

DFE presentation 6 April 2017: Aspects of post Brexit regulation in the transport sector: The last scene that ends this strange and eventful history (As you like it – William Shakespeare)



(Florentine map of Denmark from an early 17th century atlas in the Fellows' Library - with thanks to the Principal and Fellows of Jesus College, Oxford)

Summary and key texts

1. *Context: How important is the Aviation sector to the UK and the EU?*

This presentation assists in understanding the rules governing the EU Aviation Single Market; in the light of that understanding, it notes what UK air carriers stand to lose if no agreement is reached at UK/EU level; and it identifies practical considerations for lawyers to address. The points raised are illustrative, not comprehensive.

The UK Prime Minister has signalled the importance of an ambitious free trade deal covering the Financial Services industry and the EU's network industries, including transport. They were, she said, crucial "to our linked economies"?

Context on the contribution that air transport makes to the economies of the UK and the EU:

- In 2014 (UK Civil Aviation Authority evidence to the UK Balance of Competences Review in the Transport sector), the CAA said: "overall, air transport contributes E365 billion yearly to European GDP and directly supports 5.1 million jobs. Air transport is the main vehicle for tourism in Europe, generating E900million per day and provides direct or indirect employment for 23 million people";
- In its evidence to the UK Balance of Competences Review, the British Air Transport Association said: "EU oversight over air transport has been extremely beneficial, creating a very liberalised and efficient sector in Europe, allowing the industry entry to markets in Member States and to grow across borders, delivering better and cheaper travel for the public";
- Easyjet, the world's third largest low cost carrier, said: "Easyjet is a product of the EU's deregulation of Europe's aviation market. Without deregulation, we would not exist."

2. *Summary of coverage of this presentation:*

Today's coverage is therefore:

- a) The strategic air transport vision within the EU:
- b) The rules on safety - an interface between domestic law, EU Law and International Law
- c) An Institutional snapshot: the future role of an EU agency in the safety field;
- d) The rules on security- another interface between domestic law, EU Law and International Law
- e) The Futuroscope : beyond the Great Repeal Bill : the Denied Boarding Regulation

This presentation is not a discussion of many matters that arise in a post Brexit aviation context, eg:

- How the EU and UK might agree to treat tariff free movement of aeronautical parts and equipment ;
- How the UK will need to determine urgently the future of bilateral air services agreements that the EU has concluded with third countries, most importantly the EU/US Open Skies agreement .

3. *The strategic vision : access to the liberalised aviation single market in the EU*

The EU principle of freedom of access means that every Community air carrier is entitled to operate any intra Community air services. Access to this market is permitted by a system of licensing and certification.

- A Community air carrier is defined as an air carrier with a valid operating licence. Under Regulation 3.1 of Regulation 1008/2008, no EU undertaking is permitted to carry by air passengers, mail or cargo unless they have an appropriate operating licence. To obtain one, an undertaking must meet the criteria in Chapter II
- Under Chapter II, an undertaking must be granted an operating licence by the competent licensing authority of a Member State if a number of criteria are satisfied.
- The first criterion in Regulation 4 is that its principal place of business should be located in that State.
- A second criterion in Regulation 4 is that an undertaking must hold a valid air operator certificate issued by a national authority of the same Member State whose competent licensing authority is responsible for granting , refusing, revoking or suspending the operating licence of the Community air carrier
- An air operator certificate means a certificate confirming that the operator “ has the professional ability and organisation to ensure the safety of operations specified in the certificate.” [Regulation 2.8]
- From the effective date of Brexit, subject to a transitional or permanent EU/UK agreement, a UK airline will no longer be a Community air carrier for Single Market purposes since it will not hold an operating licence as defined.

Key practical points for consideration

- (a) Revival of dormant bilateral air services agreements between the Member States and the UK to fill any gap?
- (b) Moving the principal place of business of UK carriers to one of the other 27 Member States?
- (c) Post Brexit day, the probability is that there will be continuing technical compliance with EU rules by UK carriers . So how might the framework for access to the Aviation Single Market be adjusted if, politically, the 27 wished it, eg, deeming a UK air carrier to be a Community air carrier?
- (d) Joining the European Common Aviation Area?
- (e) If an EU/UK deal is agreed, UK compliance with the EU rules will rely on the way that the *EU acquis* is incorporated into UK national law. Across all areas of regulation, Danish lawyers would be wise to keep under scrutiny the progress of the Great Repeal Bill . Remember that the Commission will no longer have a role.

