

AVIATION AND BREXIT

There appears to be strong support on both sides of the Brexit to reach agreement in the area of aviation; but other topics such as regulatory alignment, level playing field provisions and fisheries are likely to be the deal breakers, says Attorney Giulia Mauri



The first round of negotiations covered a broad set of areas, including trade in goods and services, transport and level playing field provisions, which are guarantees for equal rules on, among other things, social, environmental, tax, state aid, consumer protection and climate matters. The latter are controversial as they are intended to prevent the UK operators and firms from being able to undercut their EU counterparts as a result of lower regulatory obligations.

Negotiations were due to resume a few weeks later, but were cancelled due to the spread of the Covid-19 pandemic and the introduction of stricter health measures. There have been no further face-to-face meetings, especially as both chief negotiators have succumbed to the virus and have been in self-isolation. The negotiations were moved online, but there has been little progress, which is not surprising given the sensitivity and complexity of the discussions and the technical challenges involved in maintaining secure connections amongst the negotiating teams.

There are now increasing calls to extend the transition period, especially as the deadline of one year to negotiate and sign off a comprehensive trade deal was already considered by trade experts to be unrealistic. The

ON-HOLD
Negotiations on the EU-UK Partnership were cancelled due to the pandemic.

The UK finally exited the European Union on 31 January 2020, but it remains de facto an EU Member State (without any say in the decision-making) until the transition period foreseen under the Withdrawal Agreement ends on 31 December 2020. The transition period can be extended by one or two years if the UK government requests an extension before the 30 June 2020.

Trade Negotiations Stall due to the Coronavirus

The EU and the UK commenced negotiations on a far-reaching economic and trade agreement (an "EU-UK Partnership") at the beginning of March in Brussels and exchanged draft proposals, including a draft UK text covering agreements on aviation and safety of air transport.

UK government has, however, set its stall on Britain fully departing from the EU's jurisdiction by the end of the year and even enshrined the commitment in domestic law. It will, therefore, need not only to amend domestic law, but also lose one of the most cherished ambitions of Brexiters. This is likely to be a tough ask, but

would be complemented by a Bilateral Aviation Safety Agreement (BASA) to minimize regulatory barriers for the aviation and aerospace industry and maintain high safety outcomes.

The EU's negotiating objectives that were adopted on 25 February 2020 envisage a deep bilateral agreement on aviation and aviation safety. The



given the current crisis, it seems hard to believe that the UK government would be prepared to risk having to deal with two crises in the same year; first, the economic and social fall-out arising from the coronavirus and, secondly, the potential economic damage of a 'Hard Brexit' if the EU and UK do not manage to reach a deal, which is a real prospect given the widely diverging negotiating objectives of both sides. An extension could, therefore, be on the cards if the EU and UK are not able to make substantial progress in their negotiations over the coming months because of the fallout from the coronavirus crisis. Companies should, nonetheless, remain vigilant to the possibility of a Hard Brexit.

Negotiating Positions in Respect of the Aviation Sector

The UK government set out its approach to negotiations with the EU in February 2020 and stated that it wanted to reach an agreement with the EU on a comprehensive air transport agreement (CATA). This would include provisions on liberalized market access for air services on a reciprocal basis, close co-operation to maintain high aviation security standards, and collaboration on air traffic management to ensure interoperability between UK and EU airspace. This

EU's proposals would allow for continued connectivity and ensure a high level of aviation safety and security standards, air traffic management, and sector specific level playing field provisions to allow for open and fair competition, including appropriate and relevant consumer protection requirements and social standards.

The European Parliament, which also has to approve any EU-UK deal, has set out its 'asks' for the new partnership agreement with the UK. In a resolution of 12 February 2020, the EU Parliament stated that the EU and the UK should aim to ensure continued connectivity between the two territories, based on the requirement of reciprocity in mutual access to the transport markets and considering the difference in size of the two respective markets. The resolution calls for a comprehensive air transport agreement, but highlights that such an arrangement cannot amount to allowing the UK to participate in the Single Aviation Market via the back door.

There appears to be strong support on both sides to reach agreement in the area of aviation, but other topics such as regulatory alignment, level playing field provisions and fisheries are likely to be the deal breakers. If no overall deal can be reached, it may

then be necessary for the EU and the UK to conclude a narrow and bespoke aviation agreement, at least to maintain a certain level connectivity.

