything is agreed, i.e. aviation will not be the subject of a separate standalone agreement but will be included in the overall all-encompassing ‘new deal’ UK-EU package. This could ultimately have similar disadvantages as the EEA model.

The impact on the principal areas that we have been analysing is:



## Model 3

## “Swiss style” bilateral

	UK operators	EU operators	Comment
<b>Traffic rights</b>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: Swiss-style bilateral covers 3rd and 4th freedoms.</li> <li>– Flights within the EU: Swiss-style bilateral covers 5th and 7th freedoms.</li> <li>– Flights within an EU Member State: Swiss-style bilateral does not cover 8th or 9th freedoms.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: Swiss-style bilateral covers 3rd and 4th freedoms;</li> <li>– Flights within the UK: Swiss-style bilateral does not cover 8th or 9th “cabotage” freedoms</li> <li>– UK unlikely to grant rights for commercial non-scheduled flights without reciprocity.</li> </ul>	<ul style="list-style-type: none"> <li>– Good option for securing 1st to 7th freedom rights, but notable lack of “cabotage” rights (i.e. 8th and 9th freedoms).</li> <li>– Applies aviation <i>acquis</i> interpreted in line with CJEU decisions delivered prior to the adoption of the agreement.</li> </ul>
<b>Ownership and control</b>	<ul style="list-style-type: none"> <li>– The EU-Switzerland Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li> <li>– UK treated as an EU Member State and its nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008.</li> </ul>	<ul style="list-style-type: none"> <li>– The EU-Switzerland Agreement incorporates Reg. 1008 / 2008 and refers to Community air carriers.</li> <li>– Community air carriers treated the same as UK operators.</li> </ul>	
<b>VAT / customs rules</b>	<ul style="list-style-type: none"> <li>– UK would not be a part of the EU Customs Union.</li> <li>– The EFTA Agreement supplemented by a series of bilateral agreements establishes a free trade area in certain goods and services (i.e. limited access to the single market).</li> <li>– Deals with non-EU countries.</li> <li>– Complicated “rules of origin” apply.</li> </ul>	<ul style="list-style-type: none"> <li>– UK outside of the EU Customs Union; but part of the free trade area in certain goods and services.</li> </ul>	
<b>EASA</b>	<ul style="list-style-type: none"> <li>– Member of EASA's Management Board without voting rights.</li> <li>– UK would have to apply EU safety regulations without the ability to influence their contents and to vote on the proposed measures.</li> </ul>	<ul style="list-style-type: none"> <li>– EU Member States are members of the EASA Management Board with full voting rights.</li> </ul>	

#### 4. Model 4: Join the European Common Aviation Area (ECAA)

We have seen how, following exit from the EU, UK carriers will no longer have access to the Single Aviation Market. One way of regaining access would be to join the ECAA Agreement.

##### 4.1. Traffic rights

As described in detail in Annex 2 (Traffic rights), the ECAA Agreement contemplates three stages for each joining State:

**Stage 1** – immediate access to unlimited 3rd and 4th freedoms; joining state to implement key EU aviation legislation.

**Stage 2** – 5th freedom access is granted once the Commission / Joint Committee is satisfied that Stage 1 is complete.

**Stage 3** – full market access (all nine freedoms) and rights of establishment once full aviation *acquis* is applied.

The UK already applies EU aviation legislation, so from a practical perspective it should not need to go through the transitional stages – UK operators could continue to enjoy all nine freedoms of the air within the EU internal aviation market.

However, strictly speaking, the UK would not be formally subject to EU law as at the moment it decides to join the ECAA (by virtue of the fact that following exit from the EU, EU legislation will no longer apply to the UK). It is thus not inconceivable that the EU could use this technical argument to require the UK to implement the EU aviation *acquis* as required for progression through each stage of liberalisation.

This would effectively mean that, during the first stage, UK operators would only be able to operate 3rd and 4th freedoms on routes such as London to Warsaw or Athens to London. There would be no opportunity during the first stage for UK operators on the route London to Warsaw

to take up charter passengers in Warsaw destined for another point in the EU, such as Athens (as this is a 5th freedom right only granted in Stage 2).

From the perspective of operational freedom currently enjoyed by UK operators, an even more severely limiting consequence would be that 7th freedom rights, e.g. the right to fly from Warsaw to Athens without serving a point in the UK, 8th freedom rights, e.g. the right to fly from London to Athens and on to Thessaloniki on the same service, as well as 9th freedom rights, for instance a standalone service between Athens and Thessaloniki or Rome and Milan, would be unavailable during the first transitional stage. Similarly, EU carriers would be prevented from flying on routes such as Rome to London to Edinburgh or London to Edinburgh.

Following the implementation of the initial package, i.e. the ‘core’ EU aviation legislation, UK operators would be granted the right to fly 5th freedom services, an example of which would be the above route London to Warsaw to Athens, but both consecutive and standalone cabotage (8th and 9th freedoms, respectively) would be unavailable until after the second transitional period.

Of course, having applied EU aviation *acquis* in its entirety not long before withdrawal from the EU, the UK should be able to quickly re-implement the relevant legislation (though whether this is a politically feasible option is another matter), in which case there would be arguments for UK’s quick procession through the transitional stages to the fully liberalised Single Aviation Market. However, under the ECAA Agreement, progression to the next stage of liberalisation is not automatic, as it is the European Commission that determines whether the relevant requirements have been met. It is possible that some EU Member States may oppose the UK’s joining or delay progression through

stages of liberalisation.

##### 4.2. Ownership and control

Full implementation of the Regulation 1008 / 2008 air carrier licensing rules is in suspension until the end of the 2nd transitional period (i.e. the end of Stage 3). Unless the UK joins on the basis of having achieved Stage 3 the initial impact may therefore be the same as a “no deal” scenario, on which see Model 5: Revert to previously agreed bilateral ASAs (no “aviation deal”).

##### 4.3. VAT / Customs duties

The ECAA Agreement does not form a customs union or contain provisions on the accession to the EU Customs Union. The consequences of the UK leaving the Customs Union are discussed in the “no deal” scenario in Model 5: Revert to previously agreed bilateral ASAs (no “aviation deal”) below.

##### 4.4. EASA

The UK would be interested in securing full membership in EASA, so that it has a say in the adoption of technical and safety regulations, not least as it takes part in the manufacture of Airbus aircraft and component parts. This is another feature of the ECAA Agreement that is practically only ‘unlocked’ once the Commission determines that the second transitional stage has come to an end.

##### 4.5. External dimension

The June 2006 EEA Agreement is with the EEA States as well as the EU.

This would therefore leave the UK needing to arrange its relationships with Switzerland and the seven countries with which the UK’s current aviation relationship is governed by an EU agreement (USA, Canada, Georgia, Israel, Jordan, Moldova and Morocco).

##### 4.6. Commentary

The principle that market access is gradually granted in parallel with increasing regulatory convergence



may not be too unpalatable for the UK, especially given its starting point that such aviation regulations apply anyway.

However, the ECAA Agreement was modelled for countries that are candidates for EU membership and envisages ultimately a high degree of integration with the EU. This, as well as the lack of control over the implementation of future EU aviation legislation, is unlikely to be politically

acceptable for the UK. The overall direction of the ECAA (as a staging post for the members to join the EU) is the reverse of the direction that the UK has chosen, and seen from that perspective it might be considered anomalous for the UK to become an ECAA member.

Alternatively, the UK could enter into an ECAA-style Agreement with the EU. One of the benefits of this is that the ECAA Agreement only requires the

approximation of laws, not the adoption of EU legislation, which would allow the UK to retain more policy control. However, the ECAA model currently does not envisage the immediate exchange of 7th, 8th or 9th freedoms of the air, or full membership in EASA.

The impact on the principal areas that we have been analysing is:

#### Model 4

#### The UK joins the ECAA

	UK operators	EU operators	Comment
<b>Traffic rights</b>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: ECAA Agreement covers 3rd and 4th freedoms from the onset.</li> <li>– Flights within the EU: intra-EU 5th freedom rights available in the 2nd stage and 7th freedom rights available at the final stage.</li> <li>– Flights within an EU Member State: full market access (including “cabotage”) and right of establishment only at the final stage.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: ECAA Agreement covers 3rd and 4th freedoms from the onset.</li> <li>– EU carriers able to operate between the UK and any airport in the EU (including to / from other EU Member States).</li> <li>– Flights within UK: ECAA Agreement covers 8th or 9th “cabotage” freedoms, but only at the final stage.</li> </ul>	<ul style="list-style-type: none"> <li>– Supported by the industry.</li> <li>– Viable option; UK already applies full EU aviation <i>acquis</i> and could potentially be fast-tracked to final stage under the ECAA Agreement (i.e. full access to the Single Aviation Market) – effectively maintaining status quo.</li> <li>– Securing 7th freedom and / or “cabotage” rights will be challenging.</li> <li>– UK would have no ability to shape EU legislation that it would be required to adopt.</li> <li>– ECAA Agreement entered into force on 1 December 2017.</li> </ul>
<b>Ownership and control</b>	<ul style="list-style-type: none"> <li>– ECAA State Parties have to adopt the EU aviation <i>acquis</i>, including Reg. 1008 / 2008.</li> <li>– Full implementation of the air carrier licensing rules and access to air routes in suspension until the end of the 2nd transitional period.</li> <li>– National ownership and control rules apply until full implementation of the ECAA Agreement.</li> </ul>	<ul style="list-style-type: none"> <li>– ECAA Agreement refers to Community air carriers: Reg. 1008 / 2008 continues to apply.</li> </ul>	

Model 4 - cont.

## The UK joins the ECAA

	UK operators	EU operators	Comment
<b>VAT / customs rules</b>	<ul style="list-style-type: none"> <li>– ECAA States not part of the EU Customs Union.</li> <li>– ECAA Agreement does not contain provisions on customs duties and VAT.</li> <li>– In preparation for their accession to the EU, ECAA State Parties align their legislation with the <i>acquis</i>.</li> </ul>	<ul style="list-style-type: none"> <li>– UK outside of the EU Customs Union.</li> </ul>	
<b>EASA</b>	<ul style="list-style-type: none"> <li>– ECAA State Parties in the 1st transitional period may sit on the Management Board as non-voting observers.</li> <li>– As they progress to the 2nd transitional period, the ECAA Joint Committee determines their precise status and conditions for participation.</li> </ul>	<ul style="list-style-type: none"> <li>– EU Member States are members of the EASA Management Board with full voting rights.</li> </ul>	

## 5. Model 5: Revert to previously agreed bilateral ASAs (no “aviation deal”)

### 5.1. Introduction

If no Withdrawal Agreement is in place by the end of the two year negotiation period under Article 50 TEU (or any extension of that period), the EU Treaties will cease to apply to the UK. This has been variously described as a “no deal” scenario or a “hard Brexit” – or indeed, more pejoratively, as “falling over the cliff-edge”. Unless the negotiation period is extended the UK will therefore leave the EU on 29 March 2019.

It is possible that a deal could be agreed for aviation (possibly with other special sectors also) but not overall. However, the Council’s negotiation guidelines contemplate a single overall package: “Negotiations under Article 50 TEU will be conducted in transparency and as a single package. In accordance with the principle that nothing is agreed until everything is agreed, individual items cannot be settled separately.”<sup>3</sup> These guidelines define the framework for negotiations under Article 50 TEU and set out the overall positions and principles that the Union will pursue throughout the negotiation.

It should also be noted that, unlike many other sectors, World Trade Organisation (WTO) rules will not apply as WTO rules do not cover the aviation sector.

### 5.2. Traffic Rights

In the event of the UK leaving the EU without putting in place some arrangement for a new aviation regulatory regime, UK commercial business aircraft operators would cease to have access to the liberalised intra-EU and EU-US air transport markets.

The regime going forwards would by necessity therefore be based on (i) old bilaterals, to the extent that they can be revived (i.e. to the extent that they have not been superseded by later agreements)

and (ii) the 1956 Paris Agreement.

Old bilateral agreements which have not been terminated may be revived, but these would usually only provide for the exchange of 3rd and 4th freedoms as well as some 5th freedom services. However, in the case of 5th freedom services this will depend on the survival (or replacement) of the other applicable agreement. For instance, in case of the revival of the UK-Italy bilateral, UK and EU operators should be able to fly London to Rome and Rome to London routes in both directions. However, for a UK carrier to be able to fly London to Rome to Athens, both the UK-Italy and UK-Greece bilateral air services agreements would need to have survived and contain 5th freedom rights.

7th freedom services (such as services by UK operators from Rome to Athens) as well as 8th freedom rights (such as a flight by a UK carrier from Palermo to Paris with no UK connection) or 9th freedom rights (such as a flight by a UK carrier from Rome to Milan or by an EU operator from Cardiff to Edinburgh) are not permitted under these old bilateral agreements. The agreements would need to be analysed on a case-by-case basis to see what traffic rights are granted, and to see if any distinction is made between scheduled and non-scheduled commercial traffic.

On the one hand the revival of bilateral air services agreements that have survived would be a relatively simple measure that could be implemented fairly quickly, avoiding a gap during which there would be no legal framework for the operation of air services between the UK and the EU. This is particularly important, given that the UK may be prevented from negotiating new air transport agreements with the EU prior to actually leaving the EU, and individual EU Member States would similarly be prevented from negotiating with the UK even post-Brexit if mandate is given to

the European Commission. At the same time, and on the other hand, the revived regime would be relatively inflexible, not just because of the restrictive nature of most old bilaterals, but also because of the time-consuming formalities involved in their subsequent renegotiation. As a result, what may be implemented as an interim solution has the danger of becoming a more permanent one, and an unsatisfactory one at that.

By way of example, we have reviewed four old bilaterals between the UK and the following European States:

1. **Germany:** the Agreement for Air Services between and beyond their Respective Territories (with Exchange of Notes) of 1955 and the subsequent Exchanges of Notes of 1962 and 1990 do not expressly apply to non-scheduled air services; Article 1 defines an air service as “any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo” and the Agreement does not at any point refer to non-scheduled or charter traffic;
2. **Italy:** the Agreement for Air Services between and beyond their Respective Territories (with Schedules and Exchange of Notes) of 1976 does not expressly apply to non-scheduled services, with the exception of Article 6 which provides an exemption from customs duties, inspection fees and any other duty or tax on the aircraft, their regular equipment, spare parts, supplies of fuel and lubricants and aircraft stores (including food, beverages and tobacco) whether used in the course of scheduled or non-scheduled operations. It should be noted that that Italy is not a State Party to the 1956 Paris Agreement;
3. **France:**
  - a. The Agreement relating to Air

<sup>3</sup>European Council (Art. 50) guidelines following the United Kingdom’s notification under Article 50 TEU, 29 April 2017

Transport between British and French Territories (with Annex and Exchange of Notes) of 1946 and the subsequent Exchanges of Notes of 1951, 1953, 1961, 1969, 1977, and 1990 applies to scheduled ("regular") services only;

- b. The Exchange of Notes constituting an Agreement regarding Non-Scheduled Commercial Air Services of 1950 applied to commercial flights which were not covered by the original 1946 Agreement, i.e. non-scheduled commercial air services, but it was denounced by the UK on 10 February 1960, most likely due to the entry into force of the 1956 Paris Agreement.

#### 4. **Switzerland:**

- a. The Agreement (with Annex and Exchange of Notes) for Air Services between and beyond their Respective Territories of 1950 and the subsequent Exchanges of Notes of 1957, 1959, 1979, 1983, 1986, 1990, 1992 and 1993 does not cover non-scheduled operations; it defines "air service" in line with Article 96 of the Chicago Convention, that is as "any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo".
- b. The Exchange of Notes constituting an Agreement for Air Services between and beyond their Respective Territories of 1952, similarly to the French Agreement described above, applied to commercial flights not covered by the original 1950 UK – Switzerland Agreement, i.e. non-scheduled commercial air services, but, just like in the case of the French bilateral arrangements, it was denounced by the UK on 10 February 1960, most likely due to

the entry into force of the 1956 Paris Agreement, to which both the UK and Switzerland are party.

According to Bin Cheng (1962)<sup>4</sup>, the only two UK bilaterals in existence in 1962 that related to international air transport other than scheduled international air services were the two agreements with France and with Switzerland, discussed above. Both were denounced and superseded by the 1956 Paris Agreement.

In the absence of any suitable bilateral agreement there will be three fallback positions discussed in detail in Annex 2 (Traffic rights):

- i. Article 5 of the Chicago Convention
- ii. The 1956 Paris Agreement
- iii. Third Country Operator rules

The 1956 Paris Agreement operates independently of the EU legal framework and liberalises traffic rights for the following categories of flights: (1) humanitarian or emergency flights; (2) taxi flights "of occasional character" not available to the general public, performed using aircraft with seating capacity of no more than 6 seats; (3) charters of the entire aircraft by an individual, firm, corporation or institution for the carriage of their staff or merchandise without resale of space; (4) isolated flights, on a condition that the operator (or group of operators) of such a flight performs no more than one flight per month between the same two traffic centres; (5) all-freight flights (subject to further conditions); and (6) passenger flights between regions which have no reasonably direct connection provided by scheduled air services (subject to further conditions). The Agreement is, however, limited in scope; in particular, it only applies to civil aircraft registered in a Member State of the European Civil Aviation Conference (ECAC) and operated by a national of one of the Contracting

States when engaged in international flights for remuneration or hire between the territories of the Contracting States.

The UK is a 1956 Agreement Contracting State. The Agreement can therefore be of assistance to UK operators, but its applicability depends on the rules set out above, its effect will therefore be patchwork and confusing and its results will be anomalous. For example, by the Agreement a business aircraft flight of a registered aircraft conducted by a UK operator from Madrid to Paris would be permitted if the aircraft has been chartered by a company for the carriage of its staff, but not if the company has chartered the aircraft to fly its customers (unless the operator only flies the route once per month or the aircraft has less than six seats.) It is submitted that this would be a very difficult regulatory regime for UK charter operators to operate within.