4. *Aviation safety*

5. *The future role of an EU agency – the European Aviation Safety Agency*

- Major airlines operate within the EU and outside it. It is business critical to comply with both EU and International Civil Aviation Organisation (ICAO) safety standards; but if regulatory cost burdens are to be minimised by cooperative means, so much the better. So the EU and ICAO have entered into a memorandum of understanding which aims to give a framework for enhanced cooperation in aviation safety, aviation security, environmental protection and so on.
- Regulation 216-2008 confirmed the continued existence of the European Aviation Safety Agency and established the basic rules governing the operation of civil aviation in the Community.

- Article 1 provides for the application of common standards (a) to the design, production, maintenance and operation of aeronautical products, as well as to the personnel and organisations involved in the design of such products; (b) to personnel and organisations involved in operation of aircraft; (c) design, maintenance and operation of aerodromes.
- Article 2 contains important overarching principles such as establishing and maintaining a high level of aviation safety in Europe; ensuring a high level of environmental protection; facilitating the free movement of goods, persons and services; promoting cost efficiency in regulatory and certification processes; assisting Member States to fulfil their obligations under the Chicago Convention.
- The responsibility for regulatory oversight and certification processes is split between EASA and the competent authority designated by each Member State.
- Critically for businesses and passengers, there is mutual recognition of certificates. Article 11 provides that Member States must, without further technical requirements or evaluation, recognise certificates which are issued in accordance with Regulation 216-2008. Mutual recognition maintains high common standards and reduces costs

Key practical points for consideration

- (a) On Brexit day, UK air carriers are likely to be in technical compliance with EU safety rules.
- (b) Dormant bilateral air services agreements will need to be examined to check relevant coverage.
- (c) Strict position is that, absent an EU/UK agreement, certificates of safety issued by the UK CAA would cease to be valid in the Single Market on Brexit-day. Without valid safety certificates, an air operator certificate could not be issued to a UK based air carrier which seeks access to the Aviation Single Market. Equally if there is no agreement at the EU/UK level, the UK could refuse to recognise EU carriers' safety certificates. But that would be wholly implausible;
- (d) The biggest headache would be for the UK to replicate the role of EASA, not least in connection with its type approval functions.

6. *Aviation Security*

- EU Aviation standards are intended to be consistent with the Chicago Convention requirements
- On 11 March 2008, Regulation 300-2008 on Common Rules on Aviation Security was adopted. This provides for common basic standards for security at EU airports.
- Member States are entitled to adopt more stringent standards, based on a local risk assessment.

Key practical points for consideration

- (a) Aviation security should not become a pawn in a negotiating game;
- (b) Some countries have a greater security risk profile. The UK is one. If the UK imposes more stringent measures, they are capable of undermining airline schedules and adding to cost burdens.

7. *The Futuroscope: what EU rules might the UK Parliament decide to revoke or amend in a post Brexit phase? Illustrative case: Denied Boarding Regulation*

- The UK Government has said that, notwithstanding the incorporation of EU Law into domestic law, the UK Parliament will later have the right to consider whether to amend or repeal those laws after Brexit.
- Under Regulation 261-2004, the *Denied Boarding Regulation*, there is a right to compensation for cancellations or denied boarding on defined flights. There is also a right to assistance in the case of long delays to flights.
- The Regulation was opposed by air carriers because of the costs of compliance.
- In cases *C402/07 Sturgeon and C432/06 Block*, the CJEU extended the availability of compensation for passengers in a way that did some injustice to the drafting of the Regulation. This increased the costs exposure of airlines. Low cost carriers are especially at risk.
- But if the UK Government acts as it has promised, the Regulation will be duly implemented into UK national law.

Key practical points to be considered

- (a) Aspects of the Regulation are an obvious target for subsequent amendment in a deregulatory policy environment in a post-Brexit UK. Yet deregulatory measures, if out of step with the EU rules, would result in a competitive advantage for UK carriers if they had continued to enjoy access to the EU Aviation Single Market. The EU's negotiating guidelines make clear that, if a transitional agreement is reached, existing EU regulatory rules would have to continue to apply.

(b) Even if the Regulation is properly implemented into UK law, what about the incorporation of subsequent amendments to the Regulation at EU level? In this case, the Commission has in fact proposed legislative amendments to the Denied Boarding Regulation.

8 *How ends “this strange and eventful history” ?*

- Will there be a deal on UK access to the Aviation Single Market? The EU’s negotiating guidelines emphasise that nothing is agreed until everything is agreed.
- Overall, taken on a sectoral basis, it is doubtful whether the EU, even if it holds most of the cards, would want to deny continuing access. There are many significant economic interests to consider, which could be undermined by instability, such as the impact on the tourism industry.
- But there are also some Member States which may see advantage in denying access on Single Market terms to powerful UK low cost carriers if that could help to safeguard their national air carriers.
- Will either side want to stare

“Last scene of all
That ends this strange and eventful history
.....sans everything”

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