

BBB FIDE FUNDACION – HANDOUT FOR BREXIT SEMINAR – 5 June 2018 Second part –
BREXIT AND AVIATION – ILLUSTRATIVE ASPECTS OF A POST BREXIT FUTURE

DRAFT HANDOUT FOR ATTENDEES: PLEASE DO NOT CIRCULATE AND PLEASE CHECK TEXT AGAINST DELIVERY ON 5 JUNE



EU balloon, landing on the shore of Lake Burley Griffin , Canberra , Australia . 2014. Photograph Christopher Muttukumaru

PURPOSE OF SEMINAR: Using the Aviation sector as an illustrative case, we wish to enable discussion of the challenges that lie ahead for the negotiators. The Aviation sector is of considerable importance to the economies of the EU, Spain and the UK. The liberalised Aviation Single Market, through a system of mutual recognition of certification and permissions, allows EU carriers the right to operate anywhere within the EU and beyond. The Brexit negotiations have exposed the need for early agreement on how closely the UK is prepared to accept regulatory alignment after the transition period ; and for how long. The closer the regulatory alignment, the greater the access that UK air carriers will enjoy in the EU Aviation Single Market. In summary: in the language of the 1960s, will the future for UK air carriers be “Up, up and away in our beautiful balloon...for we can fly...”?

A How important is the Aviation sector to the UK and the EU? What is the illustrative policy context ?

- Aviation is a significant contributor to economic growth in the EU and the UK
- Aviation contributed some £22 billion of value to the UK economy in 2015 (source: UK Parliament’s Exiting the EU Select Committee);
- The tourism industry and business travel are facilitated by aviation. In 2016, passengers flying from the UK to the EU27 numbered 53 million trips. Spain is the most visited destination (14.7 million trips in 2016). UK outbound passengers’ spending in the EU amounted to over £25 billion.
- Spain’s business interest in the transport sector in the UK are significant. For example, Ferrovial’s interests in Heathrow Airport and other airports; the successful bid by Keolis and Amey for the Wales rail franchise.
- In 1984, Iberia took judicial review proceedings against the UK in respect of its landing rights at Heathrow. The UK and Spain both operated protectionist regimes to safeguard their national airlines. How that has changed!

B What does the status quo in the liberalised Aviation Single Market mean?

- The EU principle of freedom of access to the market means that every Community air carrier is entitled to operate any intra-Community air service. Relying on EU-negotiated treaties with some third countries, Community air carriers can pick up passengers in an EU country and carry them to a third state.
- Access to the market is governed by a system of mutual recognition of licensing and certification. This covers common standards on safety, security, professional competence, consumer protection standards and environmental standards.
- The current status quo should remain in place in a transition period if the draft Withdrawal Agreement is agreed.

C What will happen after the transition period ends on 31 December 2019? The policy battleground.

- **EU position** The Council Guidelines for negotiators of 23 March 2018 : having regard to the UK red lines , in terms of socio-economic cooperation the following possibilities might be envisaged. But there can be no cherry picking through participation in the Single Market on a sector-by-sector basis.
- “...regarding transport services, the aim should be to ensure continued connectivity between the EU and the UK...This could be achieved, inter alia, through an air transport agreement, combined with aviation safety and security agreements...”
- This is subject to the need for a level playing field: “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”;
- The guidelines expressly state the need for effectiveness of dispute settlement and enforcement; the need for legal certainty; and for the autonomy of the EU legal order, including adherence to CJEU jurisprudence;
- **UK position** On 2 March 2018, the UK Prime Minister said that she wanted to have continuity of transport services , but she repeated the red lines, including the ending of the jurisdiction of the CJEU;
- She denied any desire to adopt new regulatory standards which resulted in a race to the bottom , not least in respect of environmental standards and workers’ rights, and of competition and state aid rules.
- But she did not rule out the lowering of regulatory standards by the UK Parliament in the long term. But the UK Parliament would act in the knowledge that that would have an impact on the level of EU market access that the UK wished to enjoy.

D Would membership of the European Common Aviation Area be an answer to allow access to the EU Aviation Single market?

- The ECAA would offer the most comprehensive access to the EU market, with little change;
- But membership would require compliance with the EU *aviation acquis* and would require acceptance of the jurisdiction of the CJEU;
- The UK red lines would seem to be an obstacle to this option.

E What could a bespoke air transport agreement cover?

- At the point of exit, the UK would be in a different position to any other Third Country since it would be fully in alignment with the EU's rules. Thus it would be in compliance with the EU rules on safety, security, environmental and consumer protection, competition and state aid restrictions.
- But, in a post transition internal aviation market, full market access would be impossible for the EU to allow if there was no continuing UK commitment to full regulatory alignment.
- Moreover the EU would argue that the UK could not pick and choose between different segments of the Single Market since it would amount to cherry picking.
- Indeed Member States with strong aviation sectors may wish to deny access other than for Third and Fourth Freedom traffic (see annex for a description of what these operational freedoms permit).

