FIN BB FIDE FUNDACION – BREXIT AND AVIATION – AN ILLUSTRATIVE EXAMPLE OF A POST-TRANSITION FUTURE

5 JUNE 2018

Brexit, the EU and aviation - "Up, up and away in my beautiful balloon"; or not? A song by Fifth Dimension. Photograph by Christopher Muttukumaru, Canberra, 2014.

This presentation was the second Brexit-related presentation made at a seminar on 5 June 2018 at the FIDE Fundación. Its purpose was summarised in a Handout used by attendees [link to Aviation and Brexit handout is here] The presentation was an illustrative analysis of how Brexit might affect future UK access to the Aviation Single Market. It is not a comprehensive survey. This presentation does not repeat points made in the first presentation on 5 June covering aspects of the draft EU/UK Withdrawal Agreement [a link to that presentation is here]

A HOW IMPORTANT IS THE AVIATION SECTOR TO THE UK AND EU? WHAT IS THE ILLUSTRATIVE POLICY CONTEXT?

1. The Aviation sector is a significant contributor to economic growth, both in the UK and the EU27.
2. On 17 December 2017, the UK Parliament's Select Committee on Exiting the EU (House of Commons) published a report on Aviation post Brexit. Points made to the Committee included:
   - Aviation is a significant services sector in the UK, contributing some £22 billion to the UK economy in 2015. Specifically, aviation is an economic enabler. The tourism industry and business travel are facilitated by aviation. 73% of visitors to the UK arrive by air. 61 % of that number arrive from the EU27. Of the ten countries whose residents visited the UK most often in 2016, eight out of the top 10 were residents of EU countries.
   - As one of the four major hub airports, Heathrow Airport is often used as an entry point by North American visitors, who then transfer to EU destinations. Passengers flying from the UK to the EU27 in 2016 numbered 53 million trips (75% of all trips abroad). Spain is still the most visited destination in the EU27 (14.7 million visits in 2016). UK outbound passengers' spending in the EU27 amounted to £25.4 billion.
   - Overall, UK passengers account for about 33% of intra EU aviation numbers.

- Spain's business interests in the transport sector in the UK are significant. The creation of International Airlines Group (which owns Iberia, British Airways and Aer Lingus) is a sign of the value and potential of the aviation sector. Ferrovial's ownership of Heathrow and of several other airports in the UK is a further sign of the value of the sector. The recent appointment of a consortium comprising Keolis and Amey (Ferrovial) to run the railways in Wales are a third indicator of the strong Spanish transport stake in the UK economy.

The days of Iberia challenging the UK Secretary of State for Transport in the UK courts (1984) are long gone. It is in the interests of the UK and the EU27 to reach agreement on a post-Brexit future in the aviation sector.

3. For today's purposes, my aim is to use aviation as an illustrative case to show how the future might be shaped; how the negotiating battle lines have been drawn in a legal context; what solutions there are; and whether those solutions can be reconciled with some of the UK's and EU's red lines. In particular, the UK's insistence (a) on regulatory autonomy in the long term and (b) on rejecting the role of the Court of Justice in relation to interpretation of common rules governing the Aviation Single Market, seems to amount to a major stumbling block. This presentation does not cover export or import of goods, such as aeronautical parts.

B WHAT DOES THE STATUS QUO IN THE LIBERALISED AVIATION SINGLE MARKET IN THE EU MEAN TODAY? WHAT WILL HAPPEN IN THE TRANSITION PERIOD?

