

Brexit: Aviation and Transitional Arrangements

A famous resident of Florence once observed “There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success than to take the lead in the introduction of a new order of things.” UK Prime Minister Theresa May could be forgiven if she had more than a little sympathy with that Machiavellian observation.

Finalising both the terms of the UK’s exit from the EU and the terms of the future trading relationship between the UK and the EU was always going to be difficult, if not impossible, within the two year period afforded by Article 50. In addition the EU is not legally able to sign a free trade or other agreement establishing any form of future partnership with the UK until the UK has ceased to be an EU member state. As such in her Florence speech the UK Prime Minister acknowledged that an “implementation period” of up to two years would be required during which “access to one another’s markets should continue on current terms” so that “people, businesses and public services should only have to plan for one set of changes in the relationship between the UK and the EU”.

The aviation industry has long recognised the need for a transition period. But what are the proposed terms of transition for aviation? Will the regulatory environment remain the same during the transition period or do airlines and other aerospace businesses need to plan for the transition period itself? In this article we explain the terms of transition and where areas of uncertainty persist for aviation businesses.

What are the terms of the transition period?

The proposed terms of the “implementation period” or “transition period” have now been included in the draft Withdrawal Agreement which is currently under negotiation between the UK and the EU. Pursuant to the draft Withdrawal Agreement the transition period will commence on the entry into force of the Withdrawal Agreement and will end on 31 December 2020. During that period, the UK will be subject to both existing EU law and EU law which enters into force during the transition period but the UK will not take an active role in the EU’s decision making processes including those conducted by EU agencies such as EASA.

Although during the transition period as between EU member states the UK will largely be treated as if it were still a member of the EU, the proposed transition period is not an extension of the UK’s EU membership. The UK will cease to be an EU member on 29 March 2019. This distinction is particularly significant for the aviation industry due to the industry’s reliance on international agreements entered into by the EU on behalf of its member states or which contain a so- called “EU designation clause”.

Transition and international agreements

The EU has either exclusive competency to conclude international agreements on behalf of EU member states or that competency is shared with the member states. Where competency is shared the agreements are known as “mixed agreements”. In a mixed agreement it is often difficult to determine which parts of the agreement are those where competency is shared and which parts are the subject of exclusive EU competence. Indeed the competency of the EU to take action on behalf of member states has extended over time.

It is generally accepted that where the EU has concluded an international agreement on the basis of exclusive competency then the UK will cease to benefit from that agreement when it ceases to be an EU member state. The status of mixed agreements is less clear. Although the UK may technically remain a party to the relevant agreement after Brexit (at least with regards to the parts of the agreement where the EU did not have exclusive competency), the interpretation of that agreement may preclude the UK from continuing to benefit from it – for example where the text of the agreement confers benefits on “EU member states” or includes territorial restrictions which are determined by reference to the EU.

Pursuant to the draft Withdrawal Agreement, the UK will be obliged to fulfil any obligations stemming from international agreements concluded by the EU on behalf of its member states. A footnote to the draft Withdrawal Agreement contains an agreement by the EU to notify the international counterparties to those agreements to treat the UK as if it were an EU member state during the transition period.

However ultimately whether or not the UK continues to benefit from the relevant agreement on the same terms after 29 March 2019 is up to the international counterparty. The Withdrawal Agreement cannot compel international counterparties to continue to apply the benefit of those agreements to the UK.

The Withdrawal Agreement also provides that the UK will not be able to participate in the work of any international bodies set up by international agreements concluded by the EU (whether under exclusive or mixed competency) unless the UK participates in its own right or is invited to do so as part of the EU delegation.

The Financial Times identified over 750 international agreements entered into by the EU on behalf of member states which may need to be replicated upon Brexit. These included some important agreements for the aviation industry. In terms of flying rights for example the US/EU Open Skies Agreement is a mixed agreement. Its benefits apply to “Community airlines” defined as “airlines of the European Community and its Member States”. Upon the UK ceasing to be a member of the European Union, the UK will cease to benefit from the US/EU Open Skies Agreement unless the EU and the US agree otherwise.

For aviation manufacturing, repair and safety standards, the agreement between the US and the EU on cooperation in the regulation of civil aviation safety (also known as a bilateral aviation safety agreement or “BASA”) is key. In general terms this agreement facilitates recognition as between EASA and the FAA of each other’s certification and approval processes thus negating a requirement for relevant products and processes to undergo dual certification or inspection. The loss of the benefit of the EU/US BASA would mean for example that the FAA would not be able to rely on UK CAA conducted inspections of FAA licensed repair stations in the UK. As such FAA inspectors would need to have direct oversight of these facilities and then subsequent CAA approval would be required to permit such activities.

Some commentators have indicated that the mutual recognition afforded by the EU/USA BASA could be preserved if the UK maintains membership of EASA. The UK will cease to be a member of EASA when it leaves the EU as full membership is only open to EU member states. However during the transition period and pursuant to the provisions of the draft Withdrawal Agreement it is likely to be treated from an EU perspective as if it were a member but without the ability to participate in any decision making process. In theory the UK could apply for some kind of associate membership status once it ceases to be an EU member state. Indeed the Prime Minister announced that the UK would be seeking some kind of associate membership of EASA in her speech of 2 March 2018. Participation in EASA is open to European third countries (i.e. countries which are not members of the EU) pursuant to Article 66 of the Basic Regulation. The UK fulfils one of the criteria for third country participation in EASA in that it is a party to the Chicago Convention. However Article 66 of the Basic Regulation would also require the UK to apply relevant EU aviation law which may be more problematic politically given that such a commitment would need to extend beyond the end of the transition period.

