ACCESS TO MARKET AFTER BREXIT FROM AIRLINES' PERSPECTIVE

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SUMMARY: 1. UE regime of law and its applicability to aviation – 2. Irrebuttable legal acts – 3. Economical perspectives for UK airlines – 4. Aicraft financing – 5. Passengers' protection after Brexit – 6. Social rights attributable to airlines' employees – 7. Environmental protection – 8. Judiciary area – 9. Possible scenarios.

1. – There are still more questions than answers for aviation, although the UK withdrawal notice was provided over one year ago. Aviation sector is a very complex one and many aspects should be taken into account. Although it seems that EU has provided many solutions for third countries regarding access to the aviation market, depending on their approach to the EU law applicability, not all of them seems to be beneficial for UK airlines. It seems also that UK airlines are on a weaker position than its existing competitors coming from the EU and in short, they have much more to lose than EU airlines in negotiations between EU and UK. This article analyses some of key aspects which should be considered from airlines' perspective and ways in which they could be formulated during the process of negotiations.

Although the fundamental principles of aviation are addressed by TFUE, the core of European aviation law consists of regulations and directives. Everything started a few decades ago, when the Community decided to liberalize the aviation market. Airlines and other undertakings involved in the aviation sector and established within the EU had to adapt to the new legal environment dominated by common principles ensuring an equal access to the European aviation market. Before it happened, aviation was subject to the rules established by the Chicago Convention and bilateral agreements concluded under conditions set up by international standards widely accepted all over the world [1].

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[1] Convention on international civil aviation, signed at Chicago on 7 September 1944,

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European aviation law has changed the pattern in aviation regulations. After the creation of the Common Aviation Area, regulations concerning aviation have been implemented not only between member states of EU, but also by neighbours linked with regulatory convergence through the gradual implementation of EU aviation rules.

The most important regulation establishing common rules for commercial flights within the EU is Regulation (EC) 1008/2008 [2], which summarises achievements of the so called third package of liberalization [3]. According to this regulation conditions regarding licencing of EU airlines and their rights to operate without restrictions on intra-EU flights were set up. Each airline having a valid operating license may operate without necessity to obtain permission from the EU member state to which the flight is conducted. It also gives EU airlines freedom in combining air services and to enter into code share arrangements with any air carrier on air services to, from or via any airport in their territory from or to any point(s) in third countries. The mentioned regulation creates a legal framework for all airlines wishing to operate within EU, but also includes some provisions for airlines established in third countries. It is however worth emphasizing that the European aviation sector is touched directly and indirectly by more than two hundred regulations and directives adopted by EU, that need to be taken into account because of Brexit.

Application of EU regulations differs from the application of EU directives and contrary to the EU treaties are made by the EU institutions. In addition to decisions, recommendations and opinions they fall under the secondary law. As set out in Article 288 of the Treaty on the Functioning of the European Union (TFUE), a regulation has direct application and is binding in its entirety and directly applicable in all member states of EU, while a directive lays down certain results which must be met by national le-

ICAO Doc 7300/9.

[2] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, O.J. L 293 from 31.10.2008, p. 3.

[3] Third package of liberalization substantially liberalized internal Community market. The legislative instruments adopted within the package were as follows: Regulation 2407/92/EC provided for common specifications and criteria for the licensing of Community air carriers, Regulation 2408/92/EC establishing the provisions on access for Community air carriers to intra-Community air routes and Regulation 2409/92/EC set out rules on fares and rates for air services. It also included set of regulations concerning rules of competition applicable to air transport.

gislation, however a member state freely decides how to transpose directives into its national law. UK like all other member states of EU must follow rules established by regulations and directives, although applicability of EU directives and results established by them have to be addressed through the respective national legislation. In case of discrepancy between EU regulation and national law, a member state is obliged to respectively modify a relevant national law. Moreover, thanks to the European Court of Justice, the principle of harmonious interpretation has been developed and the Court in *Von Colson* expressly identified the national courts as organs of the member state which are responsible for the fulfilment of EU obligations [4]. When UK ceases to be a member of EU family, then there will be no longer obligation on UK to interpret directives within the spirit of EU intentions.

Brexit will result in a different approach to EU regulations and directives and depending on which solution would be agreed between UK and EU in relation to the aviation sector, currently binding regulations and directives may change their applicability in UK. The more EU binding regulations and directives will be in force, the more likely it is, that UK airlines and airports may maintain the similar status to that obtained due to the UK membership in EU. It requires however transposition of the secondary law, particularly existing and future regulations and ongoing directives to the national law of UK [5]. If the procedure established by Article 50 of TFUE would be completed, contrary to the directives which have been already implemented into the national law, all existing regulations will no longer be applicable in relation to UK and relevant transposition into the national law will be required. The effect of EU regulations would be therefore equated with the effect of directives. Hard Brexit may however result in the worst-case scenario upon which all EU regulations and directives would be abandoned by UK and a new system of law applicable to the aviation may be adapted in place of EU legislation. The latter however may result in a very restrictive access of UK airlines to the EU aviation market.

[4] Case 14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891.

[5] A. Masutti, A.Laconi, „The impact of Brexit on the Aviation Industry", The Aviation & Space Journal, July/Sept 2016 Year XV N° 3, p. 26-27.