4. The aviation sector encompasses many of the generic issues that will arise in the negotiations on future UK access to the Single Market. It is a liberalised market, based on common standards and on mutual recognition of national certification and permissions; a single market that allows any EU air carrier to operate within the Single Market; a system which enables air carriers to fly to Third Countries on the strength of treaty rights that the EU is able to deliver on behalf of 28 Member States; a sector where an EU agency performs a critical safety function which it would not be sensible or economical to replicate, country by country; a system which enables the Member States, through EU regulatory compliance, to comply with their obligations under the Chicago Convention.
5. ***What is the current basic legal framework for operating air services in the EU*****? The** EU principle of freedom of access means that every Community air carrier, as defined, is entitled to operate intra Community air services. Member States cannot subject the operation of intra-Community air services by a Community air carrier to an additional permit or authorisation.
6. Access to this market is governed by an EU system of licensing and certification of Community air carriers (*Council Regulation 1008/2008*):
    - A Community air carrier is defined as an air carrier with a valid operating licence.
    - No EU undertaking is permitted to carry by air passengers, mail or cargo unless they hold an appropriate operating licence. To obtain one, an undertaking must meet specified criteria;
    - An undertaking must be granted an operating licence by the competent licensing authority of a Member State if the criteria in Regulation 4 are satisfied.;

- The first criterion in Regulation 4 is that the undertaking's principal place of business must be located in that Member State.
- The 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 or suspending the operating licence of the Community air carrier.
- An air operator certificate means a certificate that the operator has "the professional ability and organisation to ensure the safety of operations specified in the certificate".
- A third criterion is that Member States and/or nationals of Member States must own more than 50% of the undertaking and effectively control it, whether directly or indirectly through an intermediary undertaking.
- Therefore, unless an EU/UK Withdrawal Agreement, including a transition period, is concluded (see associated presentation on 5 June), the UK would cease to be a Member State under the Regulation on exit day and its air carriers could no longer benefit from access to the Aviation Single Market.

7. ***What will happen in the transition period if the draft EU/UK Withdrawal Agreement is adopted as drafted?*** If the provisions on a transition period in the draft Withdrawal Agreement are fully agreed and adopted, the status quo would be preserved until 31 December 2020. It must be remembered that the UK starts from a standpoint of full compliance with the Single Market rules.
8. Under the Withdrawal Agreement, how would the status quo work?
    - The UK would accept the continued application of EU law. That would produce "the same legal effects as those which it produces within the Union and its Member States…"(Article 122(1) and (3)).
    - Under Article 122(6), the UK would be treated as a Member State which would also solve the need for separate compliance with ownership and control restrictions.
    - The UK would adhere to harmonised safety, security and consumer protection standards. The UK would also be bound by rules (a) on social issues such as workers' rights and (b) on ensuring a level playing field, such as environmental standards;
    - The UK would also be subject to competition law and state aid control;
    - The UK would be subject to CJEU jurisdiction;
    - The UK would need to comply with European Aviation Safety Agency (EASA) standards;
    - Accordingly, air traffic rights would be preserved (that is, full market access rights, including flying rights across borders up to 9th Freedom).

C WHAT WILL HAPPEN AFTER THE TRANSITION PERIOD ENDS ON 31 DECEMBER 2019?

9. ***EU position.*** In the Council's Guidelines for negotiators of 23 March 2018, the Council noted the UK's (then) position that it wished to be outside the Single Market and Customs Union. It repeated that there could be no cherry picking through participation in the Single Market on a sector-by-sector basis. But the Council confirmed its readiness to work towards an ambitious free trade agreement. Specifically, three points were important to note:

- In terms of socio economic cooperation, “the following could be envisaged: (i) regarding transport services, the aim should be to ensure continued connectivity between the UK and the EU …This could be achieved, inter alia, through an air transport agreement, combined with aviation safety and security agreements, as well as agreement on other modes of transport, while ensuring a strong level playing field in highly competitive sectors”;
- Moreover, “the aim should be to prevent unfair competitive advantage that the UK could enjoy through undercutting of levels of protection with respect to, inter alia, competition and state aid, tax, environmental and regulatory measures and practices. This will require a combination of substantive rules aligned with EU and international standards, adequate mechanisms to ensure effective implementation domestically, enforcement and dispute settlement mechanisms in the agreement as well as Union autonomous remedies that are all commensurate with the depth and breadth of the EU-UK connectedness”.
- The “governance of our future relationship with the UK will have to address …supervision, dispute settlement and enforcement…Designing the overall governance of the future relationship will require to take into account: (i) the content and depth of the future relationship; (ii) the necessity to ensure effectiveness and legal certainty; and (iii) the requirements of the autonomy of the EU legal order, notably as developed in the jurisprudence.”
- In summary, the EU has recognised the importance of the need to reach agreement on future aviation arrangements, short of full access to the Aviation Single Market, so long as regulatory standards are met and so long as cross-cutting rules to ensure a level playing field are honoured. The greater the access that is requested by the UK and the deeper the future EU-UK relationship, the more likely it is that the EU will demand a role for the CJEU to preserve legal certainty and the autonomy of the EU legal order.

