

# Brexit and the aviation industry

## *Up in the air?*

The aviation sector is crucial to the UK economy. The UK government has said it wants to work with industry to ensure the sector remains “prosperous and open for business” post-Brexit. It seems likely that there will be some trade-off between national sovereignty and access to the EU single aviation market, but the extent of this remains to be seen. We discuss some of the key high-level issues and raise questions that policymakers in the UK will need to address in reaching any agreement with the EU.

### Competition between airlines

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#### Traffic rights within and outside the EU

Within the EU:

- Retaining membership of the European Common Aviation Area (ECAA) would ensure continued unrestricted access to all EU destinations. It is not clear at this stage, however, what form UK membership would take, as the ECAA Agreement does not make provision for a change of status of an EU Member State party.
- Leaving the ECAA behind would require the UK to enter into a new bilateral deal with the EU (in theory the UK could enter agreements with individual Member States, although this is unlikely). Switzerland is not a member of the ECAA, but has a separate bilateral agreement with the EU, which gives it access to the EU aviation market. Whether a new bilateral agreement would include the right to fly domestically within an EU Member State is not certain.

Outside the EU:

- If the UK retains membership of the ECAA, the UK may be able to retain access to 17 non-European countries with which the EU already has agreements, including the US. ECAA members Norway and Iceland are both parties to the EU-US Open Skies Agreement, despite not being EU Member States.
- Leaving the ECAA would entail signing new bilateral deals, including open skies agreements, with third (i.e. non-EU) countries, or relying on historic agreements which may no longer be suitable. Transitional arrangements may be put in place due to time constraints (also for any EU-UK agreement).

#### Key government considerations:

- **Less “hard Brexit”:** whether the UK government is willing to accept some, or all, of the EU aviation rules in exchange for entering into an agreement with the EU.

Relevant considerations will include: free movement of people, non-discrimination, market access, air traffic management, aviation safety, and rules on competition and state aid.

- **Political considerations:** whether the UK will be held to ransom by any parties to the ECAA Agreement. In order to join the ECAA, the UK requires the consent of the current signatories. Political considerations may come into play here – for instance, some European countries may use this opportunity to seek to promote their low-cost airlines at the expense of UK-based ones.
- **Timing:** whether there is sufficient time for the UK to reach agreement on a new bilateral agreement, including with the US. Agreeing new bilateral deals, including open skies agreements, will be contentious and time-consuming. The Swiss bilateral agreement, for example, took seven years to be negotiated, as did the EU-US Open Skies Agreement (stage one took more than four years to be negotiated, while the second stage took a further two years of negotiations).
- **Protectionism:** whether third countries will try to take a protectionist approach, for example limiting flying rights to certain national carriers. The UK government may consider preventing EU carriers from operating intra-UK flights.
- **Heathrow:** whether Heathrow will prove to be a jewel in the crown. In the EU-US Open Skies negotiations, Heathrow access rights were heavily negotiated with accusations by British Airways that the US required maximum access to Heathrow, but fought to restrict access to US airports by EU airlines. Will this remain the case for UK bilateral negotiations? It may be that in the context of agreeing a new trade deal, third countries seek to obtain additional airport slots.

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## Airline ownership

- EU nationality airline ownership rules require airlines to be majority owned and controlled by EU nationals so they can offer flights within the EU.
- If the UK signs up to the ECAA, it must continue to comply with the EU ownership and control arrangements.
- If the UK decides to adopt different ownership rules, it could take this opportunity to relax the current ownership rules to allow foreign non-EU investment into the UK aviation market. Alternatively, the UK may decide to legislate for UK ownership and control, although this seems unlikely at this stage.



### Key government considerations:

- **Foreign investment:** whether the UK government will use this opportunity to make the domestic aviation market more competitive by allowing foreign investment, or adopt a more protectionist approach. The latter may push EU-owned airlines to establish UK subsidiaries. Conversely, UK-owned airlines operating in the EU may move to alternative headquarters outside the UK, or expand in the EU post-Brexit by setting up subsidiaries with an EU air operator's certificate (AOC).
- **Discrimination:** whether the UK government will impose different requirements for non-UK companies operating in the UK.
- **Airline restructuring:** whether airlines will need to restructure as a result of any changes that are proposed by the UK government and whether any weight will be given to lobbying by airlines. Airlines may consider, for example, changes to their AOC, articles of association and/or headquarters. Operational restructuring may lead to job losses in the UK.

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## EU slot rules

- Current EU slot rules state that 50 per cent of new slots are to be allocated to new competitors at a particular airport.
- If the UK signs up to the ECAA it will have to abide by EU slot rules, unless negotiated otherwise.
- If the UK forgoes the ECAA, it could introduce a UK-based slot regime whereby slots are auctioned by either the airport operator or the government.