Implications

EASA, the European Union Aviation Safety Agency, mandate and role as an agency of the EU with regulatory and executive tasks in the field of civil aviation safety is not altered in respect of the UK during the transition period. It continues to process applications from existing UK Civil Aviation Authority ("UK CAA") approval holders within the context of the early application process.

Although the UK could remain in the EASA system under a future aviation agreement, the UK government has indicated that it is the intention that the UK would withdraw from the agency. The UK Department for Transport stated recently that "being a member of the European Aviation Safety Agency is not compatible with the UK having genuine economic and political independence." On the basis of the current declarations of the UK government, it is intended that the UK CAA will take-over the regulatory functions without having EASA as a technical agent. This decision has been heavily criticized by many

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European Parliament (left). London City Airport (right).



industry players, including the parent company of British Airways, IAG which has stated that “the CAA will require fundamental restructuring from top to bottom which will take time. There is no way that it can be done by 31 December”.

An exit of the UK from EASA would mean that the UK would no longer be bound by EASA’s rules and regulations. Licenses of pilots, maintenance providers and crews will differ from EASA’s licenses and, without an agreement of mutual recognition in place, it would be very difficult for UK qualified personnel to work under the EASA system.

In addition to the above, European maintenance providers wishing to offer services to British operators will have to obtain licenses in accordance with UK safety regulations, in addition to their EASA licenses.

It is highly likely that, in such a scenario, at the beginning, the UK CAA will align itself with the safety measures adopted by EASA. However, as the time will pass, the approaches and rules adopted by the UK CAA and by EASA may end up differing substantially.

In such a case, and lacking an agreement on mutual recognition of licenses and permits, European operators willing to work and service the UK market will have to obtain a double license, a UK one and an EASA one. The same will apply to British operators willing to offer services under the EASA system.

Should the UK leave the European Union without a comprehensive avia-

tion agreement, the UK will leave the European Common Aviation Area in a rather abrupt way.

In such a case, British airlines will no longer fall under the supervision of the European Court of Justice and, as indicated above, of EASA.

If the UK exits from the EU without a deal, UK licenses will no longer be recognized and accepted in Europe and vice-versa. In order to continue operating intra-European routes, UK operators will have to establish their place of business in the EU and will have to restructure their organization so that the operators are majority owned and controlled by EU nationals.

The above of course applies solely to operators flying under an AOC in commercial operations. Indeed, non-commercial operators are not concerned, nor impacted by the limitation on ownership and control that are otherwise applicable to AOC holders.

It is moreover highly likely that, in the absence of reciprocity, the UK will not allow European commercial operators to fly intra-UK routes.

Conclusions

The aviation sector is currently confronted with an unprecedented crisis. Most commercial airlines have decided to leave their entire fleet on the ground. This is something never heard of before.

Travel limitations, bans and restrictions are also having a terrible impact on Business Aviation. Very few flights are taking place at the moment and,

in Business Aviation, those include repatriation flights or cargo flights to carry medical goods and supplies.

Both sides of the channel are currently focused in saving the lives of their citizens and trying to safeguard their own economies.

What would be the impact of the current Covid-19 crisis on the Brexit negotiations and respective positions of the EU and the UK is difficult to foresee. However, one thing is apparent and that is that the Brexit negotiations are currently at a standstill.

It would therefore be justifiable that the temporary situation crystallized under the Withdrawal Agreement is prolonged. However, the UK government has so far always declared that no extension will be requested.



Attorney Giulia Mauri is Head of Aviation and Founder of KADRANT (www.kadrantlaw.com). She has more than 20 years' experience in advising national and international clients on all aspects of aviation and transport-related transactions, including asset-finance and leasing, regulatory issues, carrier's liability and litigation matters. She also acts as a mediator and is the co-founder of Mediation4Aviation, a mediation platform dedicated to the aviation industry. Giulia co-chairs the European and Legal Affairs Committee of the European Business Aviation Association and is an active member of the Industry Affairs Group of the European Regions Airline Association. Her LinkedIn profile is accessible here: <https://www.linkedin.com/in/giulia-mauri-5741979/>

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