As discussed in Annex 2 (Traffic rights), third country operators wishing to carry out commercial flights, whether scheduled or non-scheduled, to, from or within the UK, must obtain: (1) an EU safety authorisation, and (2) a UK operating permit, before they are allowed to perform such flights. In the absence of an agreement to the contrary, UK air carriers will become third country operators for the purpose of the EU rules, and vice versa, Community air carriers wishing to operate to the UK will be viewed as third country operators under English law. With regard to the safety element of this, EU rules expressly state that any third country operator which intends to perform commercial air transport (CAT) operations, transporting passengers, cargo or mail for remuneration or hire, into, within or out of the territories to which the Basic Regulation applies must first comply with the requirements of Part-TCO and hold an authorisation issued by EASA

<sup>4</sup>The law of international air transport. Volume 47 of Library of world affairs, London Institute of World Affairs. Author, Bin Cheng. Edition, 3. Publisher, Stevens, 1962

under Part-ART. The obtaining of an operating permit for ‘ad hoc chartering’ is governed in the UK by Article 250 of the Air Navigation Order 2016, and will be governed in the other EU Member States by their local regulations. Certain of these may provide that permission may only be granted for a flight where a local carrier or locally registered aircraft cannot provide the service. It is submitted that, if UK operators have to obtain a foreign carrier permit to fly on an ad hoc charter to a particular country, and if EU operators have to obtain a foreign carrier permit from the UK CAA every time they fly to the UK, then the system will become overloaded and administratively cumbersome.

### 5.3. Ownership and Control

Following the UK’s exit from the EU, without an agreement in place to the contrary, a UK business aircraft operator will not be entitled to become or remain a “Community air carrier” under Regulation 1008 / 2008 as its principal place of business will be in the UK (and therefore outside the EU) and its AOC will have been issued by an authority (the UK CAA) which is not in a Member State. That operator could endeavour to set up a principal place of business in the EU, and obtain an AOC from the relevant Member State, but would still not be entitled to be issued an EU operating licence if it is not majority owned and effectively controlled by Member States and / or nationals of Member States (which for these purposes includes EEA States and Switzerland). In the case of a UK business aircraft operator which is owned and controlled by EU nationals at present, its continuing status in the UK would depend on UK rules going forwards.

Conversely, it follows that an EU business aircraft operator which is majority owned and effectively controlled by UK nationals could be in danger of losing its status as a “Community air carrier” under Regulation 1008 / 2008.

It is not inevitable of course that the UK would adopt an ownership and control test that would be equivalent to the test set out in Regulation 1008 / 2008. It is possible that the UK could adopt a more liberal regime, allowing UK business aircraft operators to be owned and controlled by non-UK shareholders. The UK CAA’s CEO Andrew Haines stated in a speech on 5 September 2017: “We think ownership and control requirements could be much more liberal. But we wouldn’t advise these are sacrificed if they were the price to be paid for on-going, full participation of the European market.”

A UK operator could establish a new operator in a continuing EU Member State in order to avail itself of access to the Single Aviation Market (in the airline sector, this is what easyJet has done in establishing an AOC / operating licence holder in Austria). However, this requires the operator to (1) obtain a new AOC / operating licence from the continuing Member State, and so establish a principal place of business there (either itself or through a subsidiary), i.e. its head office / registered office where its main financial function and operational control (including continued airworthiness management) are exercised and (2) restructure its ownership and control (as necessary) to comply with Regulation 1008 / 2008 either at topco or subsidiary level. This may not be straightforward. A business aircraft operator that is quoted on a public exchange may need to consider amending its Articles of Association to provide for forced divestiture of shares if shares are purchased by individuals or entities whose nationals may lead the operator to be non-compliant with the rules going forwards (this is a common provision in the Articles of Association of quoted airlines).

### 5.4. VAT / Customs duties

The EEA is not a customs union and the EEA EFTA States are not part of the EU

Customs Union. As described below in Annex 4 (Customs duties / VAT), the UK could form its own separate customs zone and an aircraft imported through the Isle of Man / UK would not (without any further agreement between the UK and the EU) have “free circulation” status within the EU. Conversely, an aircraft imported into the EU for “free circulation” in the EU would not have that status upon entry into the UK. A UK registered aircraft would have ‘third country’ status for the purposes of the EU temporary admission regime, so therefore the EU temporary admission rules would need to be analysed in relation to any UK registered aircraft entering the EU relying on the temporary admission rules. Conversely, an EU registered aircraft entering the UK could do so under the UK’s temporary admission regime rather than being fully imported into the UK. We note in this regard that, as described in Annex 4 (Customs duties / VAT), when the UK leaves the EU it is the UK Government’s intention that the existing rules will be codified in domestic UK legislation without amendment, but they would be subject to amendment and repeal going forwards.

### 5.5. EASA

The technical and safety regulatory environment could be disadvantageous, as the UK may no longer be a member of EASA and thus would not have a say in the decision-making process. Nevertheless, the UK operators flying to the EU would need to continue to meet EASA requirements. Operators as well as air navigation service providers would similarly be affected by uncertainty surrounding the UK’s participation in the Single European Sky project and in particular the provision of air traffic services as well as cost-saving measures such as free route airspace, within the functional airspace block.

The UK CAA has been very clear that the strong preference is for the UK to remain



full members of EASA. For example, in a speech on 5 September 2017 its CEO, Andrew Haines, stated: “we at the CAA are very explicit that we want to remain full members of EASA. I have to say in my eight years in the aviation sector, I don't think I have ever come across an issue that has such broad consensus in the sector. It's almost universal. It makes no sense to recreate a national regulator. At best, you replicate the vast majority of European regulation, and you'd have to do it over an extended period of time.”

The potential disadvantages of not belonging to EASA are discussed in detail in Annex 5 (European Aviation Safety Agency).

#### 5.6. External dimension

Following its exit from the EU, absent any other arrangement or agreement, the UK will cease to benefit from third country aviation arrangements concluded by the EU on its behalf.

These are extensively discussed in this report, namely:

- The EEA Agreement (Norway, Iceland, Liechtenstein)
- The EU-Switzerland Agreement
- The ECAA Agreement (Albania, Bosnia & Herzegovina, Macedonia, Montenegro, Serbia, Kosovo)
- The EU-US Open Skies Agreement 2007
- The EU-Canada Air Transport Agreement 2009
- Agreements with Georgia, Israel, Jordan, Moldova and Morocco

Old bilateral agreements which have not been terminated may be revived in respect of each of these countries.

Transatlantic services would be particularly affected, as the revival of the Bermuda II Agreement would mark the regress of air services to the very restrictive environment of the early 1980s. The EU-US Open Skies Agreement is set to replace the Bermuda II Agreement once it enters into force. However, at present, the EU-US Open Skies Agreement is being applied provisionally, as it has not yet entered into force. During this time, the Bermuda II Agreement remains suspended. Absent any specific solution, if the Open Skies Agreement does not enter into force prior to the UK leaving the EU, the suspension would no longer have effect, arguably resulting in the reinstatement of the Bermuda II Agreement.

The options for the UK to avoid reversion to Bermuda II would be to:

1. Accede to the EU-US Open Skies Agreement as a separate party by a negotiated accession agreement (similar to Norway).
2. Negotiate a new bilateral agreement with the US.

If the EU-US Open Skies Agreement became inapplicable to the UK then the likely and most serious impacts would be:

1. A UK operator would lose the automatic right to fly commercially from another EU Member State to the US e.g. Paris to New York.
2. An EU operator would lose the automatic right to fly commercially from the UK to the US e.g. London to New York.

In summary, the impact on the principal areas that we have been analysing is:

## Model 5

## “No aviation deal” scenario

	UK operators	EU operators	Comment
<b>Traffic rights</b>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>– Flights within the EU: existing bilateral agreements unlikely to exchange 5th and 7th freedoms.</li> <li>– Flights within the EU: existing bilateral agreements do not exchange 8th and 9th freedoms.</li> <li>– Article 5 of the Chicago Convention and the 1956 Paris Agreement will be of relevance.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>– Flights within the UK: existing bilateral agreements do not cover 8th or 9th freedoms – UK unlikely to grant “cabotage” rights for commercial non-scheduled flights without reciprocity.</li> <li>– Article 5 of the Chicago Convention and the 1956 Paris Agreement will be of relevance.</li> </ul>	<ul style="list-style-type: none"> <li>– Depends on whether previous bilateral agreements have been suspended or revoked.</li> <li>– Stable framework providing legal certainty for the continuation of air services may not provide a framework for non-scheduled commercial operations.</li> <li>– Most existing bilateral agreements are likely to contain restrictions on designation, routes, capacity, frequency and pricing – a significant step back from current liberalised regime.</li> <li>– UK-US Bermuda II Agreement is particularly restrictive, providing for single designation per route on most transatlantic routes, and restricted services to London Heathrow to two US and two UK airlines and limited 5th freedom services.</li> </ul>
<b>Ownership and control</b>	<ul style="list-style-type: none"> <li>– Almost all bilaterals impose “national” ownership and control requirements.</li> <li>– UK would have to adopt its own rules on ownership and control.</li> <li>– UK commercial non-scheduled operators would have to comply with nationality and ownership requirements under the relevant bilaterals, which could pose a challenge to non-UK majority owned and controlled air carriers.</li> <li>– Scheduled UK operators would no longer benefit from EU designation under bilateral agreements of other EU Member States; to what extent this would affect non-scheduled operators would need to be analysed on a case-by-case basis.</li> </ul>	<ul style="list-style-type: none"> <li>– EU operators are Community air carriers under Reg. 1008 / 2008;</li> <li>– Previously agreed bilaterals do not usually refer to Community air carriers, instead designating carriers from a particular State; Horizontal Agreements may apply.</li> <li>– EU operators owned by UK nationals based in EU Member States other than the UK may need to relocate / undergo a restructuring on a corporate and / or operational level to comply with the EU ownership and control rules.</li> </ul>	

Model 5 cont.

**“No aviation deal” scenario**

	<b>UK operators</b>	<b>EU operators</b>	<b>Comment</b>
<b>VAT / customs rules</b>	<ul style="list-style-type: none"> <li>– Bilateral air service agreements may contain separate provisions on customs duties (see for example Article 9 of the original 1977 Bermuda II Agreement).</li> </ul>	<ul style="list-style-type: none"> <li>– Bilateral air service agreements may contain separate provisions on customs duties (see for example Article 9 of the original 1977 Bermuda II Agreement).</li> </ul>	
<b>EASA</b>	<ul style="list-style-type: none"> <li>– Bilaterals do not usually contain provisions on EASA membership.</li> <li>– UK would have to renegotiate its participation in EASA.</li> <li>– Possible cooperation on the basis of a Working Arrangement, separate from the bilateral.</li> </ul>	<ul style="list-style-type: none"> <li>– EU Member States are members of the EASA Management Board with full voting rights.</li> </ul>	



## 6. Model 6: Negotiate new ASAs with EU and / or individual Member States

The UK could ensure continued access to the EU internal aviation market by entering into a comprehensive air transport agreement with the EU, similar to one of the EU Open Skies Agreements such as the EU-US Open Skies Agreement, or by concluding liberal air transport agreements with individual Member States. In the former scenario, by being treated as a strategic partner of the EU, rather than a member of the internal market in one form or another, the UK would avoid the need to adopt undesirable EU legislation, while ensuring that its operators enjoy benefits of market access. However, no current comprehensive air transport agreement envisages full 7th freedom traffic rights or 8th or 9th freedom traffic rights (consecutive and standalone ‘cabotage’ respectively), and it is not clear whether this may be achievable in the negotiation of a standalone air transport agreement.

Agreements with individual EU Member States may prove to be easier to negotiate and could avoid trade-offs involved in wider Brexit negotiations with the EU, however, Member States are equally likely to bargain for the exchange of 7th and 9th freedom rights, which are not normally exchanged in bilateral air services agreements. The negotiation of 5th freedom rights can be problematic as it requires buy-in from multiple countries: for example, the right to conduct a commercial flight on a route London to Rome to Athens requires permission not just from the UK and Italy but also from Greece.

It is highly likely that the European Commission would be granted a mandate under Regulation 847 / 2004 to negotiate on behalf of the EU, precluding separate (and potentially more beneficial) agreements with individual Member States. During the period of such a mandate it would be exclusive, so that individual Member States would not

be able to negotiate with the UK, but which they could do in the absence, of a mandate they could. As a result, it would be advisable (not just for the UK, but also for other Member States) to try to ensure, if possible, that any mandate given to the Commission is limited in time or subject to a successful outcome by a certain date.

A separate issue is whether the UK would be able to negotiate a new agreement prior to the formal exit from the EU. Arguably, it would be preferable for the UK to get involved in complex negotiations prior to exit from the EU, so that the new legal framework can take effect immediately upon exit, leaving no transitional period of uncertainty. The difficulty, however, is that the current negotiating position of the Council as set out in its instructions to the Commission does not envisage the entering into of separate sectoral agreements: nothing is agreed until everything has been agreed. Also, as discussed above in the context of maintaining the status quo, Article 50 only requires a withdrawal agreement to be entered into, it does not require the future trading relationship between the UK and the EU to be determined (except as a “framework” to be taken into account).

We query how much a new bilateral would necessarily assist business aviation, as business aviation is often ignored in bilateral air transport agreements, leaving the position being that permission for each particular flight is normally required (as to third country operations see Annex 2 (Traffic rights)). Hence, from a business aviation perspective what may be more beneficial would be an agreement specifically for the sector (which might be easier to achieve than a full bilateral).

We do not discuss further the impact on business aviation operations of a new Air Service Agreement as the impact would clearly depend on the negotiated terms.

## 7. Other arrangements

### 7.1. Transitional arrangement

The UK Government’s current position appears to be to attempt to secure a transitional arrangement for the first two years after Brexit in March 2019 whereunder the current rules will continue to apply. Following the Joint Report of the EU and UK negotiators on 8 December 2017 this approach appears to also have broadly found favour at EU level, though the UK prefers to refer to the transition period as an implementation period in order to emphasise that the period is an implementation phase, not years of de facto EU membership. The EU is clear that during any transition the UK will have to accept the jurisdiction of the CEJU, apply all new EU rules and pay into the EU, but will lose its seat at the table on all EU decision-making bodies. The UK will very likely push to be free to negotiate, and possibly even sign, trade deals with third party countries during the transition period. Any such deals could not come into force legally until after the UK has left the EU.

We do not believe that a transitional arrangement should be referred to as a possible model or option, on its own at any rate, as it seems that any transitional arrangement only makes sense if there is an agreed solution to transition to, and hence it is only a temporary bridge to that solution.

That said, a transitional arrangement could be a more practical way of ensuring continued market access and avoiding significant disruptions caused by the UK’s exit from the EU until a long-term solution is agreed than relying on the much more uncertain principles of comity and reciprocity.

We do not discuss further the impact on business aviation operations of a transition agreement as such since its presumed effect would be that of maintaining the status quo pending

a full agreement, though this is by no means certain and ultimately it will depend on the terms of the transition agreement.

## 7.2. Comity and reciprocity

The legal principle of “comity and reciprocity” might allow the existing regime to continue to apply pending agreement on a permanent arrangement or solution.

The principle of comity and reciprocity has deep roots in the theory of public international law, but it has never been precisely defined. As a legal construct it exists as a symbiosis of its two constitutive elements, comity and reciprocity, each of which has a distinct role in regulating the relationship between two parties.

In its decision in *Hilton v Guyot* (159 US 113, 163-164 (1895)), the US Supreme Court noted that comity is neither a matter of absolute obligation, nor of mere courtesy or good will; rather, it is the recognition of one nation of the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of persons under the protection of its laws.

Reciprocity is the element of the principle that creates a relationship based on comity, as states are prepared to recognise the authority of other states within what is naturally a sovereign field on the basis that their partners are willing to do the same. It is thus unsurprising that due to its nature, the principle of comity and reciprocity has been applied to matters such as mutual recognition of regulatory findings or judgments in civil cases. Interestingly, it has also been applied to air transport to provide a basis for the agreement of additional frequencies in some bilateral agreements, where formal agreement or revision of the bilateral would be cumbersome.

The principle has also been used in the past to bridge the gap between an agreement on the matter that ceased to have effect and a new legal framework yet to be put in place. For instance, when France denounced its bilateral air services agreement with the US in 1992, air services continued on the basis of comity and reciprocity for several years before a new agreement was negotiated.

Thus, in theory the principle could be relied on both to preserve the current air transport relations between the UK and the EU, and also between the UK and the US, as the UK would no longer be a party to the EU-US Open Skies Agreement following withdrawal from the EU.

The obvious advantage of continuing relations on the basis of comity and reciprocity is that this mechanism would be easy to implement, providing some certainty and leaving no gap during which there would be no regulation. However, the principle does not give long-term comfort and certainty in the legal framework, as much is dependent on the reaction of the other side and its policies, which may change with changes in the political environment. Further, the mechanism has been applied in the field of bilateral relations between two states, but is largely untested with multiple states, which will be relevant in relation to aviation (e.g. the tripartite relationship between the UK, the EU and the US).

Furthermore, whilst this principle has been used to preserve a certain state of affairs, it is questionable whether it is suitable to sustain a complex and ever evolving air transport market. Indeed, in the case of the above France-US example, only the status quo as at denunciation of the former agreement was preserved; new designations were not allowed. Additional problems with this mechanism include uncertainty over the resolution of any disputes that may arise or even its general adaptability to changing market circumstances.

## 7.3. Separate agreement for business aviation

Another alternative would be a special deal for business aviation. While special deals for small sectors may seem highly unlikely, because of the current negotiation positions as discussed above, it may be that such a solution is not impossible. It would be much less controversial and less far-reaching than a wider deal, which could well encounter opposition, and if an argument could be made that EU businesses and operators would benefit just as much as UK interests, it could possibly attract some support.





## Annex 1

# Business aviation: Key types of aircraft operations

This section provides, by way of background, an overview of the current legal and regulatory regime applicable to business aircraft operations.