10. ***UK position.*** In her speech on 2 March 2018, the UK Prime Minister said:
    - In facing up to “hard facts”, she repeated that, in leaving the EU, the EU treaties and EU law (save as replicated in UK domestic law) would no longer apply in the UK. The jurisdiction of the ECJ “must end” and she added “that the ultimate arbiter of disputes about our future partnership cannot be the court of either party”.
    - Yet, oddly, there was an acceptance that “if we agree to participate in an EU agency, the UK would have to accept the remit of the ECJ in that regard”. It is not obvious what distinction is in principle being drawn. In an aviation context, it seems that the UK would want to explore the terms on which the UK could remain as part of the EASA.
    - “we recognise that certain aspects of trade in services are intrinsically linked to the single market and therefore our market access in these areas will need to be different.”;
    - “on transport, we will want to ensure the continuity of air, maritime and rail services; and we will want to protect the rights of road hauliers to access the EU market and vice versa”;

- Another hard fact was this: "If we want good access to each other's markets, it has to be on fair terms. As with any trade agreement, we must accept the need for binding commitments – for example, we may choose to commit some areas of our regulations like state aid and competition to remain in step with the EU's. …..And in other areas like workers' right or the environment, the EU should be confident that we will not engage in a race to the bottom in the standards and protections that we set."
- In summary, there are many common features between the two sides. But (and it is a big "but") consistently with its red line on legislative sovereignty, the UK (even in areas where it wishes to have the fullest possible access to a market) would in future have the right to choose not to follow the EU's rules. This is made very clear in the section of the UK Prime Minister's speech on free movement of goods – "If the Parliament of the day decided not to achieve the same outcomes as EU law, it would be in the knowledge that there may be consequences for our market access". Moreover, again consistently with its red line on judicial independence, the UK courts would be the final arbiter, subject to any joint committee system that might be set up. There would be a discretion, not an obligation, to follow CJEU jurisprudence.

D THE CHOICES FOR PASSENGER AIR SERVICES

WOULD MEMBERSHIP OF THE EUROPEAN COMMON AVIATION AREA (ECAA) BE AN ANSWER TO ALLOWING UK ACCESS TO THE AVIAITON SINGLE MARKET?

11. Both sides are likely to see advantages in a steady and stable transfer to a new model. The UK has already set its face against EEA membership and so this presentation does not cover that option.
12. The UK is a member of the separate European Common Aviation Area (ECAA). For EU Member States, this has effect by virtue of a multilateral agreement between the European Community and the counterparties; that agreement is in turn adopted by the Member States through an intergovernmental decision. Its membership comprises the EU Member States, the Baltic states, as well as Iceland, Norway and Liechtenstein.
13. The ECAA would provide the most comprehensive access to the Aviation Single Market, with little change. But it would require adherence to the whole of the *EU Aviation acquis*, including horizontal rules on competition and state aid. By virtue of Article 16 of the ECAA Agreement, the provisions of the ECAA, where they are substantively identical with the rules under the EC Treaty, must be interpreted in conformity with the relevant rulings of the CJEU and the Commission. There is power for the national courts to refer a question of interpretation to the CJEU. A Joint Committee is established to ensure the proper administration of the agreement and to ensure its proper implementation. Disputes between the parties are referred to the Joint Committee (article 20) and, in certain circumstances, such as a failure to resolve the issues, the parties may themselves refer the case to the CJEU (article 20(3)).
14. So, having regard to the UK's red lines, it is assumed that the ECAA model would not be acceptable to the UK Government (and it would not be compatible with the European Union Withdrawal Bill, as enacted).