Yet deemed or actual associate membership of EASA during transition will not, of itself, allow the UK to retain the benefit of the UK/US BASA. The BASA is between the EU and the USA. It refers in a number of places to things being done in EU territory which will cease to include the UK on 29 March 2019. To preserve the status quo during transition, the USA will need to agree that it will treat the UK as if it were still an EU member state. Ultimately the USA and the UK will need to conclude a separate BASA or to update the old bilateral US/UK aviation safety agreement in order to preserve the existing regime during the transition period and beyond. Continued UK participation in EASA will help to facilitate this but does not obviate the need for such a separate agreement between the US and the UK to be concluded.

Clearly there will be a need for the UK to negotiate agreements with international counterparties to replace those from which it currently benefits as an EU member state. However pursuant to the Withdrawal Agreement, although the UK would be able to negotiate, sign and ratify its own international agreements during transition, in areas where the EU would have exclusive competence the international agreement could not become effective during the transition period without EU consent. The negotiation of international agreements in the field of transport is generally understood to be an area of mixed competency as it is expressly excluded from the common commercial policy by virtue of Article 207(5) of the Treaty on European Union. However in the recent decision of the Court

of Justice of the European Union (CJEU) on the EU/Singapore free trade agreement, a distinction was drawn by the CJEU between agreements which are “inherently linked to the physical act of moving persons or goods from one place to another” and those which relate to other services such as maintenance and repair. The CJEU found that international agreements relating to the latter would fall under the common commercial policy and thus would fall within the exclusive competence of the EU. Arguably a replacement for BASA would therefore require EU consent if it were to come into effect during transition. Given the desire for a smooth and orderly exit, it is to be hoped that obtaining such consent would not be problematic.

Transition and the EU (Withdrawal) Bill

In addition it will be necessary for the aviation industry to monitor how the terms of the Withdrawal Agreement are implemented within English law so as to preserve legal certainty and to understand the new UK regulatory environment for aviation.

The European Communities Act 1972 is the statute which gives effect to the EU treaties within the UK. At present the UK Government plans to pass an EU (Withdrawal) Bill pursuant to which the European Communities Act 1972 would be repealed upon Brexit. At the same time it plans to transpose into UK law, the then existing body of EU law, the EU “acquis”, the idea being that the UK will, over time decide what to amend, retain or replace. The transposition envisaged by the EU (Withdrawal) Bill would result in the UK mirroring EU law on day one of Brexit but this is not the same as the UK actually applying EU law after Brexit. For example references to EU agencies and institutions may need to be replaced with references to domestic UK agencies and institutions and it is proposed that the Court of Justice of the European Union will cease to have jurisdiction in the UK.

However the notion of the EU (Withdrawal) Bill is at odds with the idea in the draft Withdrawal Agreement that the UK will remain subject to the EU acquis during the transition period. The Withdrawal Agreement envisages that during the transition period the UK will remain subject to EU law as it is now and as enacted or implemented during the transition period – references to EU institutions and agencies will remain exactly that and the UK will remain subject to the jurisdiction of the Court of Justice of the European Union.

The UK Government has announced that the Withdrawal Agreement will be given effect to by an EU Withdrawal and Implementation Bill however this has not yet been published and there has been little discussion to date of how the EU Withdrawal and Implementation Bill and the EU Withdrawal Bill will inter-relate. For example given the continued application of current and future EU law during the transition period, will the transposition of EU law into UK law as envisaged by the EU Withdrawal Bill need to occur at the end of the transition period rather than on 29 March 2019?

Is transition agreed?

A transition period makes sense while the terms of the future trading relationship between the EU and UK are established. It is also a positive step that the terms of transition in the draft Withdrawal Agreement are largely finalised. However it is important to bear in mind that the terms of transition are part of a broader negotiation of the draft Withdrawal Agreement. While other points in the draft Withdrawal Agreement remain unresolved then there is no certainty as to whether a transition period will be agreed however it is to be hoped that pragmatism will win over politics.

How should aviation businesses prepare for transition?

The old adage “hope for the best, plan for the worst” applies to transition as much as it applies to the consequences of Brexit as a whole. We would recommend that aviation businesses consider the following:

- To the extent that UK aviation businesses rely on rights derived from international agreements entered into by the EU on behalf of member states or on EU designation clauses contained in air services agreements entered into by other EU member states, aviation businesses should seek answers from the UK government as to whether relevant international counterparties have agreed that the benefits under those agreements will continue to apply to the UK during

the transition period. Similar enquiries should be made to the governments of those international counterparties where relevant contacts exist.

- UK aviation businesses will need to consider how they can best position themselves to influence the development of EU regulation and decision making after Brexit including within agencies such as EASA given that the UK will cease to have any direct participation in those organisations from 29 March 2019.
- UK aviation businesses should continue to make the case for participation by the UK in EASA. Clearly current efforts to persuade the UK government of this necessity have been successful bearing in mind that EASA membership was mentioned specifically by the Prime Minister in her 2 March 2018 speech. However given the criteria for third country participation it is likely that the case will continue to need to be made politically.
- UK aviation businesses will need to monitor the proposed transposition of EU law into UK law and how this relates to the terms of the Withdrawal Agreement. This will be key to understanding the regulatory environment for aviation in the UK after Brexit.

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