There are many types of business aircraft operations and an equally wide range of definitions by which these are classified for legal and regulatory purposes. As shall be seen below, practical examples of business aircraft operations may involve elements of more than one regime, falling into more than one category. For the purposes of this report, we concentrate on commercial and non-commercial air services, this distinction being relevant to the exchange of traffic rights, and commercial and non-commercial operations, the classification on which operator safety regulation is based.

The International Business Aviation Council defines business aviation as “the sector of aviation which concerns the operation or use of aircraft by companies for the carriage of passengers or goods as an aid to the conduct of their business, flown for purposes generally considered not for public hire and piloted by individuals having, at the minimum, a valid commercial pilot license with an instrument rating”. Commercial business aviation operations involve corporate transport and the chartering of the whole aircraft, flown by employed professional pilots. Non-commercial operations involve corporate transport not involving the chartering of the aircraft, where the aircraft is flown by either employed professional pilots or the owner.

Regulation 965 / 2012 on air operations was developed by the European Aviation Safety Agency to address the technical and organisational requirements necessary to ensure safe aircraft operations. It expands on the rules of ICAO Annex 6 (Operation of Aircraft) and recognises four principal types of operations, based on commerciality and

the complexity of aircraft involved:

- i. Commercial air transport (Part-CAT, Annex IV to the Regulation).
- ii. Non-commercial operations with complex aircraft (Part-NCC, Annex VI to the Regulation).
- iii. Non-commercial operations with aircraft other than complex (Part-NCO, Annex VII to the Regulation).
- iv. Specialised operations (Part-SPO, Annex VIII to the Regulation).

Business aircraft operations generally fall into either commercial air transport or non-commercial operations with complex aircraft.

The CAA has published a very helpful guidance as to what constitutes non-commercial flights: see Summary of the Meaning of Commercial Air Transport, Public Transport & Aerial Work<sup>5</sup>.

In addition to an operating licence, certifying their financial viability, operators transporting passengers, cargo or mail for remuneration (or other valuable consideration) also require an AOC demonstrating compliance with stringent safety standards. These include organisational, as well as operational and technical requirements contained in Commission Regulation 965 / 2012. The latter are contained in Part-CAT, an annex to the Regulation which covers a wide range of issues, including the authority of the commander and crew responsibilities, the documents and manuals that need to be carried on board, the carriage of dangerous goods, instruments and equipment, aircraft tracking systems, use of air traffic services and aerodromes, departure and

approach procedures, noise abatement, routes and areas of operation, carriage of special categories of passengers, stowage of baggage and cargo, meteorological conditions, aircraft performance and operating limitations, aircraft loading, mass and balance rules, management of aeronautical databases etc.

As from 25 August 2016 non-commercial air transport operators need to comply with a new, comprehensive, but slightly less demanding set of requirements issued by EASA. The applicable rules vary depending on whether the aircraft operated are “complex”, in which case Part-NCC applies, or “other than complex”, in which Part-NCO applies.

Part-NCC concerns operators of “complex motor powered aircraft”, which are defined as having any of the following features: a maximum certified take-off mass exceeding 5,700kg, maximum certified passenger seating configuration of more than 19 seats, a minimum crew of at least two pilots, have one or more turbojet engines or two or more turbo-prop engines. The vast majority of business aircraft will meet these requirements. Part-NCC applies to EU operators of such aircraft (regardless of whether the aircraft is registered in or outside the EU) and to EU registered aircraft operated by foreign operators.

Part-NCC rules are designed to be slightly less burdensome than regulations relating to commercial air transport. Operators falling under Part-NCC rules are not required to obtain an AOC prior to the start of operations. Instead, they just need to submit a “declaration” to the competent national authority by completing a form providing details

<sup>5</sup> UK Civil Aviation Authority, May 2010. // <http://webarchive.nationalarchives.gov.uk/20100709114627/http://www.caa.co.uk/docs/1428/SummaryOfCATPTAWANO2009May2010.pdf> (date last accessed: 20 November 2017).



of the operation and confirming that the operation as detailed will comply with the applicable regulations. The national aviation authority is required to verify both these elements, i.e. that the declaration contains the required information and that the operator continues to comply with the rules, but it need not conduct an immediate inspection. The competent authority will inform the operator of any non-compliance detected and give it a timeframe within which to rectify the situation. Non-compliance that has a serious impact on flight safety may lead to a limitation or complete restriction of the operator's activities.

Operators of "other than complex motor powered aircraft" need to comply with the organisational requirements (Part-ORO) of Regulation 965 / 2012: they need to have an "accountable manager" that has overall responsibility for the safety of operations; a safety management system; trained and competent personnel in charge of ensuring compliance with regulatory requirements; documentation, including an operations manual, a minimum equipment list for each aircraft and a records system; and a compliance monitoring system. In addition, relevant operators must ensure that their flight and cabin crew (required for aircraft with more than 19 passenger seats) are appropriately licensed and regularly trained. These and other activities, such as flight planning and ground handling may be subcontracted to other entities, but responsibility for meeting the relevant requirements rests with the operator concerned. Similarly, the operator is responsible in ensuring the continuing airworthiness of the aircraft, i.e. ensuring that the aircraft is airworthy, that all emergency and safety equipment fitted is correctly installed and serviceable, that maintenance is performed per an approved maintenance

schedule and that the certificate of airworthiness remains valid.

Part-NCO applies to aeroplanes which do not fall within the above definition of complex aircraft. These include the majority of general aviation aircraft, but few business aircraft. The principal examples of the latter would be the Pilatus PC-12 and Cessna 208 Caravan. Having been designed to cater for general aviation, with proportionality in mind, Part-NCO contains little over and above national rules; the purpose was predominantly to harmonise regulation of this area across the EU.

Part-NCO applies only to aircraft with a certificate of airworthiness issued by EASA. In terms of the technical side, much of what is covered is normally included in either the aircraft's flight manual or the pilot's operating handbook. Relevant operators are required to ensure that aircraft are equipped with first aid kits, as well as an emergency locator transmitter (or alternatively, on aircraft with six seats or fewer, a personal locator) which are activated in the event of a crash or accident requiring survivors to be rescued. Part-NCO allows for cost-sharing between the pilot and up to five passengers (who are not carried on board for remuneration). Part-NCO also addresses the carriage of dangerous goods (which include aircraft spare parts, aircraft oil, fuel, de-icing fluid, batteries etc.) and oxygen systems required for flight above 10,000 ft. EASA rules also make it an EU requirement to maintain a journey log detailing aircraft nationality, itinerary, flight time and nature of flight, as well as any observations or incidents.

While the impact of Part-NCO rules was not significant, due to both the fact that these were already common in many EU Member States and the

relatively undemanding standards set, the same cannot be said for Part-NCC rules, which have established detailed and comprehensive rules. Most affected are small aircraft management firms and in-house aircraft management departments of organisations that manage business aircraft for that organisation, for whom compliance with Part-NCC may be costly.

When the UK leaves the EU, Part-NCC of Regulation 965 / 2012 will continue to apply to UK management companies operating EU-registered aircraft. To what extent UK operators of UK-registered aircraft would be affected will largely depend on the UK's membership in or relationship with EASA, discussed below: if EU law is transposed without amendment into UK law and the UK remains a member of EASA then Part-NCC would continue to apply in the UK.





## Annex 2

# Traffic rights

## 1. Nine freedoms of the air

This section will discuss, by way of background, the types of traffic rights available to commercial business aircraft operators.

International civil aviation is governed by the provisions of the Chicago Convention which established the International Civil Aviation Organisation (ICAO). ICAO distinguishes the following nine “freedoms of the air”.

- **1st freedom of the air** - the right to fly over the granting State without landing (the right of overflight)
- **2nd freedom of the air** - the right to land in the territory of the granting State for non-traffic purposes (the right to make a technical stop)
- **3rd freedom of the air** - the right to put down, in the territory of the granting State, traffic coming from the home State of the carrier (the right to set down traffic)
- **4th freedom of the air** - the right to take on, in the territory of the granting State, traffic destined for the home State of the carrier (the right to pick up traffic)
- **5th freedom of the air** - the right to put down and to take on, in the territory of the granting State, traffic coming from or destined to a third State (the right to carry traffic to / from other States)
- **6th freedom of the air** - the right of transporting, via the home State of the carrier, traffic moving between two other States (the right to carry traffic via home State).

- **7th freedom of the air** - the right of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the home State, i.e. the service need not connect to or be an extension of any service to / from the home State of the carrier (the right to operate from the granting State to / from third State)
- **8th freedom of the air** - the right of transporting “cabotage” traffic between two points in the territory of the granting State on a service which originates or terminates in the home country the carrier or (in connection with the so-called 7th freedom of the air) outside the territory of the granting State (“consecutive cabotage”)
- **9th freedom of the air** - the right of transporting traffic entirely within the territory of the granting State (“standalone cabotage”)<sup>6</sup>

Only the first five freedoms of the air have been officially recognised;<sup>7</sup> consequently, all freedoms beyond the 5th freedom (i.e. 6th-9th freedoms) are characterised by ICAO as the ‘so called’ freedoms of the air.

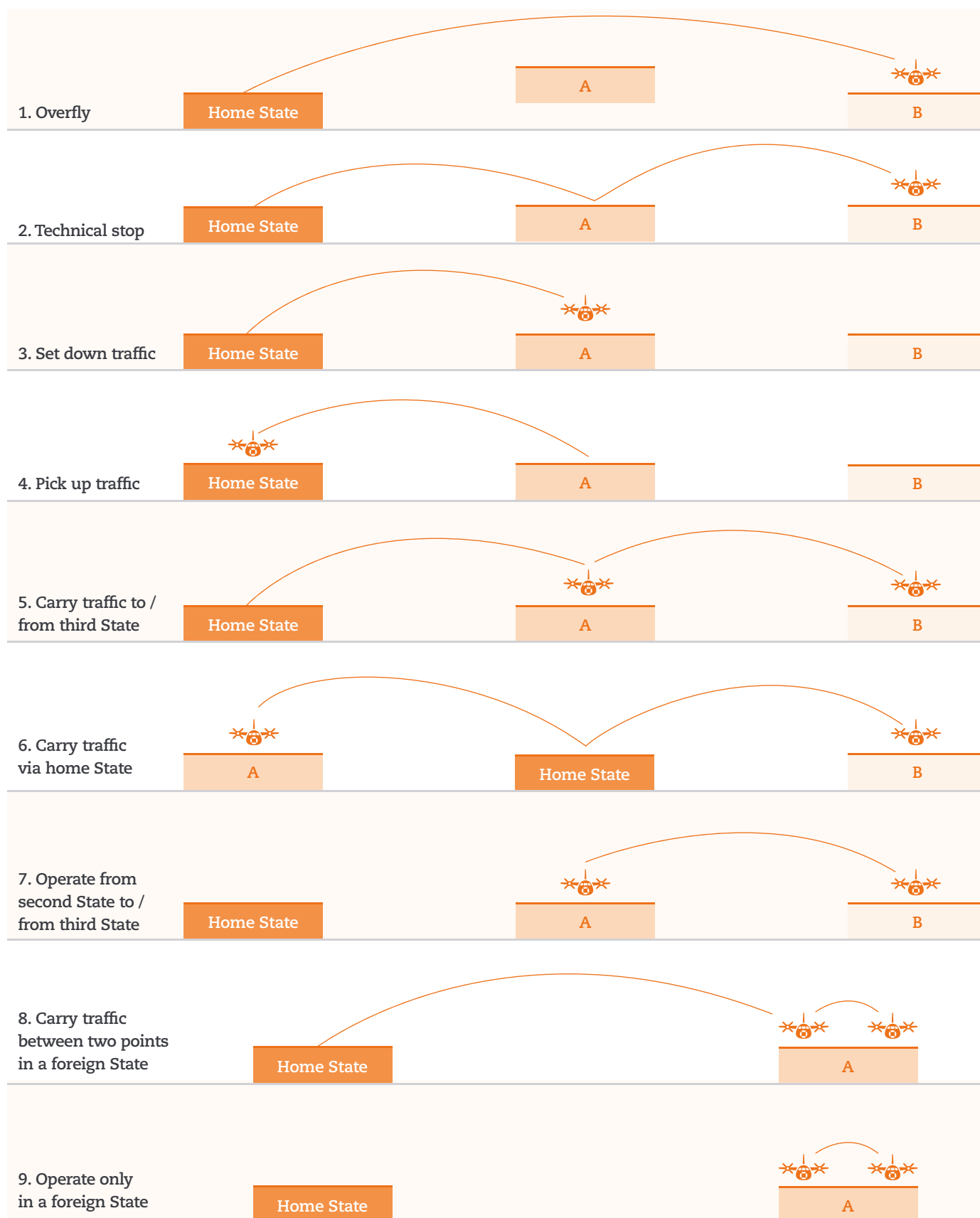
Please see Figure 3 for a graphic representation of the nine freedoms of the air.

<sup>6</sup> ICAO Manual on the Regulation of International Air Transport (Doc 9626, Part 4).

<sup>7</sup> This is a reference to the International Air Transit Agreement of 1944 (the “Two Freedoms Agreement” or “IATA”) and the International Air Transport Agreement of 1944 (the “Five Freedoms Agreement”; not in force).

Figure 3

## Nine freedoms of the air



## 2. Chicago Convention States

Both commercial and non-commercial non-scheduled international air services benefit from a special legal regime established by Article 5 of the Chicago Convention on the “right of non-scheduled flight”.

Under paragraph 1 of that provision, any civil aircraft has a right to fly into, transit non-stop across the territory of a Contracting State or make stops for non-traffic purposes without the necessity of obtaining prior permission from the State into or over whose territory the flight is to be performed, provided that the aircraft is registered in a Contracting State,<sup>8</sup> and is “not engaged in a scheduled international air service”.

The actual text of the provision does not refer to a “non-scheduled air service” and the term is not defined elsewhere in the Convention. Consequently, in determining whether an aircraft is “not engaged in a scheduled international service”, and therefore entitled to the right under Article 5, it is helpful to refer to the definition of the term “scheduled international air service” adopted by the ICAO Council in 1952, keeping in mind that it was meant as a flexible guidance for the interpretation and application of Article 5 rather than a rigid litmus test. In that regard, the ICAO Council has defined a “scheduled international air service” as follows:

“A scheduled international air service is a series of flights that possesses all the following characteristics:

- a. It passes through the airspace over the territory of more than one State.

- b. It is performed by aircraft for the transport of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public.
- c. It is operated, so as to serve traffic between the same two or more points, either
  - i. According to a published timetable.
  - ii. With flights so regular or frequent that they constitute a recognizably systematic series. (emphasis added).

A single flight does not constitute a scheduled international air service, which, by definition, consists of a series of flights. The Notes on the Application of the Definition<sup>10</sup> emphasise further that the main elements a), b), and c) are cumulative in nature, so that “if, for a series of flights, any one of the characteristics (...) is missing, the series cannot be classified as a scheduled international air service”<sup>11</sup>, and will be classified as non-scheduled air service instead. Non-commercial or “non-revenue” operations or operations which are not open to the public are classified, by definition, as non-scheduled.

The right established by Article 5 (1) covers the following three types of flights:

1. Entry into and flight over a Contracting State’s territory without a stop.
2. Entry into and flight over a Contracting State’s territory with a stop for non-traffic purposes.
3. Entry into a State’s territory and final stop for non-traffic purposes.

The Convention defines a “stop for non-traffic purposes” as a “landing for any purpose other than taking on or discharging passengers, cargo or mail”. It includes stops for refuelling, maintenance purposes or convenience of operation of the flight, and may involve temporary offloading of transit passengers, cargo or mail carried for remuneration or hire.<sup>12</sup> More importantly, however, ICAO has interpreted it to also encompass non-commercial non-scheduled operations, such as purely private flights, taking on or discharging passengers, cargo or mail in the Contracting State. This would seem to imply that under Article 5 of the Chicago Convention, a non-scheduled operator is allowed to set down traffic without the necessity of obtaining prior permission from the Contracting State provided no persons, cargo or mail are carried for remuneration or hire.

Non-scheduled air operators do not have a complete and unfettered freedom to “make flights into, or in transit non-stop across [the] territory and to make stops for non-traffic purposes”. The non-scheduled flights may only be performed subject to the terms of the Chicago Convention and the right of the State flown over to require landing. The Contracting State may also require advance notice of intended arrival for traffic control, public health and other similar purposes. There is a further caveat with regard to flights over regions that are “inaccessible or without adequate air navigation facilities”. Such operations may be required to follow prescribed routes or obtain special permission.

<sup>8</sup> As of the date of this report, there were 191 Contracting State Parties to the Chicago Convention. For an up to date list of all the States, see: <https://www.icao.int/secretariat/legal/lists/current%20lists%20of%20parties/allitems.aspx>.

<sup>9</sup> See ICAO, Policy and Guidance Material on the Economic Regulation of International Air Transport, (Doc 9587, Part 1).

<sup>10</sup> See above.

<sup>11</sup> See above.

<sup>12</sup> Article 96(d) of the Chicago Convention.

In case of commercial flights (i.e. for remuneration or hire), non-scheduled operators wishing to set down or pick up passengers, cargo or mail will have to comply with laws, regulations, conditions and limitations imposed by the State where the embarkation or disembarkation takes place. The phrase “for remuneration or hire” is defined to encompass “any kind of remuneration, whether monetary or other, which the operator receives from someone else for the act of transportation”. Consequently, the right to operate non-scheduled air services that have a commercial element will always be subject to the national laws and regulations of the granting State.