### Key government considerations:

- **"Use-it-or-lose-it":** whether, if the UK introduces a UK-based regime, the government considers imposing "use-it-or-lose-it" rules, or sanctions for slot misuse.
- **Slot trading:** whether the UK government addresses the secondary market for the trading of slots.
- **Negotiating tool:** whether the UK government will be able to use slots at UK airports to gain traction in its negotiations with third countries.

## Safety and security

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### European Aviation Safety Agency (EASA)

- EASA is tasked with aviation safety regulation within the EU, of which the UK is currently an influential member (on the Membership Board). As with consumer protection (see below), if the UK remains in the ECAA, the EU will require compliance with EASA regulations, unless negotiated otherwise. Iceland, Liechtenstein, Switzerland and Norway are non-EU members of EASA, although they do not have voting rights.
- In the event the UK forgoes this membership option, it would be for the Civil Aviation Authority to seek to develop a new international aviation safety system and/or to exert influence via the International Civil Aviation Organisation (ICAO).

- **Limited influence:** whether the UK government will be able to negotiate different EASA membership terms. Historically, non-EU members have had to accept restrictions on voting rights and influence.



### Key government considerations:

- **Free movement:** whether the UK will accept full or partial free movement of people.

## Consumer and environmental protection

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### Consumer protection

- EU consumer protection rules give passengers rights to compensation, refund and care in the event of delayed or cancelled flights. If the UK remains in the ECAA, the EU will require compliance with these rules, unless negotiated otherwise.
- Alternatively, the UK could develop a new set of national standards, although it is unlikely that these would be substantially different from the current rules.

### Key government considerations:

- **Limiting liability:** whether the UK will limit the liability of airlines where delay or cancellation is due to extraordinary circumstances beyond the control of an airline.

### Environment

- The current EU laws cover noise emissions and air quality standards.
- If the UK remains in the ECAA, it must continue to comply with certain EU environmental provisions, including on noise emissions, unless negotiated otherwise.
- The alternative would be for the UK to comply with the environmental protection measures enshrined in national legislation. It is unlikely that domestic legislation would differ markedly from the current position under EU law, but it is possible that the UK

may introduce further protection, for example as a condition of developing the proposed new runway at Heathrow.

- In relation to emissions, ICAO recently passed an assembly resolution introducing the first global market based measure for CO<sub>2</sub> emissions. Whilst the EU has questioned how effective the measure will be in combating climate change, it would be open to the UK post-Brexit to adopt the ICAO measure.

### Key government considerations:

- **Emissions trading:** whether the UK adopts the Global Market Based Measure independent of the EU.

### Further considerations

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- **The future of Heathrow:** under the EU-US Open Skies Agreement, any US airline may compete for access to Heathrow. This has led to Heathrow becoming more specialised in the US-Europe market. While a new bilateral agreement is negotiated, would the UK and US revert to their previous agreement restricting US-Heathrow access to four airlines? Or is Heathrow's role as one of the world's best-connected hub airports less significant now than it was previously, given the expansion of other hubs, the delay on the proposed third runway at Heathrow and, possibly, changes in passenger numbers?
- **Political considerations:** It is not clear at this early stage whether any future EU-UK agreement granting the UK access to the EU's single aviation market would apply to the airport of Gibraltar, given that both the UK and Spain claim legal rights to the territory. This has the potential to give rise to difficulties where unanimous support of all the EU Member States is required for such an agreement.
- **State aid:** the UK will no longer be bound, or protected, by EU restrictions on state aid to national air industries. However, EU Regulation 868/2004, which has not to date been relied on by Member States, allows an action to be brought against a third country that unfairly subsidises its airlines. In addition, WTO limitations on subsidies will continue to apply.

- **UK Great Repeal Bill:** there is uncertainty over whether all EU law will be transposed into UK national law, ready for the day when the UK leaves the EU. It is also not clear what, if any, changes will be made by the UK government to EU aviation legislation before, or after, the Bill is passed by Parliament – this will depend on the progress and extent of the UK's negotiations with the EU.
- **EU's Aviation Strategy for Europe:** Brexit has already disrupted discussions on future legislation under the EU Aviation Strategy. But what will be its long-term effects?
- **An all-encompassing free trade agreement:** any EU-UK aviation agreement may form part of a suite of free trade arrangements and therefore be the subject of wider negotiation.



## Contacts

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**Richard Barham**

Partner

D +44 20 7246 7109

[richard.barham@dentons.com](mailto:richard.barham@dentons.com)



**Rebecca Owen-Howes**

Managing Associate

D +44 20 7246 7523

[rebecca.owen-howes@dentons.com](mailto:rebecca.owen-howes@dentons.com)