E WHAT COULD A BESPOKE AIR TRANSPORT AGREEMENT COVER?

15. The UK is in a different position to any other Third Country since it starts with a fully aligned regulatory framework. But the Member States will undoubtedly wish to assert their long-held view that, absent membership of the Aviation Single Market and continued adherence to all its rules, the UK can no longer expect the same benefits.
16. There will be serious questions about market access. First each Member State will have its own views about exploiting the opportunities that Brexit brings to their nationals. Spain will take the view that, in the light of the strong interest in supporting IAG and the partnership with British Airways, British owned airlines should continue to have extensive access to the EU market. But other Member States with strong aviation sectors, including those with powerful airlines (Lufthansa Group or KLM/Air France) and with international hub airports (Paris, Frankfurt, Amsterdam) may think differently. That said, the EU hub airports have faced considerable competition from Middle East hubs in recent years. There are advantages in the status quo since the airports do benefit from one another.
17. There will be a balance to strike on market access especially if the UK chooses to preserve its own regulatory framework and if it refuses to accept the jurisdiction of the CJEU which presently brings legal certainty to the interpretation of the *Aviation acquis*.
18. In such a scenario, the strong probability is that UK air carriers will continue to enjoy no more than Third and Fourth Freedom flying rights [link to Aviation and Brexit Handout *here* where the Freedoms of the Air are explained]. But there will be serious questions about the future availability of Fifth Freedom (the right for a UK airline (and vice versa) to take passengers from the UK to an EU Member State A; then to pick up and carry passengers to another EU Member State B (or to a Third country) and more liberal traffic rights to UK air carriers.

F WHAT WOULD HAPPEN TO FLYING RIGHTS TO THIRD COUNTRIES?

19. The UK has bilateral Air Services Agreements with 111 countries, including Brazil, Russia, India and China. But access to some international destinations relies on membership of the EU. In total, this accounts for access to 44 markets in the EU and in Third countries. This includes the USA and Canada. Together they account for 85% of the movements to and from the UK airports (*source: UK Government submission to the House of Commons Exiting the EU Committee*).
20. Compliance with international regulatory standards set by ICAO is unlikely to be a stumbling block. The UK is a member of ICAO's Governing Committee. If the UK is in compliance with EU standards, which are expressly intended to ensure that EU air carriers are in compliance with ICAO standards, then there is likely to be alignment with ICAO requirements. The real question is whether the UK, acting alone, has the negotiating muscle to preserve the status quo, agreement by agreement, with Third Country counterparties.
21. In the transition period, the EU has sought to protect the UK's rights under existing arrangements with Third Countries. The key provision is Article 124(1) of the draft WA which provides: "…during the transition period, the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union or by a Member State acting on its behalf, or by the Union and its Member States acting jointly…"In a footnote it is stated that: "the Union will notify the other parties to these agreements that

during the transition period, the United Kingdom is to be treated as a Member State for the purposes of these agreements". The legal force of the footnote is unclear since much will depend on the terms of any such international agreement as to whether a unilateral statement is sufficient. But Article 124(2) makes clear that UK representatives may not participate in the work of any bodies set up under these international agreements unless the UK is able to participate in its own right or unless the Union exceptionally invites the UK to attend meetings where it is in the Union's interests to do so.

22. Importantly, under Article 124(4), the UK may negotiate, sign and ratify international agreements entered into in its own capacity in the areas of exclusive EU competence, provided that the agreements do not enter into force or apply within the transition period – unless authorised by the EU.