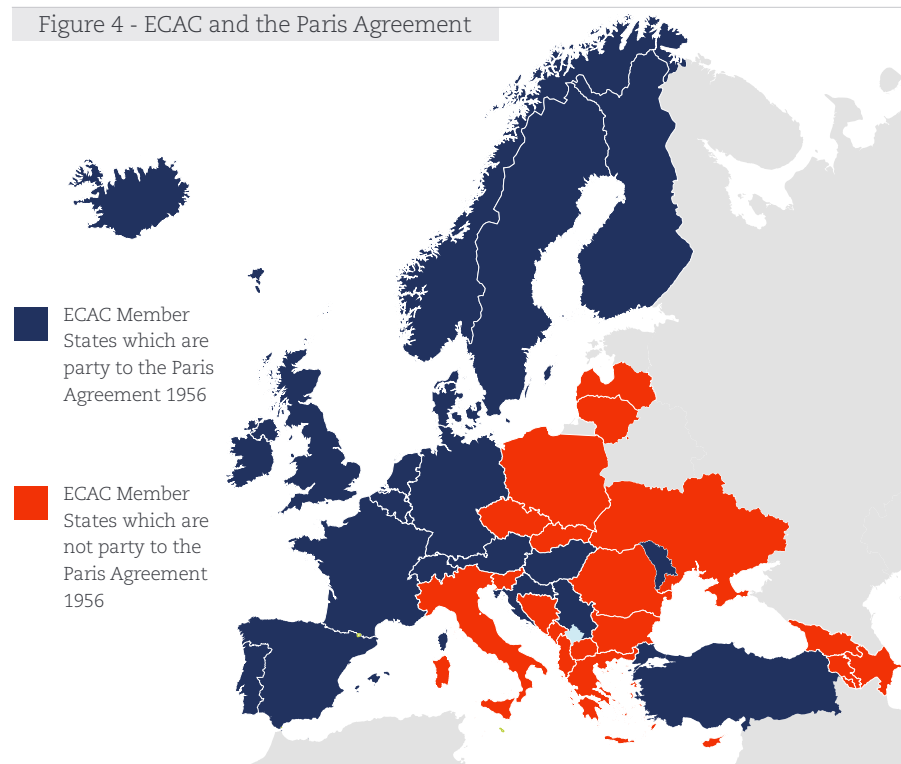
As a result of the provisions contained in Article 5 of the Chicago Convention, the operation of international non-scheduled services has generally been subject to the rules adopted by individual States, with a few bilateral and multilateral agreements creating a more harmonised framework for commercial non-scheduled air transport on a regional basis.

### 3. ECAC member states

The 1956 Multilateral Agreement on Commercial Rights of Non-scheduled Air Services in Europe (the “Paris Agreement”, which entered into force on 21 August 1957, is an example of a regional agreement liberalising commercial rights of non-scheduled air services on intra-European routes. It was developed under the auspices of ICAO and the European Civil Aviation Conference (ECAC),

an intergovernmental organisation established in 1955 by ICAO and the Council of Europe to promote the “continued development of a safe, efficient and sustainable European air transport system”. ECAC is currently composed of 44 Member States, but only 24 of them are parties to the Paris Agreement. A number of EU Member States, such as Bulgaria, Italy and Poland have not ratified it. Please see the map in Figure 4, which shows the Contracting States to the Paris Agreement in blue and other ECAC Member States in red.

Figure 4 - ECAC and the Paris Agreement



<sup>13</sup> Based on the ICAO's Analysis of the Rights Conferred by Article 5 of the Chicago Convention, see ICAO, Policy and Guidance Material on the Economic Regulation of International Air Transport, (Doc 9587, Part 1).

<sup>14</sup> The relevant provisions of the Chicago Convention seem to be: Article 4 (misuse of civil aviation), Article 8 (pilotless aircraft), Article 10 (landing at customs airport), Article 11 (applicability of air regulations), Article 12 (rules of the air), Article 13 (entry and clearance regulations), Article 16 (search of aircraft), Article 18 (dual registration), Article 20 (display of marks), Chapter V (conditions to be fulfilled with respect to aircraft), Chapter VI (International Standards and Recommended Practices).

<sup>15</sup> ECAC is currently composed of 44 Member States: Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, The Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom; see online: <https://www.ecac-ceac.org/>.

The Paris Agreement applies to any civil aircraft registered in a Member State of the ECAC and operated by a national of one of the Contracting States when engaged in international flights for remuneration or hire between the territories of the Contracting States,<sup>16</sup> on other than scheduled international air services.<sup>17</sup> It provides for a more liberalised regime for the operation of commercial non-scheduled air services between the Contracting States “without the imposition of the regulations, conditions or limitations”, provided that the flight in question falls within one of the specific categories listed in Article 2 of the Agreement. The provision identifies several classes of flights that enjoy freedom of operation, meaning they are not required to obtain any prior permission for intra-European flights, although for the purposes of traffic control, prior notification may be required. These include:

- Humanitarian or emergency flights
- Taxi flights “of occasional character” not available to the general public, performed using aircraft with seating capacity of no more than six seats, provided that the destination is chosen by the hirer
- Charters of the entire aircraft by an individual, firm, corporation or institution for the carriage of their staff or merchandise without resale of space
- Isolated flights, provided that the operator (or group of operators) of such a flight performs no more than one flight per month between the same two traffic centres

The Paris Agreement identifies two further categories of operations, namely (1) all-freight flights, and (2) passenger flights between regions which have no reasonably direct connection provided by scheduled air services. These two types of activities are allowed to benefit from the same liberalised framework as the other categories of flights, but are potentially subject to further requirements, limitations or even a prohibition in case where any contracting State believes that they are “harmful to the interests of its scheduled air services”. In particular, any Contracting State may ask for information concerning the nature and extent of such operations, as well as determine which regions may be served (including specific airports). These two categories of non-scheduled commercial air services were particularly singled out to ensure that they did not compete with the established scheduled services which are generally subject to much more restrictive regimes under bilateral air services agreements.

With regard to all other types of non-scheduled commercial air services, the Paris Agreement provides that where such flights are required to comply with “regulations, conditions or limitations” laid down by each Contracting State, all of the rules must be prescribed in public regulations setting out the required information (including the request for prior permission, if one is required), timelines for submission of the information,<sup>18</sup> and details of the relevant aviation authority to which such information must be furnished. Where flights are not allowed without prior permission, the Contracting State

may not require information other than: (1) the name of the operating company, (2) the aircraft type and registration, (3) date and estimated time of arrival and departure, (4) the itinerary, (5) the purpose of the flight, and (6) the number of passengers and amount of freight to be embarked or disembarked.

Due to the liberalisation of the rules on the operation of air services in the EU, for scheduled and non-scheduled operations alike, and the conclusion of a number of multilateral air services agreements ensuring the exchange of commercial rights between the EU and its neighbouring countries, the regime for non-scheduled services established by the Paris Agreement has gradually become obsolete.

In the context of Brexit, however, especially in a situation where the UK fails to strike a deal with the EU, it is possible that the non-scheduled commercial air services operators will have to rely on the legal framework established by the Paris Agreement in 1956. In comparison to the arrangements under the currently applicable EU regime, which will be discussed below, the benefits conferred by the Paris Agreement are much more limited, both in terms of their scope and geographical reach.

## 4. EU Member States

### 4.1. Liberalisation

The liberalisation of the air transport market in the EU was achieved gradually through the adoption of three “packages” of regulations between 1987 and 1992. The process led to the creation of the “Single Aviation Market”, a fully

<sup>16</sup> Please note that pursuant to Article 11, the Paris Agreement applies to all the metropolitan territories of the Contracting states, with the exception of outlying islands in the Atlantic Ocean and islands with semi-independent status.

<sup>17</sup> Paris Agreement, Article 1.

<sup>18</sup> In case of a single flight or a series of no more than four flights, the time by which the information has to be submitted must not exceed two full business days; for series of more than four flights longer period may be prescribed, see Article 3(a) of the Paris Agreement.

integrated market in air transport services, providing community air carriers<sup>19</sup> with access to all intra-EU routes without any commercial restrictions on fares, frequencies or capacities and without the need to obtain a permit or authorisation (with the exception of some specific routes subject to public service obligations which may be imposed only in relation to scheduled operations).

#### 4.2. Air carrier licensing

The current rules on the operation of scheduled and non-scheduled commercial air services within the EU are set out in Regulation 1008 / 2008 which consolidated and revised the regulations contained in the third aviation “package”. Regulation 1008 / 2008 is directly applicable in all EU Member States. In the context of Brexit, it is interesting to note that Article 15(4) of Regulation 1008 / 2008 expressly states that its provisions prevail over any restrictions on the freedom of access to intra-EU routes contained in bilateral agreements between the EU Member States.

Regulation 1008 / 2008 applies without distinction to scheduled and non-scheduled air services, and includes air taxis and general aviation. Non-commercial or gratuitous carriage falls outside of its scope.

The key elements of Reg 1008 / 2008 are in the areas of (i) licensing and (ii) market access.

In order to operate commercial (i.e. for remuneration or hire) non-scheduled air services for the carriage of passengers,

mail and / or cargo,<sup>20</sup> an undertaking<sup>21</sup> established in the EU must hold an appropriate operating licence issued by the competent licensing authority of an EU Member State.<sup>22</sup> Only two categories of air services are exempted from the need to hold an operating licence: (1) flights performed by non-power-driven and / or ultralight power-driven aircraft; and (2) local flights that do not involve carriage between different airports or other authorised landing points.

The grant and maintenance of an operating licence in the UK is subject to a number of conditions set out in Regulation 1008 / 2008. An undertaking established in the UK wishing to operate commercial non-scheduled flights must:

- Have its principal place of business in the UK
- Hold a valid AOC issued by the UK CAA
- Have one or more aircraft at its disposal through ownership or a dry lease
- Operate air services as a main occupation
- Be more than 50 per cent owned and effectively controlled by EU nationals or Member States, or both (also including EEA or Swiss nationals)
- Satisfy financial fitness conditions
- Comply with the insurance requirements under the relevant EU law

An air carrier with a valid operating licence granted by a competent licensing authority in accordance with

Regulation 1008 / 2008 is designated as a “Community air carrier”. If an air transport undertaking meets the common requirements for an operating licence (AOC, financial fitness, EU ownership / control etc.) then a licence must be granted. This has enabled a common EU area for ownership and control of air transport undertakings including business aircraft operators, providing freedom for cross-border establishment and takeovers. On the other hand, the Regulation has restricted investment from non-EEA / Swiss nationals in the EU aviation industry including business aviation.

#### 4.3. Access to the single aviation market

Regulation 1008 / 2008 deals with access to the EU market for the provision of air transport services. In accordance with the principle of freedom of access enshrined in the third “aviation” package, Regulation 2008 / 2008 provides that “Community air carriers shall be entitled to operate intra-Community air services”. The Regulation further prescribes that EU Member States may not impose any permit or authorisation requirements with respect to the operation of intra-Community air services by a Community air carrier or require the carrier to provide any documents or information which the carrier has already supplied to the competent licensing authority. Consequently, any holder of an operating licence from an EU Member State is allowed to operate commercial non-scheduled air transport services (i.e. for remuneration or hire) between any two points in the EU.

<sup>19</sup> A “Community air carrier” is an air carrier with a valid operating licence granted by a competent licensing authority of an EU Member State in accordance with Regulation (EC) No 1008 / 2008.

<sup>20</sup> Regulation 1008 / 2008 defines “air service” as “a flight or a series of flights carrying passengers, cargo and / or mail for remuneration and / or hire” (emphasis added).

<sup>21</sup> “Undertaking” as “any natural or legal person, whether profit-making or not, or any official body whether having its own legal personality or not”, see Article 2(3).

<sup>22</sup> Article 3(1) of Regulation 1008 / 2008.



In the 2014 International Jet Management case (C-628 / 11), the Court of Justice of the European Union (CJEU) considered whether an EU Member State (Germany) could require International Jet Management, an air carrier with an operating licence issued by another EU Member State (Austria), to obtain authorisation to enter German airspace in respect of the provision of commercial non-scheduled inward flights to Germany from a third country, such as Russia or Turkey, where German air carriers did not need such an authorisation. The CJEU held that this was prohibited on the basis of the general principle of non-discrimination on grounds of nationality. When the UK leaves the EU, and there is no agreement otherwise, the principle established in the International Jet Management case will no longer apply. As a result, UK business aircraft operators may, subject to any applicable multilateral or bilateral agreements, be required to obtain permission in order to fly between an EU Member State and a third country, and, conversely, the UK may impose such a requirement on air carriers from the remaining 27 EU Member States.

## 5. European Economic Area

The European Economic Area (EEA) was established on 1 January 1994 by the Agreement on the European Economic Area (the “**EEA Agreement**”)<sup>23</sup> and includes all 28 EU Member States as well as Norway, Iceland and Liechtenstein (“**three EEA EFTA States**”). The EEA Agreement extends the European Single Aviation Market, with some minor exceptions,

to the three EEA EFTA States, providing for the four freedoms of movement of persons, goods, services and capital across 31 European States. In the context of Brexit, it is important to note that the EEA membership is automatic for any European State which is a Member State of the EU, and otherwise it is only open, upon appropriate application, to Switzerland or another European State that joins the European Free Trade Association (EFTA).<sup>24</sup> The United Kingdom was a founding member of EFTA upon its establishment in 1960, but left in 1973 to join what is now known as the EU.

Unlike the Member States of the EU, the three EEA EFTA States are not formally involved in the EU legislative process. Instead, when a new EU act has been adopted, the three EFTA EEA States evaluate whether the act is EEA-relevant, meaning whether it concerns a subject matter that is within the scope of the EEA Agreement, and should be made part of their internal legal order. If they conclude that it is, the act will be incorporated into one of the Annexes or Protocols of the EEA Agreement through a Joint Committee Decision, a type of international agreement adopted in accordance with the procedure set out in the EEA Agreement.

Civil aviation is one of the modes of transport covered in Annex XIII to the EEA Agreement.<sup>25</sup> The Joint Committee Decision of 19 July 2011 incorporated Regulation 1008 / 2008 into the EEA Agreement.<sup>26</sup> As a result, both EEA EFTA and Community air carriers operating

either scheduled or non-scheduled commercial air services enjoy all nine freedoms of the air, including cabotage, within the whole area of the EEA.

## 6. Switzerland

Switzerland is one of the four EFTA Member States, but does not participate in the European Economic Area. Instead, the international relations between the EU Member States and Switzerland are currently governed by seven inter-linked sectoral agreements, including an agreement on the free movement of persons. Each of the bilaterals contains the so-called “guillotine clause”, which states that upon termination of one of the agreements, the other six fall away simultaneously.<sup>27</sup>

One of the agreements, the 1999 Agreement between the European Community and the Swiss Confederation on Air Transport (the “**EU-Switzerland Agreement**”)<sup>28</sup>, which entered into force on 1 June 2002, is devoted to the regulation of civil aviation. It implements the EU aviation ‘*acquis communautaire*’ in Switzerland, making a proviso that the regulations and directives which are a part of the *acquis* must be interpreted in line with the decisions of the CJEU given prior to 1999.<sup>29</sup> Any CJEU decisions made after that date are not binding on Switzerland.

The EU-Switzerland Agreement foresees gradual release of traffic rights between the parties, establishing reciprocal access to the air transport market, subject to the provisions of Regulation 1008 / 2008.<sup>30</sup> In

<sup>23</sup> The Agreement on the European Economic Area, (Official Journal L 001, 03/01/1994 P. 0003 - 0036) (the “**EEA Agreement**”).

<sup>24</sup> Article 128 of the EEA Agreement.

<sup>25</sup> The EEA Agreement, Annex XIII (Transport), Chapter VI (Civil Aviation).

<sup>26</sup> Decision of the EEA Joint Committee No 90/2011 of 19 July 2011 amending Annex XIII (Transport) to the EEA Agreement, OJ L262, 6.10.2011, p. 20. See the EEA Agreement, Annex XIII (Transport), Point 64a and Article 7 of the EEA Agreement.

<sup>27</sup> See for example Article 36(4) of the Agreement between the European Community and the Swiss Confederation on Air Transport.

<sup>28</sup> Agreement between the European Community and the Swiss Confederation on Air Transport, OJ L 114, 30.4.2002.

<sup>29</sup> Article 1(2) of the EU-Swiss Air Transport Agreement.

<sup>30</sup> See Article 15, Chapter 3 of the EU-Swiss Air Transport Agreement; see also Decision No 1/2010 of the Joint Community/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 7 April 2010 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport (OJ L 106, 28.4.2010).



the first phase, starting with the entry into force of the agreement, both the Community and Swiss air carriers may enjoy 3rd and 4th freedom traffic rights. Since 2004, two years after the entry into force of the agreement, Swiss air carriers have a further right to operate 5th and 7th freedom flights between points in different EU Member States. The important distinction between the market access enjoyed by the EEA EFTA and Swiss air carriers is that under the EU-Switzerland Agreement there is currently no right to operate cabotage flights (i.e. 8th and 9th freedom).<sup>31</sup> Consequently, while a Community air carrier operating a non-scheduled commercial air service does not need to submit a separate application or notification for flights between the EU and Switzerland, it will be required to obtain a permit for cabotage flights within Switzerland.

The relationship between Switzerland and the EEA EFTA States is governed by the Convention Establishing the European Free Trade Association (the “EFTA Convention”), which entered into force on 1 June 2002.

<sup>32</sup> The EFTA Convention incorporates some elements of the EU aviation *acquis* and takes account of the EU-Switzerland Agreement.<sup>33</sup> Through the inclusion of Regulation 1008 / 2008 into the EFTA Convention, a common regime has been extended to Switzerland and the EEA EFTA States for their respective air carriers.

## 7. European Common Aviation Area

The creation of a Common Aviation Area with neighbouring countries is a

key pillar of the EU’s external aviation policy. This envisages gradual market liberalisation through the exchange of traffic rights between the EU and its neighbours linked with regulatory convergence by way of implementation of EU aviation rules, starting with safety requirements. The development of the Common Aviation Area has been taken forward using two concepts: the Single Aviation Market concept, as set out in the Multilateral Agreement Establishing the European Common Aviation Area 2006 (the “ECAA Agreement”);<sup>34</sup> and of regulatory harmonisation, as set out in Euro-Mediterranean Aviation Agreements (the “EMAA Agreements”). The ECAA Agreement has been provisionally applied and came properly into force on 1 December 2017.

As regards the first concept, the goal of the ECAA Agreement was to bring the south-east European countries, many of which were candidates or potential candidates for accession to the EU, into the then existing EU internal air transport market. As such, it contains the same principles that apply to the EU internal air transport market, such as free market access, freedom of establishment, common rules in the fields of safety, security, air traffic management, competition, environmental protection etc., but envisages the progressive liberalisation of air transport relations with non-EU ECAA partners and the gradual adoption by the latter of EU *acquis*.