F What happens to flying rights to Third Countries?

- The UK relies on EU membership for access to 44 markets in the EU and in Third countries (source: UK Government submission to the Exiting the EU Select Committee).
- During the transition period, "the United Kingdom shall be bound by the obligations stemming from the international agreements concluded by the Union or the Member States on its behalf..." (Article 124(1) of the Withdrawal Agreement).
- But that requires the cooperation of those Third Countries. Are those Third Countries bound to treat the UK as a Member State for the duration of the transition period?
- As for a future beyond the transition period, can the UK negotiate, sign and ratify international agreements in its own capacity during the transition period?

G What is the future for the safety roles performed by the European Aviation Safety Agency for the Member States?

- The role of EASA is pivotal in setting safety standards in the EU aviation sector. If complied with, those standards are also intended to ensure compliance with standards and recommended practices that arise under the Chicago Convention.
- Some functions are performed by national designated authorities, such as (in the UK) the Civil Aviation Authority.
- The UK Prime Minister has said that the UK would seek participation in the work of EASA.
- But it is doubtful whether that would be possible in the light of the UK's red lines. First, under the governing EU regulation (Regulation 216/2008), participating states must comply with the EU *aviation acquis*. Secondly in relation to the work of EASA, the Court of Justice has jurisdiction. As to the latter, the UK Prime Minister, somewhat obscurely, has implied that the UK could accept the jurisdiction of the CJEU in an EASA context if that was the necessary price of securing participation in EASA.
- As a non-EU participant, the UK would no longer have a role in setting standards even though it is widely recognised as being a leading member of ICAO (and a member of its governing council).

H What is the future in the aviation security field?

- EU aviation security standards are intended to be consistent with the requirements under the Chicago Convention.
- The EU's common basic standards are in Regulation 300/2008.

- Future security requirements will depend on the security risks which a given state faces. Might this, given the security challenges that exist, require the UK authorities to impose more rigorous, not lesser, standards?

What is the likelihood that, in the post-transition period, the UK would seek to deregulate in the aviation sector?

- Some UK Cabinet Ministers are strongly committed to post transition period deregulation;
- But the UK Prime Minister has recognised that any future deregulation which was out of step with the EU's regulatory standards would result in less access to the market.
- An example of the possible lowering of standards is in respect of the *Denied Boarding Regulation (Regulation 261/2004)*, a consumer protection measure. Since UK Ministers have consistently criticised the regulation and since the UK has consistently opposed the Commission's stance in the CJEU, it is an open question what might happen after the end of the transitional period.
- 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 a diminution of) access to the Aviation Single Market.

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Amex to Handout

ICAO Freedoms of the Air

First Freedom of the Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to fly across its territory without landing (also known as a **First Freedom Right**).

Second Freedom of the Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State or States to land in its territory for non-traffic purposes (also known as a **Second Freedom Right**).

Third Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down, in the territory of the first State, traffic coming from the home State of the carrier (also known as a **Third Freedom Right**).

Fourth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to take on, in the territory of the first State, traffic destined for the home State of the carrier (also known as a **Fourth Freedom Right**).

Fifth Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State to put down and to take on, in the territory of the first State, traffic coming from or destined to a third State (also known as a **Fifth Freedom Right**).

ICAO characterizes all "freedoms" beyond the Fifth as "so-called" because only the first five "freedoms" have been officially recognized as such by international treaty.

Sixth Freedom of The Air - the right or privilege, in respect of scheduled international air services, of transporting, via the home State of the carrier, traffic moving between two other States (also known as a **Sixth Freedom Right**). The so-called Sixth Freedom of the Air, unlike the first five freedoms, is not incorporated as such into any widely recognized air service agreements such as the "Five Freedoms Agreement".

Seventh Freedom of The Air - the right or privilege, in respect of scheduled international air services, granted by one State to another State, of transporting traffic between the territory of the granting State and any third State with no requirement to include on such operation any point in the territory of the recipient State, i.e the service need not connect to or be an extension of any service to/from the home State of the carrier.

Eighth Freedom of The Air - the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting State on a service which originates or terminates in the home country of the foreign carrier or (in connection with the so-called Seventh Freedom of the Air) outside the territory of the granting State (also known as a **Eighth Freedom Right** or "consecutive cabotage").

Ninth Freedom of The Air - the right or privilege of transporting cabotage traffic of the granting State on a service performed entirely within the territory of the granting State (also known as a **Ninth Freedom Right** or "stand alone" cabotage).