G WHAT IS THE POST TRANSITION FUTURE OF THE SAFETY ROLES PERFORMED BY THE EUROPEAN AVIATION SAFETY AGENCY FOR THE MEMBER STATES?

23. EASA performs a pivotal function in setting aviation safety standards and in their enforcement. The strategy of EASA is to lay down, in line with the standards and recommended practices of the Chicago Convention, essential requirements applicable to aeronautical products, parts and appliances; to persons and organisations involved in the operation of aircraft; and to persons and products involved in the training and medical examination of pilots.
24. The rules are elaborated in *Council Regulation 216/2008*. The rules are based on recommendations by EASA to the Commission and the Member States. The Commission then proposes a legislative measure to give effect to the recommendations.
25. Member States must designate a competent authority to perform the enforcement role that is conferred by the Regulation in respect of the person and organisations which are covered by the Regulation. The UK Civil Aviation Authority is the designated authority in the UK. The rules cover compliance with rules on airworthiness of commercial aircraft; on environmental protection; on pilots, including pilot licensing; on air operations; on aerodromes; on air traffic controllers. Critically, under Article 11, Member States must recognise – without further technical requirements or evaluation – safety certificates issued in accordance with the Regulation.
26. Crucially, while many functions are assigned to the designated authorities, EASA itself performs certain functions such as type approval of aircraft.
27. The result is a significant cost saving to the aviation sector since, for example, there is no need for double certification.
28. At present, the CAA does not have sufficient expertise to perform the functions which EASA does. This is partly because the national experts moved to EASA in Cologne after the need for national expertise diminished. So, it is not surprising that the UK Prime Minister has signalled that the UK would prefer to explore the terms on which the UK might remain "part" of EASA.
29. In its slides (*TF50 website*) for a workshop on Brexit and Aviation on 17 January 2018, the Commission seemed to be taking the view that "UK membership of EASA is not possible". Instead the Commission seemed to be working on the assumption that there would need to be administrative arrangements to facilitate the acceptance of EU and UK products. Mutual

recognition was not possible unless there could be a promise of continued alignment of regulatory requirements.

30. The Commission may be right. Under Article 66 of *Regulation 216/2008,* "the agency is open to the participation of European third countries which are contracting parties to the Chicago Convention" and "which have entered into arrangements with the [EU] whereby they adopted and apply [EU] law in the field covered by this Regulation and its implementing rules". Moreover, actions may be brought in the CJEU for annulment of acts of EASA which are legally binding on third parties. Direct actions may also be brought in the CJEU by Member States and the institutions. Since the UK has aid that it will not accept membership of the Single Market, will it instead commit itself to compliance with the rules, sector by sector? As for CJEU jurisdiction, the UK Prime Minister has left the door open in an EASA context. Will that satisfy the EU which has said that it will not tolerate cherry picking?
31. As a non-EU participant in EASA, the UK would no longer have a role in setting EU standards even though it is widely recognised as being a leading member of ICAO (and a member of its governing council).
32. There is no alternative to a viable safety certification system. In practice, there is no economical alternative to the role that EASA performs.

H WHAT IS THE POST TRANSITION FUTURE FOR AVIATION SECURITY?

33. EU aviation standards are intended to be consistent with Chicago Convention requirements. On 11 March 2008, *Regulation 300/2008* on Common Rules on Aviation Security were adopted. The rules provide for common basic standards for security at EU airports. But Member States are entitled to adopt more stringent standards, based on a local risk assessment.
34. Some countries have a greater risk profile than others. The UK is one. It is unlikely that the UK would adopt less stringent security measures than the EU in a post-Brexit environment. So, almost paradoxically, the issue would not be a race to the bottom by relaxing security regulation. The real question is whether, if the UK decided not to align itself with EU requirements in a post transition future, it might impose higher security standards and whether that would result in disproportionate cost burdens on non-UK air carriers.

I IS THE UK LIKELY TO DEREGULATE IN THE AVIATION SECTOR AFTER THE END OF THE TRANSITION PERIOD?