Common Aviation Area Agreements based on the ECAA Agreement, such as those entered into with Moldova and

Georgia, specifically define air transport as encompassing both scheduled and non-scheduled air transport. The ECAA Agreement does not contain such a definition. However it also does not make a distinction between scheduled and non-scheduled services, or specifically exclude the latter from its scope. Commentators thus come to the conclusion that the ECAA Agreement applies to both types of carriage.<sup>35</sup>

The ECAA Agreement envisages two transitional phases. The first transitional period lasts from the entry into force of the Agreement until the core elements of the legal framework are adopted by the ECAA country concerned. These include full membership in EASA, application of the ECAC Manual on European Aviation Security and Facilitation; ratification of the Montreal Convention 1999 and implementation of principal EU aviation legislation listed in an annex to the ECAA Agreement. During this period ECAA carriers enjoy unrestricted 3rd and 4th freedom rights.

The second transitional period then lasts until all EU aviation legislation listed in the relevant annex to the Agreement is implemented, including all safety and security legislation. During this phase all EU carriers will enjoy 5th freedom rights between the ECAA partners which have reached this transitional period and the ECAA partners concerned will similarly have intra-EU 5th freedom rights.

After the end of the second transitional

<sup>31</sup> Please note that five years after the entry into force of the EU-Switzerland Agreement, i.e. from 2007 onwards, the parties have an option to negotiate a possible extension of the scope of the agreement to include cabotage flights within Switzerland and EU Member States; see Article 15(3) of the EU-Switzerland Agreement.

<sup>32</sup> The Convention Establishing the European Free Trade Association (the “EFTA Convention”) replaced the Convention Establishing the European Free Trade Association signed in Stockholm on 4 January 1960 which established the European Free Trade Association (EFTA).

<sup>33</sup> Annex Q to the EFTA Convention; See also Decision of the [EFTA] Council No 1 of 2012 (adopted at the 2nd meeting on 22 March 2012), Amendment to the Appendix to Annex Q to the Convention, Air Transport.

<sup>34</sup> Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area. OJ L 285, 16.10.2006, p. 3–46.

<sup>35</sup> See Peter Bombay, Máté Gergely, ‘The 2006 ECAA Agreement: Centrepiece of the European Community’s Aviation Policy Towards its Neighbours’ (2008) 33 Air and Space Law, Issue 3, pp. 214–232

period, both EU carriers and ECAA partners will enjoy full market access including cabotage and the right of establishment.

As far as the second concept is concerned, ECAA Agreements take the form of comprehensive air transport agreements providing for a high level of regulatory harmonisation combined with gradual market opening and increased investment opportunities for carriers of both sides. Similarly to the Common Aviation Area Agreements with Moldova and Georgia, ECAA Agreements specifically include both scheduled and non-scheduled air transport in the definition of air transport.

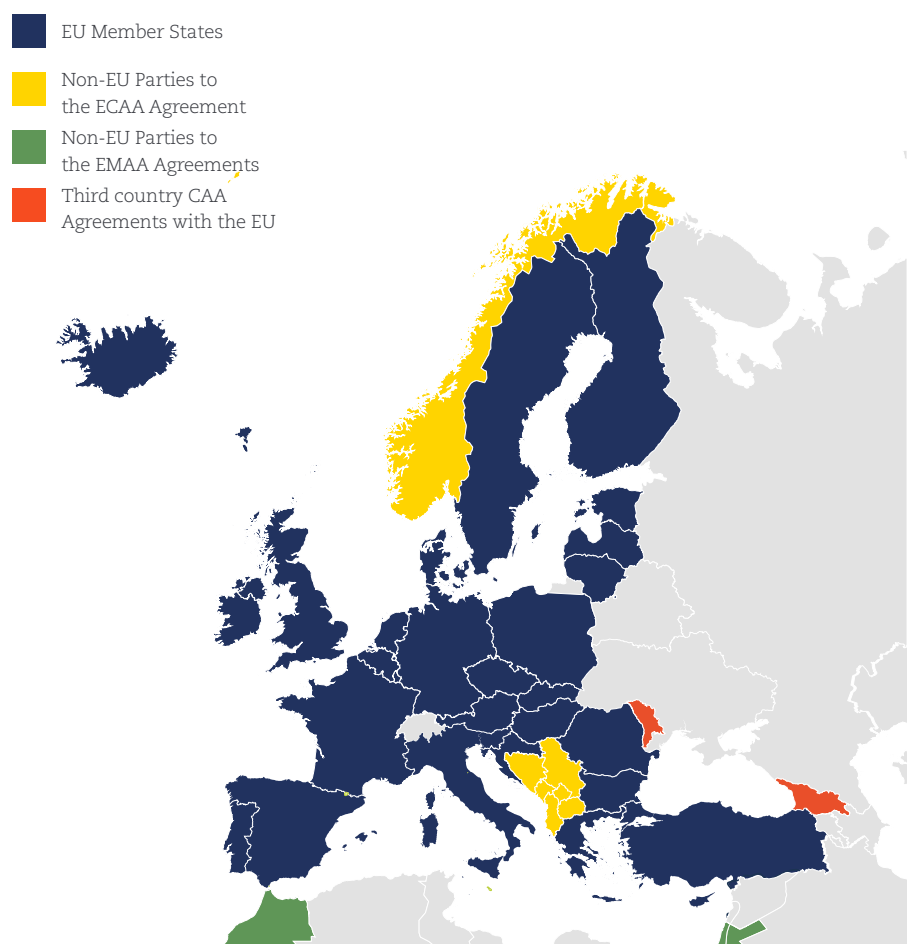
The first such agreement was concluded with Morocco in 2000.<sup>36</sup> Similar agreements have since been entered into with Jordan and Israel, and negotiations are on-going with Lebanon, Tunisia, Ukraine and Azerbaijan.

ECAA Agreements provide for lesser market liberalisation than the ECAA Agreement: 3rd, 4th and 5th freedom rights are exchanged in stages, but the agreement does not provide for the exchange of 7th freedom or cabotage. Similarly to the ECAA Agreement, progressive liberalisation happens in two stages, but unlike the ECAA Agreement, frequency of services is not unlimited from the outset, but rather is increased gradually.

Thus, in the first phase, lasting two years following the signature, frequencies of 3rd and 4th freedom services are progressively increased. The Joint Committee then meets to consider whether approximation of laws is proceeding as intended so as to decide by consensus whether to continue

increasing frequencies of services or delay such increase. This mechanism allows for potentially unlimited 3rd and 4th freedom services five years following signature of the ECAA, however, 5th freedom rights are only exchanged once the Joint Committee decides that the relevant neighbouring country has completed the approximation of its laws with EU aviation legislation as required under the ECAA.

Please see Figure 5 below for Member States of the Common Aviation Area.  
Figure 5 – Common Aviation Area



<sup>36</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. OJ L 070, 18.3.2000.

## 8. EU-US Open Skies Agreement

Despite the small charter segment of the US market, the US Department of Transport views charter operations as an important part of the air transport environment. In defining the US Open Skies policy, it argued that the least restrictive charter regulations of the two governments should apply, regardless of the origin of the flight.

Liberal charter arrangements were then established in the EU-US Air Transport Agreement 2007<sup>37</sup> as amended by its 2010 Protocol (also known as the “EU-US Open Skies Agreement”). Although the Agreement does not specifically differentiate non-scheduled services from scheduled services, it treats both equally. The Memorandum of Consultations affirms that the definition of air transportation includes all forms of charter services.

The EU-US Open Skies Agreement liberalised transatlantic air transport: the Parties exchanged the first five freedoms (as well as limited 7th freedom with respect to cargo operations), but did not grant carriers of the other side cabotage rights, i.e. the right for carriers of one party to operate flights between two points in the territory of the other party. Importantly, routes are generally open, which permits the inclusion of any points in the parties’ territories, as well as behind, intermediate and beyond points. The only limitation on this is that for passenger services operated by EU carriers, the service must serve a point in a Member State of the EU.

Ownership and control rules restrict EU persons from holding more than 25% of voting shares and / or 49.9% of the total shares of a US carrier. US ownership of EU carriers is also restricted so that EU airlines are majority owned and effectively controlled by EU nationals.

The Agreement also contains detailed provisions on safety and security, regulatory cooperation to include air traffic management, and environmental protection, as well as the establishment of a Joint Committee as the body in charge of overseeing the implementation of the agreement and a forum for cooperation between the parties.

The EU-US Open Skies Agreement is open to accession by third countries (Article 18(5)) and both Norway and Iceland acceded to the Agreement via this route in 2011. Accession took place through the conclusion of two agreements: the Four-Party Air Transport Agreement between the EU, US, Iceland and Norway,<sup>38</sup> extending the scope of the 2007 EU-US Air Transport Agreement, as amended by the 2010 Protocol, to all four parties, so that Iceland and Norway would have all of the rights and obligations of the EU Member States (Article 2 of the Four-Party Agreement); and the Ancillary Agreement,<sup>39</sup> which ensures Norway and Iceland’s representation in the Joint Committee by the Commission for all areas that are not in the exclusive competence of Member States and deals with other items to account for the expansion of membership, such as exchange of information, participation in second-stage negotiations,

representation in arbitration procedures etc. It is worth bearing in mind, however, that the accession of Norway and Iceland was the natural result of the countries’ membership in the EEA, whereas any UK accession post-Brexit could be conditioned on close cooperation with the EU in other areas.

## 9. UK air service agreements

The UK has entered into over 150 bilateral air services agreements, which focus on the exchange of traffic rights in respect of scheduled air services. They may or may not contain a clause referring to charter or non-scheduled services more broadly, but do not expressly exclude charter services from their scope. The impact of Brexit on non-scheduled traffic under these agreements would need to be analysed on a case-by-case basis.

The structure and contents of early bilateral agreements are based on the restrictive 1946 UK-US agreement (the “Bermuda I Agreement”) which exchanged transit rights, as well as the 3rd, 4th and 5th freedoms on specified routes, indicated in an Annex to the Agreement.

With the development of aviation and a growing free-market climate, the UK began to renegotiate some of its restrictive bilateral agreements. The new, liberal model agreements allowed free entry of new carriers, open route access by designated carriers to any point in either country, no capacity controls and a more liberal fare-setting mechanism. Agreements of this type

<sup>37</sup>Air Transport Agreement. OJ L 134, 25.5.2007, p. 4–41.

<sup>38</sup> See Decision of the Council and of the Representatives of the Governments of the Member States of the European Union, meeting within the Council of 16 June 2011 on the signing, on behalf of the Union, and provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part; and on the signing, on behalf of the Union, and provisional application of the Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part. OJ L 283, 29.10.2011, p. 1–3; Air Transport Agreement. OJ L 283, 29.10.2011, p. 3–16.

<sup>39</sup> Ancillary Agreement between the European Union and its Member States, of the first part, Iceland, of the second part, and the Kingdom of Norway, of the third part, on the application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part. OJ L 283, 29.10.2011, p. 16–24.

were entered into with the Netherlands, Germany, Luxembourg, France, Belgium, Switzerland and Ireland.

An example of a recently renegotiated UK bilateral agreement is the UK-Turkey Air Services Agreement 2000, which replaced the restrictive 1946 Agreement. In respect of non-scheduled services, the parties agreed to adopt a liberal charter policy, and expressed willingness in principle to approve applications for such flights. Applications need to be submitted at least three working days in advance of the proposed flight and decisions should be made within one working day; urgent applications may be submitted and considered within shorter time limits.

## 10. Third country operators

Third country operators wishing to carry out commercial flights, whether scheduled or non-scheduled, to, from or within the UK, must obtain: (1) an EU safety authorisation, and (2) a UK operating permit before they are allowed to perform such flights. The discussion below is particularly important in the context of Brexit because, in the absence of an agreement to the contrary, UK air carriers will become third country operators for the purpose of the EU rules, and vice versa, Community air carriers wishing to operate to the UK will be viewed as third country operators under the English law.

## 11. EU safety authorisation

The EU rules expressly state that any third country operator who intends to

perform commercial air transport (CAT) operations, transporting passengers, cargo or mail for remuneration or hire, into, within or out of the territories to which the Basic Regulation applies<sup>40</sup> must first comply with the requirements of Part-TCO<sup>41</sup> and hold an authorisation issued by EASA under Part-ART.<sup>42</sup> Non-commercial operations are not subject to these requirements.

### 11.1. Part-TCO

First, the third country operator must comply with the relevant rules under Part-TCO, namely: (1) the standards contained in the relevant Annexes to the Chicago Convention and / or mitigating measures where the State of operator or registry has notified differences to the ICAO standards; (2) the relevant requirements of Part-TCO; and (3) the applicable EU rules of the air. The aircraft performing the flight must also: (a) be operated in accordance with its AOC and the relevant operations specifications, as well as the authorisation issued under Part-ART, as well as the scope and privileges contained in the attached specifications; (b) have a certificate of airworthiness of the aircraft (CofA) issued or validated by either the State of registry or, alternatively, the State of the operator where there is an Article 83bis Transfer Agreement.<sup>43</sup> In addition, the operator must be able to provide, upon EASA's request, any information relevant for verifying compliance with Part-TCO and must, without undue delay, report to EASA any Annex 13 accident involving aircraft under its AOC.<sup>44</sup>

At least 30 days before the intended commencement of CAT operations, a third country operator must apply to EASA for an authorisation in line with Part-TCO. There is a narrowly defined exception for certain specific types of non-scheduled commercial flights which do not need to obtain prior authorisation, but are instead only subject to prior one-off notification requirement, provided that they apply for an authorisation within 10 working days after the date of notification of the first flight to EASA. These flights are: (1) air ambulance flights, and (2) a non-scheduled flight or a series of flights "to overcome an unforeseen, immediate and urgent operational need". There are further conditions regarding the notification of such flights, namely that the notification may not be filed more than once every 24 months and the flight in question must be performed within six weeks from the date of the notification or until EASA has made a decision on the application in accordance with Part-ART.

### 11.2. Part-ART

Part ART lays down the administrative procedures to be followed by EASA and the EU Member States concerning the issuance, maintenance, change, limitation, suspension or revocation of authorisations and monitoring of third country operators.<sup>45</sup> With regard to the latter, EASA assesses continued compliance of third country operators with their authorisation and the relevant Part-TCO conditions.

<sup>40</sup> Part TCO applies to the following territories: 28 EU Member States, 4 EFTA States and Gibraltar, Åland Islands, Azores, Madeira, Canary Islands, Guadeloupe, French Guiana, Martinique, Réunion, Saint-Martin, Mayotte.

<sup>41</sup> Annex 1 of Regulation 452/2014 laying down technical requirements and administrative procedures related to air operations of third country operators.

<sup>42</sup> Annex 2 of Regulation 452/2014.

<sup>43</sup> Under Article 83bis of the Chicago Convention the State of registry may transfer the responsibility for the issue of certificates of airworthiness to the State of the operator.

<sup>44</sup> TCO.200, Regulation 452/2014

<sup>45</sup> Part ART, Annex 2 to Regulation 452/2014.

## 12. Foreign carrier permit

In addition to the EU safety authorisation, a third country operator must also obtain a UK operating permit. As a general rule, under Article 250 of the UK Air Navigation Order 2016 (“ANO”),<sup>46</sup> aircraft registered in a State other than the UK must not take on board or discharge any passengers or cargo in the UK where valuable consideration is given or promised for the carriage of such persons or cargo.

This rule is, however, subject to several exceptions. As discussed above, Community and EEA EFTA air carriers are allowed to operate air services within the EEA pursuant to the traffic rights conferred by Regulation 1008 / 2008. Similarly, the prohibition does not apply to aircraft operators who obtained their AOC pursuant to Article 94 of the Air Navigation (Overseas Territories) Order 2013.<sup>47</sup>

Third country operators which do not fall within the scope of either of the two exceptions have to apply to the UK CAA for a Foreign Carrier Permit. This requirement applies to all types of flights, both scheduled and non-scheduled. Operators of the latter types of air services wishing to perform either short-term or one-off charter flights, also known as “ad hoc charters”, have to apply for a Charter Operating Permit. It is important to note that neither private flights, nor overflights of the UK using aircraft registered in a State other than the UK, require additional TCO approval.

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<sup>46</sup> Article 250 of the Air Navigation Order 2016, which came into force on 25 August, 2016.

<sup>47</sup> See Article 94 of the Air Navigation (Overseas Territories) Order 2013. The 2013 Order applies to the following territories: Anguilla, Bermuda, British Indian Ocean Territory, Cayman Islands, Falkland Islands, Montserrat, Pitcairn, Henderson, Ducie and Oeno Islands, St. Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands, and Virgin Islands; see Schedule 6 of the Air Navigation (Overseas Territories) Order 2013.



## Annex 3

# Ownership and control



## 1. EU operating licence

In order to be a “Community air carrier” and benefit from full access to the liberalised internal air transport market as well as (for a scheduled airline) from the wide network of bilaterals through EU designation, an operator must hold an EU operating licence.

The operating licence is issued by the licensing authority of the EEA Member State or Switzerland where the air carrier’s “principal place of business” is located. This is defined as the operator’s head office or registered office within which the principal financial functions and operational control, including continued airworthiness management, are exercised.

Regulation 1008 / 2008 does not differentiate between scheduled and non-scheduled air services and applies equally to both, as confirmed by the CJEU International Jet Management case. In June 2017, the European Commission published interpretative guidelines on ownership and control under Regulation 1008 / 2008,<sup>48</sup> which provide insight into the European Commission’s assessment criteria and past practice in deciding cases, as well as best practices developed by national aviation authorities. Certain national aviation authorities (including the UK CAA) have issued their own guidelines.

In order to be granted an operating licence, an operator must satisfy a number of financial and non-financial conditions under Regulation 1008 / 2008, including ownership and control requirements. In accordance with Article 4(f) of the Regulation, Member States and / or nationals of Member States

must (1) own more than 50% of the undertaking and (2) effectively control it, whether directly or indirectly through one or more intermediate undertakings. (For these purposes “Member States” includes an EEA State and Switzerland pursuant to the EEA Agreement and the EU-Switzerland Agreement respectively, to which Regulation 1008 / 2008 applies).

While the European Commission does not pre-approve licence applications, so need not be notified, it supervises compliance with Regulation 1008 / 2008. For those purposes it is entitled to obtain all necessary information from national licencing authorities and ask them to review compliance. The European Commission can require them to take the appropriate corrective measures or to suspend or revoke the operating licence in case of non-compliance.

Following the UK’s exit from the EU, without an agreement in place to the contrary, a UK business aircraft operator will not be entitled to become a “Community air carrier”, as its principal place of business will be in the UK (and therefore outside the EU) and its AOC will have been issued by a country (the UK) which is not a Member State. That operator could endeavour to set up a principal place of business in the EU, and obtain an AOC from the relevant Member State, but would still not be entitled to be issued an EU operating licence if it is not majority owned and effectively controlled by Member States and / or nationals of Member States. In the case of a UK business aircraft operator which is owned and effectively controlled by EU nationals at present, its continuing status in the UK would depend on the UK rules going forwards post-Brexit.

Conversely, it follows that an EU business aircraft operator which is majority owned and effectively controlled by UK nationals could lose its status as a “Community air carrier” under Regulation 1008 / 2008.

## 2. External dimension

Ownership and control rules are not just a licensing requirement; they also have an external dimension. While Regulation 1008 / 2008 allows for the relaxation of ownership and control rules through agreements with third countries, and Open Skies Agreements encourage such market liberalisation, no air services agreement in force currently provides for this.

The EU-US Air Transport Agreement 2007 contains an ownership and control clause that restates Article 4(f) of Regulation 1008 / 2008, and the Protocol of 2010 allows (on a reciprocal basis) majority ownership of Community air carriers by US nationals, provided legislative changes are made. These did not ensue and do not seem to be on the agenda.

The aforementioned UK-Turkey bilateral agreement provides that a Contracting State may revoke an operating authorisation, condition or suspend the exercise of traffic rights where it is not satisfied that substantial ownership and effective control of the operator are vested in the designating Contracting Party (Article 5(1)(a)). The EU Model Horizontal Agreement requires the third country, the bilateral agreement with which is amended by the relevant Horizontal Agreement, to grant authorisation to operators established in the EU and holding an AOC from the

<sup>48</sup> Commission Notice of 8.6.2017 Interpretative guidelines on Regulation (EC)1008 / 2008 - Rules on Ownership and Control of EU air carriers. C(2017) 3711 final.



competent national aviation authority, and which are owned and effectively controlled by EU Member States, Norway or Switzerland.

The extent to which this would apply to a non-scheduled carrier as opposed to a scheduled carrier would require an analysis of the relevant bilateral agreements on a case-by-case basis. The ownership and control restrictions in bilaterals appear primarily to apply to carriers which require designation under the bilateral by a Contracting Party i.e. scheduled airlines where there is a restriction on the number of airlines which can be designated by each state to fly those routes. This would not necessarily apply to non-scheduled traffic.

The EU-US Open Skies Agreement contains ownership and control provisions which apply to the authorisation of carriers of the other party and to the investment into the carriers of the other side. In both cases, the Agreement does not specifically distinguish between scheduled and non-scheduled carriers (and its other provisions seem to suggest that it generally applies to both types of operations), although arguably ownership and control provisions as applied to designation have more relevance to scheduled carriers, whereas, applied to mutual investments, they may be equally relevant to both scheduled and non-scheduled carriers.



## Annex 4

# Customs duties / VAT

## 1. The EU Customs Union

Member States of the European Union (Monaco, and some territories of the UK which are not part of the EU (Akrotiri and Dhekelia, Bailiwick of Guernsey, Bailiwick of Jersey, and the Isle of Man) are all members of the EU Customs Union. Some territories within the EU do not participate in the Customs Union (e.g. Gibraltar).

The Customs Union is a principal component of the EEC, established in 1958, and now succeeded by the EU. No customs duties are levied on goods travelling within the Customs Union and unlike a free trade area members of the Customs Union impose a Common External Tariff on all goods entering the Union.

A precondition of the Customs Union is that the European Commission negotiates for and on behalf of the Union as a whole in international trade deals such as the World Trade Organisation, rather than each Member State negotiating individually.

Prime Minister Theresa May reiterated in her Florence speech of 22 September 2017 that following Brexit “we [the UK] will no longer be members of its [the EU’s] Single Market or its Customs Union” (emphasis added). HM Treasury has recently confirmed that “as the UK leaves the EU, it will also leave the Customs Union”.

## 2. Tax

### 2.1. Import

There are two tax concepts in play when

considering the import of an aircraft in the EU – that of customs clearance into the EU allowing the aircraft to be in “free circulation” within the EU and the VAT status of the aircraft, that is to say that any VAT due on the aircraft is paid or properly accounted for.

Any aircraft that operates in business or commercially within or between EU countries should normally be customs cleared and in what is referred to as “free circulation” (unless a “temporary importation” exemption applies – please see further below on temporary importation).

### 2.2. Sale

The main applicable tax in relation to the sale of an aircraft in the EU is VAT.

### 3. VAT

There is a high degree of harmonisation of VAT rules across the EU. These VAT rules are normally set by EU Directives which are not directly applicable and which are therefore implemented in the UK through domestic legislation.

On 1 January 2011, the UK’s VAT rules in relation to the supply of aircraft, aircraft engines and parts changed substantially. This followed a ruling by the European Commission that the UK’s previous rules did not correctly implement the provisions of the EU VAT Directive.<sup>49</sup>

The UK rules previously provided that any supply of an aircraft with a take-off weight exceeding 8,000 kg and which was neither designed nor adapted for recreation and pleasure should be zero-rated (and the rule applied also to

engines and parts for such an aircraft). However, the zero-rated treatment provided for in the EU VAT Directive is tested by reference to the airline rather than the aircraft, applying to supplies of aircraft and parts that are “used by airlines operating for reward chiefly on international routes”. This test has now been implemented in the UK by section 21 of the Finance (No.3) Act 2010.

### 3.1. Supply

The rules apply to the “supply” of an aircraft or aircraft equipment, i.e.:

- Sale, import or acquisition
- Charter, including hire or lease

The supply of a qualifying aircraft is zero-rated. Supplies of other aircraft are standard-rated (at the rate of 20% in the UK since 4 January 2011).

The relevance to the business aviation sector is therefore: (i) the VAT applicable on the importation of an aircraft into the EU for free circulation, (ii) the VAT applicable on the sale of a business aircraft whilst physically located in the EU, and (iii) the VAT applicable on the leasing or chartering of a business aircraft.

### 3.2. “Qualifying aircraft” test

As mentioned above, a “qualifying aircraft” is any aircraft which is used by an airline operating chiefly on international routes. Following the decision of the CJEU in the 2005 *Cimber Air* case (C-382 / 02), the test is whether the airline itself operates chiefly on international routes and not what

<sup>49</sup> Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax.

route any particular aircraft is used for. Analysing each component of the test in more detail:

**a. Airline**

An airline is defined as “an undertaking which provides services for the carriage by air of passengers or cargo”. An airline will need to operate at least one aircraft which it may own, lease or hire.

On 19 July 2012, the CJEU issued a decision in the A Oy case (C-33 / 11) which confirmed that an international charter operator (i.e. business aircraft operator) can be an ‘airline operating for reward chiefly on international routes’ in accordance with the EU VAT Directive – in other words, it does not matter if the routes flown are non-scheduled. It is irrelevant whether the international air transport is made on scheduled flights or on non-scheduled flights, including charter flights operated for companies or private persons.

**b. Operating for reward**

The airline must be providing either passenger or freight transportation (or both) on scheduled or unscheduled flights (or a mixture of both) and receiving consideration for that supply. This must be a business operation in nature for VAT purposes. There is a significant body of case law in relation to the requirements for a taxpayer to be operating a business for VAT purposes. However, there is no requirement for an airline to be operating for profit.

Does the exemption under Article 148

of the EU VAT Directive also apply in the event that the (beneficial) owner of the aircraft uses the aircraft for his own business and private needs, and contributes as such to the costs of the aircraft (own-use)? In the A Oy case the CJEU decided that the own use of the aircraft - when operated by an airline in the meaning of the EU VAT Directive - does not jeopardise the exemption, provided that the aircraft is not solely or exclusively used by the owner of the aircraft.

**c. An international route**

An international route is any route that is not a domestic route within UK airspace. A non-UK airline that mainly flies between airports within its own territory should therefore be regarded nonetheless as international for these purposes.

**d. Chiefly**

“Chiefly” means that the non-UK domestic flights of an airline must exceed its domestic flight operations. This test can be based on the value of turnover attributable to international routes compared to that attributable to domestic routes, the relative number of passengers carried, mileage or “any other method that produces a fair and reasonable result”.<sup>50</sup>

**e. Special purpose companies**

Most aircraft are, of course, owned by special purpose companies. If at the time of the supply to such an “intermediary” (as the Her Majesty’s Revenue and Customs (HMRC) Guidelines refer to them) it is known that the ultimate supply to

the end user will be of a qualifying aircraft, then the supplier may “look through” the transaction (or series of transactions) and treat its own supply as zero-rated.

For practical purposes HMRC intend to permit, “in very narrow circumstances”, suppliers to “look through” the supply to an immediate customer that is not an ‘airline’ and on to the ultimate consumer of the supply. The critical point is that the ultimate consumer of the supply of either goods or services must be an ‘airline’ operating qualifying aircraft and that the entities in the supply chain are fully taxable for the purposes of the transaction so that no input tax restriction would occur anywhere in the chain were the zero-rating not to be permitted.

In the A Oy case, the CJEU confirmed that the exemption under Article 148 of the EU VAT Directive also applies to the supply of an aircraft to a party which is not an ‘airline’ and which in turn supplies the aircraft for the use of an ‘airline operating for reward chiefly on international routes’. The CJEU determined that the exemption applied to all sales of aircraft purchased ‘for the purpose’ of supplying them to airlines operating chiefly on international routes. By this teleological approach, the CJEU applies the “look-through” principle, whereby the evaluation of whether or not VAT is applicable on the sale of an aircraft on the basis of the use made of it by the final user is decisive. This part of the CJEU judgment was therefore in line with what is already implemented in

<sup>50</sup> HMRC Notice 744C, December 2010.

many jurisdictions, including the UK.

#### 4. Business aircraft - summary

In general terms, the UK VAT position in relation to business aircraft is therefore as follows:

##### *Aircraft chartered out*

Potentially zero-rated, provided the use is a genuine business use and not a disguised private use. The general consensus is that there will need to be some degree of serious marketing to third parties and records kept of genuine charters. Following analogies from the yachts market, the “business” might be deemed abusive if it sustained significant ongoing losses or the chartering to third parties “would not, alone, be of sufficient continuity and substance to comprise an economic activity”. The 1996 CJEU case of Enkler (C-230 / 94) provides guidance on this.

##### *Private use*

20% VAT is likely to apply.

Businesses owning aircraft for the transport of staff

A business owning an aircraft used for the transport of its staff will not normally be considered to be an “airline”. However if the aircraft is operated by an associated company, separate from the main business, and otherwise the conditions set out in the rest of its Guidance are satisfied, HMRC have stated that they will normally accept that such an associate company is an airline.

#### 5. Customs duties

The EU’s basic customs legislation is contained in the Customs Code<sup>51</sup> and the Code’s implementing provisions.<sup>52</sup> These are directly applicable in all Member States.

In the case of an aircraft that is imported by an EU established entity and where the aircraft is placed on a civilian aircraft register, the import can meet the conditions needed under EU customs rules for the application of a customs duty relief (end use relief), that allows customs duty to be completely removed at import. Otherwise customs duty would be charged at 2.7% of the aircraft’s current value. Where end use relief could not be applied, this duty charge would be irrecoverable.

#### 6. Temporary admission (also known as temporary importation)

The European Union Customs Code provides a mechanism to permit an aircraft that is not domiciled or registered in the EU to be temporarily imported into the EU without customs documentation or payment of customs duties or VAT.

This ‘temporary admission’ regime exists to accommodate the occasional entry of foreign-registered aircraft into an EU Member State. The requirements of the regime are, however, not always easily applied. Under the Code, an aircraft that is not EU registered and is in private use may enter the EU for up to six months without liability for VAT or import duty tax.

Alternatively, an aircraft that is not EU registered and is in commercial use may remain in the EU only so long as required for carrying out transport obligations. Private use of an aircraft includes any use that is other than commercial. Commercial use is defined in the Code as the transport of persons or of goods for remuneration, or in the framework of an economic activity of an enterprise.

#### 7. The Isle of Man

It is common for business aircraft to be imported for free circulation in the EU through the Isle of Man. The Isle of Man is a self-governing Crown dependency in the Irish Sea. The Crown dependencies are the Isle of Man, and the Bailiwicks of Jersey and Guernsey. They are independently administered jurisdictions, and do not form part of either the UK or the British overseas territories. They are self-governing possessions of the Crown (defined uniquely in each jurisdiction). Internationally, the dependencies are considered “territories for which the UK is responsible”, rather than sovereign states. They are not part of the European Union, but they are within the EU’s Customs Area. The Isle of Man Customs & Excise Division has had responsibility for Isle of Man taxes transferred to it by UK HMRC. When the UK leaves the EU Customs Union, it follows that the Isle of Man will also leave.

#### 8. Brexit

It is UK Government policy to leave the EU Customs Union as part of Brexit, not least so that the UK is not subject to the Common External Tariff and is free

<sup>51</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code.

<sup>52</sup> Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code.

to negotiate trade deals with non-EU countries.

The European Union (Withdrawal) Bill will, when passed by Parliament, convert the body of existing law into domestic law. The UK will then need new primary legislation, irrespective of any agreement made between the UK and the EU, to create a standalone customs regime, and to amend the VAT and excise regimes so that they function effectively after the UK has left the EU.

The rules in relation to VAT / Customs duty described above will therefore continue to apply in the UK (and in The Isle of Man) post-Brexit, at least during an interim period pending any amendment. However, these rules would apply to a standalone separate UK customs zone.

The most likely scenario in respect of VAT / Customs duty is therefore a “hard Brexit” which will have the following consequences with regard to the matters discussed above:

- i. The interpretation of and development of these rules would no longer be subject to the jurisdiction of the Court of Justice of the European Union. The applicability of pre-Brexit CJEU judgments would be a matter for the UK legislature / courts.
- ii. Going forwards, it would be open to the UK to amend the rules or adopt new rules (e.g. reverting to the “old” test that the supply of an aircraft will be zero-rated if the aircraft’s take-off weight exceeds 8,000 kg and

the aircraft is neither designed nor adapted for recreation and pleasure – there is no suggestion that moves are afoot to re-adopt this test, we merely mention it as an example of what the UK Government could decide when no longer directly subject to the EU VAT Directive).

- iii. An importation of a business aircraft through the UK / Isle of Man would not therefore automatically provide “free circulation” in the remainder of the European Union – without a form of agreement being in place between the UK and the EU to allow for this.
- iv. The temporary admission rules applicable in the European Union will in principle apply to UK registered business aircraft – as these will no longer be EU registered aircraft; provided, of course, that the other criteria for the application of temporary admission rules are met. This is quite a complicated area and legal advice would need to be sought in relation to any specific case. Again, this would only be the case if there was no agreement in place between the UK and the EU providing for an alternative arrangement.
- v. Dependent on the factual scenario and the usage of the aircraft, the importer of a business aircraft with strong connections to both the UK and the EU may going forwards need to consider an importation into the UK and a separate importation into the EU.

## 9. Supply of aircraft parts

One particular concern is how any revised rules would be applied by the significant number of UK (and EU) businesses engaged in the repair, maintenance and modification of aircraft and the supply of spare parts.

### VAT

As mentioned above, the supply of aircraft parts is zero-rated if the purchaser of the parts is a ‘qualifying airline’ (or if the “look-through” principle applies and the end user is a ‘qualifying airline’).

Normally the responsibility for determining the liability to VAT in relation to a supply rests with the supplier. In order to zero-rate aircraft equipment supplies, the supplier would therefore need to know at the time of the supply that the aircraft will be a qualifying aircraft. This may not always be straightforward, as the supplier may be engaged to make supplies to multiple customers at relatively short notice and may not always be aware at the time of the supply of the identity of the end user in the supply chain. To discharge that responsibility the supplier may have to ensure that some form of documentary evidence of the airline’s qualifying status is retained.

HMRC recognise that, in the case of aircraft, this requires knowledge about the status of the customer and the use to which the aircraft is to be put. In cases of doubt, HMRC recommends obtaining evidence of entitlement to zero-rating,

for example by way of a declaration (Note 744C, Paragraph 12.2 suggests the format of this). In its Guidelines, HMRC set a high standard for this evidence, giving the example of a declaration by the customer of its entitlement to zero-rating together with an undertaking to notify the supplier of any changes to that entitlement before the time of the supply and to pay any VAT properly due. However, HMRC state that the documentary evidence could take other forms, and it is expected that it will only be necessary to retain such evidence in cases where there is some doubt that the customer qualifies. If the airline in question is based overseas and operates only a small proportion of its flights within the UK, it may be abundantly clear that the supply qualifies for zero-rating and so it may not be necessary to retain any evidence. In addition, HMRC have noted that, in “normal circumstances”, where a supplier is engaged by an airline to make multiple supplies, they would only expect the supplier to obtain one declaration from that airline each year to cover all of the airline’s aircraft.

The applicability of this post-Brexit will depend of course on the regime going forwards.

#### *Tariffs*

A further concern that has been raised in the context of the Customs Union is whether leaving the Customs Union could result in the imposition of tariffs in relation to the export of aircraft parts from the UK to the EU (or vice versa).