35. There is little doubt that some UK Cabinet Ministers regard future deregulation as an advantage of Brexit. By bringing back legislative autonomy to the UK Parliament, the UK would (it is argued) be able to drive economic growth, unfettered by EU rules. Thus:
    - Rt Hon Michael Gove (Secretary of State for the Environment, Food and Rural Affairs) on 9 December 2017 (Daily Telegraph): "after the end of the transitional period, … [the UK] will have full freedom to diverge from EU law on the Single Market and Customs Union";
    - Rt Hon Boris Johnson (Foreign Secretary) on 14 February 2018: "It is only by taking back control of our laws that UK firms and entrepreneurs will have the freedom to innovate without the risk of having to comply with some directive devised by

> Brussels, at the urgings of some lobby group, with the specific aim of holding back a UK competitor….In a world that demands flexibility and agility, we should be thinking not of EU standards but global standards, and a regulatory framework to suit the particular needs of the UK….”

36. In the Aviation sector, deregulation of (say) environmental rights or consumer protection rights would be a high-risk strategy if the UK wanted to enjoy continued access to the Aviation Single Market. The EU has consistently said that access to EU markets must be on the basis of a level playing field.
37. But if the UK were to decide to deregulate in the Aviation sector, what subjects might be liable to deregulation? Relaxation of environmental rules would be an obvious, but complex, example, although UK Ministers deny that they would seek to lower environmental standards. But illustratively, take the simpler example of the *Denied Boarding Regulation (Regulation 261-2004)(DBR).* This is a consumer protection measure. The UK Government opposed its adoption by the EU on the ground that it would impose unacceptable cost burdens on air carriers.
38. Under the *DBR*, there is a right to compensation for cancellations or for denied boarding on defined flights. There is also a right to assistance for long delays to flights. It supported a number of challenges to its legality in the CJEU. In cases *C402/07 Sturgeon* and *C432/06 Block*, the CJEU extended the availability of compensation for passengers in a way that was considered to be incompatible with the drafting of the regulation, both by equating the right to compensation for flight delays in excess of three hours with a cancellation of a flight; and by limiting the derogation for delays occasioned by extraordinary circumstances. As a result, the costs exposure of air carriers was broadened.
39. The *DBR* will be duly converted into UK national law by the EUWB. But if, in a post transition period, UK Ministers wished to relax the rules on compensation for denied boarding or cancellation, they could do so, save for UK carrier flights which were departing from an airport within the EU. That would undermine the level playing field that the EU demands.
40. A deregulatory approach would be consistent with the aim of bringing back legislative control. But it could cost the UK aviation sector the loss of (or diminution of) rights of access to the Aviation Single Market.
41. The politics are outside the scope of this presentation. But the question of CJEU jurisdiction is a central issue and it has a policy and legal policy aspect. It has never been clear why the UK is against a system under which a single appellate court, such as the CJEU, should not interpret the meaning of common aviation rules for the EU27 and for the UK in a post Brexit world. If the UK Prime Minister concedes CJEU jurisdiction for EASA cases, what is the objection elsewhere? Indeed, in my view, it is the obvious way in which consistency of judicial approach and legal certainty can be safeguarded.
42. The question of denying the judicial supremacy of the CJEU has become a symbolic political issue. But the argument makes little sense. As Dominic Grieve QC, MP, a former UK Attorney General and a senior Conservative MP has said: “[The Brexiteers’] objection to the Court of Justice, this hated supra-national tribunal, is …. irrational. …The world is full of international tribunals arbitrating the interpretation of international agreements. I think we’re subject to about 800 of them, apart from the ECJ. But we don’t get heated up about them. So why do we get heated up about the ECJ?”. I agree. The UK’s red line on the future competence of the CJEU, not least in respect of interpretation of the rules governing the Aviation Single

Market, could be a red line too far, with unquantifiable implications for the UK aviation sector.

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