The 1980 World Trade Organisation plurilateral information agreement on trade in civil aircraft eliminates import duties on civil aircraft. This agreement has 32 signatories (Albania; Austria; Belgium; Bulgaria; Canada; Chinese Taipei; Denmark; Egypt; Estonia; European Union; France; Georgia; Germany; Greece; Ireland; Italy; Japan; Latvia; Lithuania; Luxembourg; Macao, China; Malta; Montenegro; Netherlands; Norway; Portugal; Romania; Spain; Sweden; Switzerland; UK; United States). Most WTO agreements are multilateral since they are signed by all WTO members. The agreement on trade in civil aircraft is one of two plurilateral agreements (with the agreement on government procurement) signed by a smaller number of WTO members. It eliminates import duties on all aircraft, other than military aircraft, as well as on civil aircraft engines and their parts and components, all components and sub-assemblies of civil aircraft, and flight simulators and their parts.

Although the EU was a signatory to the above agreement, so were individual countries including the UK. So, providing the UK continues to abide by its terms, then the agreement should continue to apply and there will be no need for the agreement to be renegotiated.

That said, some aero parts (and materials) may not be caught by the WTO agreement. This is being investigated by the governments concerned. In addition, the WTO agreement will not assist with any non-tariff barriers.







## Annex 5

# European Aviation Safety Agency

The principal body responsible for regulating aviation safety in the UK is the Civil Aviation Authority (CAA). However, the European Aviation Safety Agency (EASA) plays an increasingly important role in developing and promoting common Europe-wide standards in the fields of civil aviation safety and environmental protection.

EASA was established in 2002 as an independent agency of the EU, with its own legal personality, distinct from the Community Institutions.<sup>53</sup> EASA became fully functional in 2008; in accordance with Regulation (EC) No 216 / 2008 (the “Basic Regulation”)<sup>54</sup> EASA’s main functions include:

- Drafting implementing rules and guidance material related to aviation safety
- Providing technical, scientific and administrative support to the Commission and EU Member States
- Conducting standardisation inspections and training
- Airworthiness and environmental certification of aircraft, engines and parts
- Certification and approval of aircraft design organisations
- Certification of flight crew, air operations, air traffic management and air navigation services, air traffic controllers and aerodromes
- Authorisation of third country operators<sup>55</sup>

The membership of EASA is composed of the 28 EU Member States, each of which

has one seat on EASA’s Management Board. Following Brexit, and, in the event that there is no agreement to the contrary, the UK will cease to be a member of EASA. It is important to note, however, that EU membership is not a prerequisite for a state’s involvement with EASA and the current framework expressly provides for the participation of non-EU countries.

Article 66 of the Basic Regulation foresees various models of participation by “European third countries”, i.e. non-EU States, as long as they are Chicago Convention Contracting States and have entered into an agreement with the EU which mandates the adoption and application of the relevant EU aviation safety regulations.<sup>56</sup> In each case, the extent and nature of the State’s involvement is subject to the provisions of the relevant agreement.

The four EFTA States (Norway, Iceland, Lichtenstein and Switzerland) have been granted participation under Article 66 of the Basic Regulation and are members of the Management Board without voting rights which are afforded to the EU Member States and European Commission only. Without the right to vote on the proposed aviation safety measures, EFTA Member States do not have the ability to directly influence the legislative process or formulate future EU policy. Currently, as an EU Member State, the UK has a say in any proposals for the new safety rules and regulations at the European Commission level, and is able to affect their implementation using its voting rights on the EASA

Management Board. If it was to participate in EASA on the same basis as the four EFTA States, it would still have to apply the same EU safety regulations, but would lose the ability to shape their content.

The ECAA State Parties who are in the first transitional period are also allowed to sit on the Management Board but only as non-voting observers. As they progress to the end of the second transitional period, their status and conditions for their participation in EASA will be determined by the ECAA Joint Committee. In addition, regardless of whether the UK participates as a member of the Management Board or merely as an observer, it would also, inevitably, need to agree to make financial contributions to the EU budget in line with the provisions of the Basic Regulation.

EASA also cooperates with the aeronautical authorities of third countries in the framework of bilateral Working Arrangements<sup>57</sup>, creating technical working relationships and cooperation in aviation safety matters. Examples of such third countries include Turkey and the EMAA States, such as Morocco and Israel. This type of arrangement, however, is even less desirable to the UK post-Brexit than the other two models discussed above.

In the alternative, the UK could seek to establish its own legal framework for the regulation of aviation safety outside of EASA, although this course of action entails several major complications and is highly unlikely to happen. The

<sup>53</sup> Article 28 of Regulation 216/2008.

<sup>54</sup> Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (“Basic Regulation”).

<sup>55</sup> See Basic Regulation; see online: <https://www.easa.europa.eu/the-agency/the-agency>; also online: <https://www.easa.europa.eu/the-agency/faqs/about-easa>

<sup>56</sup> Article 66 of the Basic Regulation.

<sup>57</sup> Article 27 of the Basic Regulation.

more likely scenario is that the UK will try to remain an active member of EASA, regardless of its exit from the EU. Currently two-thirds of all rule-making input to EASA comes from the UK and France and 60 UK CAA safety experts are involved with EASA<sup>58</sup>.

The recent COMBAR Working Paper on the Implications of Brexit notes that if the UK made a decision not to participate in EASA and instead introduced its own independent rules and structures for air safety regulation, it would likely face the following difficulties:

“The first is that it would be extremely expensive for the UK to build up the certification infrastructure required to operate independently of EASA, and that process may take a very significant amount of time to complete (as much as a decade). In the meantime, there would be a significant impact on the ability of aircraft to demonstrate effective maintenance and airworthiness records (which can encounter great difficulties when not EASA or FAA compliant).

Second, the EASA certificate regime along with the US FAA certification regime are the two leading industry standard regimes adopted internationally. It is an open question whether the UK CAA will have the resources to develop a system that is considered internationally to be equivalent in standing to EASA.

Third, UK operated aircraft may only land in the US if they are certified by a safety agency recognised by the FAA. EASA is recognised by the FAA but the CAA is not. Even if the CAA could

establish and develop a safety and certification system that is considered internationally to be equivalent standing to EASA, the FAA's internal process for recognition of any foreign agency is lengthy. Almost all aircraft leases and financings refer to either FAA or EASA standards of certification / recognition. UK operators would need to find an acceptable solution to these requirements during any transition between certification systems.

Fourth, although the CAA already produces detailed guidance on air safety (often drawn from the relevant EU Regulations), it would be a daunting task to have to consider and analyse the substantial body of EU rules referred to above and decide which to adopt and which to reject (although the baseline ICAO standards would provide a useful starting point).

Fifth, there would be great difficulty in dealing with design and aircraft modification approvals (including modification of parts), as even minor changes would cease to be subject to EASA approval, and therefore would need to be assessed in accordance with whatever domestic system was installed in its place.

Further, as soon as the UK diverges from the EU / EASA on safety standards, it will almost certainly become more difficult for UK airlines to operate into and within the EU. They would need to obtain authorisation from the Member States, which would be an unwanted administrative burden, and the Member States would have the power to limit

the scope of that authorisation if they saw fit. Further, the EASA would have the power to amend, limit, suspend or revoke the authorisation if the UK operators failed to fulfil the relevant obligations imposed on them at EU level. No doubt this will be unlikely given that UK airlines are likely to set high standards of safety, but it is by no means unforeseeable that the EU / EASA might in future adopt a set of regulations with which the UK disagrees and on which it has had no say, which would place UK operators in a difficult position.”<sup>59</sup>

Recent reportage in the UK suggests that the UK Government will tell the EU that it wishes to stay in EASA after Brexit, even under the indirect jurisdiction of the CJEU, via the mechanism of Article 66. In a future scenario where the UK is an associate member, a domestic dispute over the application of safety regulation would be under the jurisdiction of UK courts; however, under Article 50 of the Basic Regulation, the CJEU is the ultimate arbiter of EASA rulings. The UK Government appears willing to accept this on the basis that the relevant “red line” is that there be no “direct jurisdiction” by the CJEU after Brexit.

Source

<sup>58</sup> Airlines UK

<sup>59</sup> Commercial Bar Association (COMBAR), Working Paper on the implications of Brexit, Aviation Industry (23 February 2017), at 18 et seq



## Licensing

### Flight crew licensing

The requirements for the issue of EASA flight crew licences, associated ratings and certificates, and the conditions of their validity and use are contained in Commission Regulation No. 1178 / 2011, and more specifically Part-FCL (Annex I to the Regulation). The detailed provisions of Part-FCL set out the requirements as to theoretical knowledge and practical skills required for the issue of a range of licence types, from light aircraft pilot licences (LAPL) and private pilot licences (PPL), to commercial pilot licences (CPL) and air transport pilot licences (ATPL). Part-FCL also contains requirements for the award of ratings, such as aircraft class ratings (e.g. single engine or multi engine rating), additional ratings (e.g. instrument, night, or mountain rating), as well as type ratings required for specific models of complex business aviation aircraft. As fleets of most business aircraft operators consist principally of multi-engine jet aircraft, pilots employed normally need to hold either a CPL or ATPL with any applicable ratings, such as multi engine (ME) and instrument rating (IR), as well as a type rating for the specific business jet aircraft flown.

Part-FCL requires the licence holder to carry the licence and valid medical certificate, as well as a personal identification with their photo when flying. The pilot must also keep a reliable record of flights flown and have it available for inspection upon request by the local civil aviation authority. A business aircraft pilot who has attained the age of 60 years may only operate aircraft engaged in commercial air transport as a member of a multi-pilot crew and continue to do so for the next five years. Upon attaining the age of 65 years, the pilot licence holder may no longer act as a pilot engaged in commercial air transport. Failure to meet the requirements of Part-FCL

may result in the competent authority limiting, suspending or revoking the licence.

Prior to the adoption of EASA rules on flight crew licensing, the various types of flight crew licences were issued by the UK CAA and other national aviation authorities in Europe based on certain harmonised rules, known as the Joint Airworthiness Requirements (JARs). These were developed by the Joint Aviation Authorities (JAA), an associated body of ECAC. Over a number of years since their formation in 1990, a substantial number of JARs were developed. Although these were not initially mandatory, some of these became part of EU law by being annexed to Council Regulation 3922 / 91 on the harmonisation of technical requirements and administrative procedures in the field of civil aviation, while others, such as flight crew licensing requirements, were incorporated into national law.

As a result, many experienced commercial pilots in the UK will have been granted UK / JAR licences. In order for holders of such licences to continue to be able to fly EASA certified aircraft, such licences will need to be converted to the corresponding EASA licence type by 8 April 2018. If the licences are not converted by this date, they will remain valid, but any privileges to fly EASA certified aircraft will be lost. Brexit negotiations are unlikely to impact this conversion process, as this EASA requirement will continue to apply to the UK until the UK leaves the EU. Due to the severe limitations of retaining national licences and the likely delays in processing later applications due to demand, it would seem advisable for commercial pilots affected to convert their licences well in advance of the 8 April 2018 deadline.

### Maintenance engineer licensing

The regulatory framework governing the grant and conditions of validity and use of EASA maintenance engineer licences

is set out in Commission Regulation 1321 / 2014 and in particular in Part-66 (Annex III to the Regulation). Part-66 addresses the knowledge and practical experience requirements, as well as requirements as to ratings, type and task training. An aircraft maintenance licence authorises the holder to perform inspections, modifications, repairs and overhauls of aircraft and any equipment installed and issue certificates of release to service following completion of such works.

The privileges granted to the licence holder are extensive, as the certificate of release to service is a very important document in continuing airworthiness management. It is issued by the maintenance engineer at the completion of all required aircraft maintenance, which may include items, the repair of which was not originally planned, but turned out to be necessary following the inspection and repair of other items. Until the certificate of release is signed the aircraft must remain grounded as it is not deemed safe for flight. The certificate of release to service contains the basic details of the maintenance carried out, the completion date, the identity and details of the maintenance organisation and the engineer issuing the certificate, as well as any limitation to operations or general airworthiness. By issuing the certificate, the maintenance engineer confirms that the aircraft continues to be airworthy. When an aircraft is grounded in a country where the operator does not have a base or access to a maintenance provider qualified to perform base maintenance on that aircraft type, the national aviation authority of the State of Registry of the aircraft could be requested to issue a permit to fly. This would then allow the operator to fly the aircraft out of that location for further maintenance. The permit to fly will only be granted if the aircraft is capable of performing a safe flight under conditions defined by the State of Registry (or EASA if the conditions relate to safety of the design).

Part-66 licences are further categorised based on the complexity of permitted maintenance activities and whether they are to be performed without taking the aircraft out of service (line maintenance) or with (base maintenance). A category A licence allows the holder to perform minor scheduled line maintenance and simple defect rectification. Category B1 / B2 / B3 licences allow holders to perform activities on aircraft structures, powerplant, mechanical and electrical systems and avionics requiring simple tests to prove their serviceability or minor scheduled line maintenance and simple defect rectification in the case of a B3 licence. A full inspection and repair done at the base station requires a category C licence. A licence in a more restricted category can be extended to a more advanced category by demonstrating the knowledge and experience required for the more advanced category. Regardless of the category, a Part-66 maintenance engineer licence requires renewal every five years by the issuing authority. Failure to comply with the conditions of the licence may lead to its suspension or revocation by the issuing civil aviation authority.

In addition to EASA Part-66 licences, the UK CAA also issues maintenance engineer licences under British Civil Airworthiness Requirements (BCAR), Section L, which primarily apply to aeroplanes and helicopters with a maximum take-off mass below 5,700kgs. Examples of business aviation aircraft which would fall into this category include very light aircraft such as the Cessna Citation Mustang, Embraer Phenom 100, Eclipse EA500 and HondaJet, as well as some medium-sized turboprop aircraft such as the Cessna 208 Caravan and the Pilatus PC-12. The rules governing the grant, use and validity of BCAR maintenance engineer licences are similar to the EASA rules (being based on their predecessor, JAR-66).

### Impact of Brexit

The UK's exit from the EU is unlikely to have an impact on the current process of converting UK / JAR flight crew licences to EASA licences. Following Brexit, licences converted to EASA licences and newly issued EASA licences should remain valid, as they are valid indefinitely and need not be renewed every five years like UK / JAR licences. However, the UK CAA would no longer be able to issue new EASA licences under Part-FCL as EU law would no longer apply to the UK and it would no longer be a member of EASA. Newly licenced pilots in the UK would instead be issued national licences which would be subject to validation procedures in EASA Member States. Conversely, EASA licences of EU pilots would also no longer meet UK requirements, and the UK may wish to implement its own validation procedures before allowing EU pilots to operate UK certified aircraft.

The process of validation requires evidencing that the holder of the equivalent third country licence meets the criteria for the issuance of an EASA licence. This involves demonstrating that all relevant requirements of Part-FCL have been met, except that requirements of course duration, number of lessons and specific training hours may be reduced. The competent national aviation authority will then determine conversion requirements, which can be reduced on the basis of a recommendation from an approved training organisation. While the validation provisions of Commission Regulation No 1178 / 2011 took effect on 8 April 2012, Member States could validate non-EU licences without reference to the provisions of Part-FCL until 8 April 2015.

Given that the UK has been a member of EASA and applied its regulatory framework, including Part-FCL, and bearing in mind the proximity of national rules of the UK and other

EU Member States, all of which were previously based on the Joint Aviation Requirements, there would seem to be no necessity for comprehensive validation procedures with regard to licences issued by the other side. While a solution may eventually depend on the UK's relationship with or membership in EASA, if the matter is dealt with separately, it would seem preferable for both the industry and individuals affected that a mechanism of mutual recognition be put in place (whether this is politically achievable, however, may depend on cooperation in other areas).

Since EASA maintenance engineer licences principally apply to aircraft with a maximum take-off mass above 5,700kgs, while national licences cover aircraft below this weight, the UK's exit from the EU will likely only affect the former. As in the case of flight crew licences, much will depend on whether the UK continues to be a member of EASA. If this does not turn out to be the case, the UK would no longer be able to issue Part-66 maintenance engineer licences or renew previously issued licences, with the effect that maintenance engineers affected would likely be required to validate their licences in EASA Member States. The same would likely apply to EU licence holders in the UK, as the UK CAA may require them to validate their licences against UK's national regulations. Again, it seems more logical if an arrangement providing for the mutual recognition of relevant qualifications would be put in place, as both UK and EASA maintenance engineer licensing rules are likely to be very much aligned, not least due to the fact that they were both based on the JAR-66 rules.





## Annex 6

# Air traffic management / Single European Sky ATM Research project

### 6.1. Single European Sky

The Single European Sky is a multifaceted project aimed at modernising airspace and air traffic management in Europe so as to streamline routes, reduce delays and minimise costs. In terms of the legal framework, the project has been developed in several stages, beginning with the adoption of a package of four Regulations in 2004, which focused on increasing airspace capacity. For this purpose, the Regulations envisaged the division of airspace based not on national boundaries, but operational needs of users through the creation of Functional Airspace Blocks (“FAB”).

Slow progress with the formation of FABs led the European Commission to propose amendments, designed to facilitate the creation of FABs and increase supervision thereof, eventually leading to the adoption of the comprehensive Regulation 1070 / 2009, which marked the beginning of the second stage of the project. Attention shifted to increasing performance, increasing the role of EASA and further development of the technical backbone of the project, the Single European Sky Air Traffic Management Research programme (“SESAR”).

Given the aero-political nature of FABs, their legal framework is complex and consists of agreements on the intergovernmental, regulatory and operational levels. In 2008, the UK-Irish block was put in operation as the first of nine FABs to be established. Given the UK’s position, the block handles

not just traffic between the isles, but also 80% of North Atlantic traffic. The reorganisation of airspace in this Functional Airspace Block alone has led to savings of over EUR€0m in the first 15 years of operations.

NATS, the UK’s air navigation service provider, is committed to modernising UK airspace regardless of the UK’s exit from the EU and expects to continue participating in various Single European Sky initiatives. One of these, which is a significant cost-cutting measure, is the introduction of “free route airspace”, allowing an operator to plan its flight routing from an airspace segment entry point to an exit point as it wishes, subject only to airspace availability, and the avoidance of restricted airspace. NATS currently participates in the Borealis Alliance, seeking to establish a single free route airspace region across several FABs by 2021. The UK’s participation in this project is of benefit not just to UK operators, but to the EU as well, given the coverage of most Atlantic traffic.

At least as far as FABs are concerned, the Regulations do not condition involvement on EU membership, and in fact encourages the participation of as many European countries as possible to ensure maximum geographical coverage, as this increases the overall efficiency and cost savings produced by the SES project. Naturally, NATS would have to continue to meet the current regulatory targets within the block and failure to do so may impact its access to EU funding for the SESAR programme.

### 6.2. EUROCONTROL

The UK is a member of the European Organisation for the Safety of Air Navigation (“EUROCONTROL”), an international intergovernmental organisation created in 1961 and tasked with running safe, efficient and environmentally-friendly air traffic operations throughout Europe. EUROCONTROL handles the collection of air navigation charges on behalf of Member States, provides air traffic control services for the Netherlands, Belgium, Luxembourg and northern Germany, and manages the air traffic management network through its Central Flow Management Unit. In its initial stages, the Single European Sky initiative was developed mostly within EUROCONTROL, but the project has since been advanced by EASA, which has assumed most of EUROCONTROL’s regulatory powers in the field of air navigation, with EUROCONTROL continuing to provide operational and technological support.

The UK’s membership in EUROCONTROL will most likely be unaffected by Brexit, but this also means that the UK may need to continue to implement EU law governing EUROCONTROL’s activities, such as its management of airspace design and flow management covered under Regulation 677 / 2011<sup>63</sup>.

<sup>60</sup> Regulation 549/2004 of 10 March 2004 laying down the framework for the creation of the single European sky, OJ L96, 31.3.2004, p. 1-9; Regulation 550/2004 of 10 March 2004 on the provision of air navigation services in the single European sky, OJ L96, 31.3.2004, p. 10-19; Regulation 551/2004 of 10 March 2004 on the organisation and use of the airspace in the single European sky, OJ L96, 31.3.2004, p. 20-25; Regulation 552/2004 of 10 March 2004 on the interoperability of the European Air Traffic Management network, OJ L96, 31.3.2004, p. 26-42.

<sup>61</sup> Regulation (EC) No 1070/2009 of the European Parliament and of the Council of 21 October 2009 amending Regulations (EC) No 549/2004, (EC) No 550/2004, (EC) No 551/2004 and (EC) No 552/2004 in order to improve the performance and sustainability of the European aviation system. OJ L 300, 14.11.2009, p. 34-50.

<sup>62</sup> Brexit Fallout for Single Sky Remains Unclear, Air Traffic Management, <http://www.airtrafficmanagement.net/2016/06/brexit-fallout-for-single-sky-remains-unclear/> (accessed: 25/10/2017).

<sup>63</sup> Commission Regulation (EU) No 677/2011 of 7 July 2011 laying down detailed rules for the implementation of air traffic management (ATM) network functions and amending Regulation (EU) No 691/2010. OJ L 185, 15.7.2011, p. 1-29.





## Annex 7

# The Cape Town Convention

The Cape Town Convention<sup>64</sup> (“**CTC**”) has been ratified by both the EU (insofar as it relates to EU competences) and the UK, where it has been designated as an EU treaty, and implemented via the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (“**the CTC Regulations**”), pursuant to section 2(2) of the European Communities Act 1972 (and which therefore also operate to implement EU Council Decision 2009 / 370 / EC concerning the European Community’s accession to the CTC). The CTC / Aircraft Protocol entered into force in the UK on 1 November 2015.

UNIDROIT has confirmed that the UK will remain a Contracting State under the Cape Town Convention / Aircraft Protocol after Brexit following Depositary practice and that no further action will be necessary to this end.

Such a confirmation does not preclude that legislative or other regulatory actions may be needed, as a matter of domestic law, to ensure the effectiveness of the CTC Regulations implementing the Convention and the Protocol within the UK.

Moreover, certain declarations to the Aircraft Protocol were not made by the UK at the time of accession in view of the declarations already made by the EU. While it would not be necessary to do so in order to retain the status of Contracting State, the UK may wish to consider whether to make such declarations, or to clarify the interpretation of certain provisions which were included in the sphere of competence of the EU.

By the system of declarations, many of the features of the Convention are determined by whether the individual contracting state has issued a declaration, enabling it to “opt in” or “opt out” of a particular feature of the system. For example, the CTC’s insolvency regime (commonly known as “Alternative A”) which offers protection to creditors by requiring a state to specify a “waiting period” by which the debtor or its insolvency officer must cure the relevant default and agree to perform all future obligations or hand the aircraft object to the creditor, is only available if the state has made a specific declaration adopting the regime. The EU declined to make a declaration,

preserving this area to the competence of Member States, and accordingly, the UK has amended its domestic insolvency rules to adopt Alternative A. Where there is an area of the treaty that is an EU competence, the UK was unable to make a declaration covering the same area, and accordingly the UK has not opted-in to certain aspects of the CTC regime, where it is already bound by the relevant EU rules. The most salient areas in which the UK did not make a declaration concern the CTC’s choice of law rules and jurisdiction provisions. For example, Protocol Article VIII (where a contracting state has opted in by making the relevant declarations) permits the parties to choose the law that governs their contractual relationship. The UK did not make a declaration, nor do the CTC Regulations cover this, in light of the EU’s competence over this area via the Rome I Regulation. Likewise, the EU issued a declaration opting out of Protocol Article XXI (the jurisdiction provisions), indicating that Member States would be bound by the Brussels Regulation.

Given that the CTC Regulations were made pursuant to section 2(2) of the

<sup>64</sup> Much of this Section 10 derives from Aviation Working Group / Unidroit materials and the COMBAR Working Paper on Brexit of 23 February 2017.



European Communities Act 1972, which it is assumed will be repealed, it will be necessary for new legislation to implement the CTC and any additional declarations which the UK might make (as the EU's declarations will no longer apply to the UK). The new legislation should be an Act of Parliament given that it is introducing substantive law agreed to by the UK under an international treaty. Much of the treaty has been addressed under the CTC Regulations which transpose some of the CTC articles and include the full text of the CTC as an appendix. Accordingly, little additional drafting may be necessary for a new Act to safeguard the continued effects of the CTC system, which is considered to be desirable by the aviation industry. However, the Government will need to have particular regard to the areas highlighted above, where it did not make a declaration because of shared or full EU competence in that area. In the case of insolvency, the UK government's consultation provided detailed consideration of the reasons for opting for "Alternative A", rather than domestic insolvency laws: there appears to be little reason why a different approach should be taken now, given that the

consultation and ratification of the CTC are relatively recent.

In the case of jurisdiction and choice of law, the UK government will need to review its position in light of the approach taken more generally. The law applicable to contractual and non-contractual obligations is determined with the assistance of the Rome I Regulation (593 / 2008) and the Rome II Regulation (864 / 2007) and jurisdiction is governed by the Brussels Ia Regulation (1215 / 2012). The applicability of these (or measures of equivalent effect) going forwards is a significant issue for the UK given that international companies choose English law more often than any other law as the governing law of their contractual relationships and choose to settle their disputes more often before English courts than before other courts. From the CTC perspective, it may be necessary to adopt declarations in respect of the relevant provisions of the CTC to ensure that the benefits continue.



## Annex 8

# Other relevant EU law

The EU (Withdrawal) Bill, also known as the Repeal Bill or the Great Repeal Bill, is a bill of the Parliament of the UK that proposes to transpose directly-applicable EU law into the law of the UK, as part of the country's exit from the EU. To implement this, the proposed bill will repeal the European Communities Act 1972 which first brought the UK into what became the EU, incorporate all EU law into the UK statute books, and give ministers the power to adapt and remove laws that are no longer relevant. The Bill will be debated by both houses of Parliament in 2018.

In aviation, and with an impact on business aviation, the following legislation will therefore continue to apply post-Brexit, until repealed or amended. In addition, until repeal or amendment the results may be anomalous dependent on the wording of the particular legislation:

UK legislation	Subject	Comment
– Regulation (EC) No 216 / 2008 (consolidated).	– EASA Basic Regulation.	– See Annex 6 on EASA.
– Regulation (EU) No 965 / 2012 (as amended).	– Air Operations Regulation.	
– Regulation (EU) No 1178 / 2011.	– Aircrew Regulation.	
– Regulation (EU) No 748 / 2012.	– Initial Airworthiness: airworthiness and environmental certification of aircraft and related products, parts and appliances, and certification of design and production organisations.	
– Regulation (EU) No 1321 / 2014.	– Continuing airworthiness: aircraft and aeronautical products, parts and appliances, and approval of organisations and personnel involved in these tasks.	
– Regulation (EU) No 923 / 2012.	– Standardised rules of the air.	– This largely incorporates standard ICAO Rules set out in Annex 2 of the Chicago Convention – there seems little point in the UK maintaining different rules.
– Regulation (EC) No 261 / 2004.	– Flight Compensation Regulation.	<ul style="list-style-type: none"> <li>– Implemented in the UK by the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005.</li> <li>– Regulation 261 does apply to business aircraft charter services.</li> </ul>
– Regulation (EC) No 785 / 2004.	– Minimum insurance requirements.	– Implemented in the UK by the Civil Aviation (Insurance) Regulations 2005.
– Regulation (EU) No 996 / 2010.	– Air accident investigation.	– Implemented in the UK by the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations, 1996.
– Directive 2008 / 101 / EC.	– EU Emissions Trading Scheme (EU ETS).	<ul style="list-style-type: none"> <li>– Implemented in the UK by the Greenhouse Gas Emissions Trading Scheme Regulations 2012.</li> <li>– The “stop the clock” derogation is applicable until 2023: this provides that the EU ETS only applies to intra-EEA flights.</li> <li>– Will flights to / from the UK count as “intra-EEA” following March 2019?</li> <li>– There is also much discussion as to the interrelationship of the EU ETS and CORSIA (which the UK as an ICAO member state is committed to implementing).</li> </ul>



## Annex 9

# Conclusion – Summary table



Summary table

Possible models	Ownership and control rules	Customs duties / VAT	European Aviation Safety Agency	Access to routes	
				Impact on UK operators	Impact on other EU operators
Maintain status quo	No foreseeable change from the arrangements applicable as of Brexit date (30 March 2019).				
Join the European Economic Area  (e.g. Norway)	<ul style="list-style-type: none"><li>– The EEA Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li><li>– Norway, Iceland and Liechtenstein treated as EU Member States and their nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008.</li></ul>	<ul style="list-style-type: none"><li>– EEA EFTA States are not part of the EU Customs Union and EEA is not a customs union.</li><li>– EEA Agreement establishes a free trade area: no tariffs on trade between the Contracting Parties (except for agricultural and fishery products).</li><li>– Ability to negotiate free trade deals with non-EU countries.</li><li>– Complicated “rules of origin” apply.</li></ul>	<ul style="list-style-type: none"><li>– Member of EASA's Management Board without voting rights.</li><li>– “Loss of democratic control”: UK applying EU safety regulations notwithstanding lack of control over the legislative process.</li></ul>	<ul style="list-style-type: none"><li>– Continued access to the liberalised Single Aviation Market based on Reg. 1008 / 2008 (all 9 freedoms available).</li><li>– UK non-scheduled commercial operators treated like Community operators with full access.</li></ul>	<ul style="list-style-type: none"><li>– Continued access to the UK and its internal market based on Reg. 1008 / 2008 (all 9 freedoms available).</li><li>– EU non-scheduled commercial operators treated the same as UK operators.</li></ul>
Negotiate a UK-EU bilateral aviation agreement  (e.g. Switzerland)	<ul style="list-style-type: none"><li>– The EU-Switzerland Agreement incorporates Reg. 1008 / 2008 and preserves current ownership and control rules.</li><li>– Switzerland treated as an EU Member State and its nationals as nationals of EU Member States for the purpose of Reg. 1008 / 2008.</li></ul>	<ul style="list-style-type: none"><li>– Switzerland is not part of the EU Customs Union.</li><li>– The EFTA Agreement supplemented by a series of bilateral agreements establishes a free trade area in certain goods and services (i.e. limited access to the Single Market).</li></ul>	<ul style="list-style-type: none"><li>– Member of EASA's Management Board without voting rights.</li><li>– UK would have to apply EU safety regulations without the ability to influence their contents and to vote on the proposed measures.</li></ul>	<ul style="list-style-type: none"><li>– Flights to and from the UK: Swiss-style bilateral covers 3rd and 4th freedoms.</li><li>– Flights within the EU: Swiss-style bilateral covers 5th and 7th freedoms.</li><li>– Flights within an EU Member State: Swiss-style bilateral does not cover 8th or 9th “cabotage” freedoms.</li></ul>	<ul style="list-style-type: none"><li>– Flights to and from the UK: Swiss-style bilateral covers 3rd and 4th freedoms.</li><li>– Flights within the UK: Swiss-style bilateral does not cover 8th or 9th “cabotage” freedoms – UK unlikely to grant rights for commercial non-scheduled flights without reciprocity.</li></ul>

Summary table

Possible models	Ownership and control rules	Customs duties / VAT	European Aviation Safety Agency	Access to routes	
				Impact on UK operators	Impact on other EU operators
<b>Join the European Common Aviation Area</b> (e.g. Serbia)	<ul style="list-style-type: none"> <li>– ECAA State Parties have to adopt the EU aviation <i>acquis</i>, including Reg. 1008 / 2008.</li> <li>– Full implementation of the air carrier licensing rules and access to air routes in suspension until the end of the 2nd transitional period.</li> <li>– National ownership and control rules apply until full implementation of the ECAA Agreement.</li> </ul>	<ul style="list-style-type: none"> <li>– ECAA States not part of the EU Customs Union.</li> <li>– ECAA Agreement does not contain provisions on customs duties and VAT.</li> <li>– In preparation for their accession to the EU, ECAA State Parties align their legislation with the <i>acquis</i>.</li> </ul>	<ul style="list-style-type: none"> <li>– ECAA State Parties in the 1st transitional period may sit on the Management Board as non-voting observers.</li> <li>– As they progress to the 2nd transitional period, the ECAA Joint Committee determines their precise status and conditions for participation.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: ECAA Agreement covers 3rd and 4th freedoms from the onset.</li> <li>– Flights within the EU: intra-EU 5th freedom rights available in the 2nd stage and 7th freedom rights available at the final stage.</li> <li>– Flights within an EU Member State: full market access (including “cabotage”) and right of establishment only at the final stage.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: ECAA Agreement covers 3rd and 4th freedoms from the onset.</li> <li>– EU carriers able to operate between the UK and any airport in the EU (including to / from other EU Member States).</li> <li>– Flights within UK: ECAA Agreement covers 8th or 9th “cabotage” freedoms, but only at the final stage.</li> </ul>
<b>Revert to / renegotiate bilateral Air Service Agreements</b>	<ul style="list-style-type: none"> <li>– Almost all bilaterals impose “national” ownership and control requirements.</li> <li>– UK would have to adopt its own rules on ownership and control.</li> <li>– UK commercial non-scheduled operators would have to comply with nationality and ownership requirements under the relevant bilaterals, which could pose a challenge to non-UK majority owned and effectively controlled air carriers.</li> <li>– Scheduled UK operators would no longer benefit from EU designation under bilateral agreements of other EU Member States; the extent to which this would affect non-scheduled operators would need to be analysed on a case-by-case basis.</li> </ul>	<ul style="list-style-type: none"> <li>– Bilateral Air Service Agreements may contain separate provisions on customs duties (see for example Article 9 of the original UK-US 1977 Bermuda II Agreement).</li> </ul>	<ul style="list-style-type: none"> <li>– Bilaterals do not usually contain provisions on EASA membership.</li> <li>– UK would have to renegotiate its participation in EASA.</li> <li>– Possible cooperation on the basis of a Working Arrangement, separate from the bilateral.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>– Flights within the EU: existing bilateral agreements unlikely to exchange 5th and 7th freedoms.</li> <li>– Flights within the EU: existing bilateral agreements do not exchange 8th and 9th freedoms.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>– Flights within the UK: existing bilateral agreements do not cover 8th or 9th freedoms – UK unlikely to grant “cabotage” rights for commercial non-scheduled flights without reciprocity.</li> </ul>

Summary table

Possible models	Ownership and control rules	Customs duties / VAT	European Aviation Safety Agency	Access to routes	
				Impact on UK operators	Impact on other EU operators
<b>Negotiate completely new bilateral(s) with the EU and / or individual Member States</b>	<ul style="list-style-type: none"> <li>– Almost all bilaterals impose “national” ownership and control requirements.</li> <li>– UK would have to adopt its own rules on ownership and control.</li> <li>– UK commercial non-scheduled operators would have to comply with new nationality and ownership requirements, which could pose a challenge to non-UK majority owned and effectively controlled air carriers.</li> </ul>	<ul style="list-style-type: none"> <li>– It is highly unlikely that the new bilateral will cover customs duties and VAT in a comprehensive manner.</li> <li>– Bilaterals usually contain a clause exempting aircraft their regular equipment, spare parts, supplies of fuel and lubricants and aircraft stores from customs duties, inspection fees and any other duty or tax.</li> </ul>	<ul style="list-style-type: none"> <li>– UK would have to renegotiate its participation in EASA.</li> <li>– Bilaterals do not usually contain provisions on EASA membership.</li> <li>– Possible cooperation on the basis of a Working Arrangement, separate from the new bilateral.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: exchange of 3rd and 4th freedoms is standard practice.</li> <li>– Flights within the EU: exchange of 5th and 7th freedoms could be possible under a comprehensive agreement such as the EU-US Open Skies Agreement.</li> <li>– Flights within the EU: existing bilateral agreements do not exchange 8th and 9th freedoms.</li> </ul>	<ul style="list-style-type: none"> <li>– Flights to and from the UK: existing bilateral agreements likely provide sufficient basis for 3rd and 4th freedoms.</li> <li>– Flights within the UK: existing bilateral agreements do not cover 8th or 9th freedoms – UK unlikely to grant “cabotage” rights for commercial non-scheduled flights without reciprocity.</li> </ul>



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