2. – Contrary to the secondary law already implemented by UK or still being applicable to UK, there are some international treaties and agreements which will not be affected by Brexit and which in certain circumstances may help to work out some temporary solutions to keep UK airlines in the European air space. They deal with the most precious traffic rights attributed to airlines.

The aforementioned Chicago Convention was adopted nearly 75 years ago and it became the most widely accepted treaty on international civil aviation. Although it does not contain economic regulations regarding air transport, a few of its articles deal with commercial aspects of the carriage by air and what is important for this paper, UK like all member states of EU ratified the Chicago Convention. UK played a very important role during the Chicago Conference organized in 1944 under the auspices of ICAO. There was a big debate around liberalization of international air transport and although UK represented a liberal approach, it was more restrictive than that proclaimed by United States of America. There was no agreement between states participating during the conference to establish freedom for international air transport and it was confirmed through Article 6 of the convention. It is a crucial provision on scheduled air transport, from which, the necessity for concluding bilateral agreements between interested states has been established and is still dominant in international relations [6]. This means that any scheduled air service requires a special permission or other relevant authorization from the country to which the service is provided. Contrary to the scheduled air service, Article 5 of the Chicago Convention gives the right of non-scheduled flight. It is addressed to aircrafts (not airlines) and stipulates that contracting States agree that any civil aircraft registered in another contracting State has the authority, unless it is engaged in scheduled international air service – to fly into or make non-stop transit across its territory or make stops for non-traffic goals without a need to ob-

[6] In 1952 the Council of ICAO adopted in Resolution A2-18 the definition of "scheduled international air service" which includes the following elements: 1) it passes through the air space over the territory of more than one State; 2) it is performed by aircraft for the transportation of passengers, mail or cargo for remuneration, in such a manner that each flight is open to use by members of the public; 3) it is operated, so as to serve traffic between the same two or more points either according to a published time-table or with flights so regular or frequent that they constitute a recognizable systematic series.

tain a prior permission. While Article 5 of the Chicago Convention is not important for commercial flights from the point of Brexit's view, Article 6 of the same treaty will be the legal base for future arrangements that need to be done for the establishment of air transport between UK and EU or UK and individual member states of EU (if no agreement is reached with the regional organization) and UK and third countries which currently entered into aviation relations with EU. There was an attempt to overcome the restrictions of scheduled international air service set down by the Article 6. While the general multilateral agreement on the mutual granting of traffic rights for scheduled international air services failed during the Chicago Conference, two separate agreements where submitted to the table. One of them was the International Air Services Transit Agreement referring to the so-called two technical freedoms [7] (expressed also by Article 5) and the second one was the International Air Transport Agreement known also as a treaty on the five freedoms. The latter provides for freedoms of the air in respect of scheduled international air services which are as follows:

1) the privilege to fly across its territory without landing;
2) the privilege to land for non-traffic purposes;
3) the privilege to put down passengers, mail and cargo taken on the territory of the State whose nationality the aircraft possesses;
4) the privilege to take on passengers, mail and cargo destined for the territory of the state whose nationality the aircraft possesses;
5) the privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

The International Air Services Transit Agreement has been ratified by 131 parties including UK, while to the International Air Transport Agreement only 11 parties joined including two member states of EU without UK. Therefore, all potential agreements will be followed by restrictions established by Article 6 of the Chicago Convention. For the sake of clarity, it should be emphasised that European aviation law does not make a distinction between scheduled and non-scheduled flight and traffic rights granted

[7] International Air Services Transit Agreement signed at Chicago on 7 December 1944 (ICAO Doc 7500) and International Air Transport Agreement signed at Chicago on 7 December 1944.

within EU to EU air carriers apply to all flights. Moreover, Regulation (EC) 1008/2008 seems to omit restrictions imposed under Article 7 of the Chicago Convention as the right to cabotage has been given to European airlines, whereas the mentioned provision clearly states that contracting States are prohibited to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other state or an airline of any other state. Brexit will deprive British air carriers of the cabotage right and negotiations of traffic rights would be conducted in the spirit of principles adopted under the Chicago Convention.

The second multilateral treaty which deals with aviation issues and which should be brought into attention because of Brexit is the GATS, although it's relevance to market access is not significant. It is due to the fact that hard traffic rights that are the domain of air services bilateral agreements were excluded from the scope of the treaty. GATS apply only to measures affecting aircraft repair and maintenance services, selling and marketing of air transport services and computer reservation system (CRS) services, commonly referred to as ancillary services. Consequently, neither the Most Favoured Nation clause (MFN) upon which the best access conditions that have been conceded to one country must automatically be extended to all other participants, nor the principle of the national treatment which implies the absence of all discriminatory measures that may modify conditions of competition to the detriment of foreign services or service suppliers, would be applicable in respect to market access. In any case, regardless of Brexit, UK would remain within the WTO system and therefore would remain to be a GATS member and a very limited applicability of the treaty to the aviation would not be affected by Brexit [8].

Notwithstanding the core principle established in the Chicago Convention, which cannot be lifted, UK being a member of European Civil Aviation Conference joined also to the conventions adopted under the auspices of ECAC and should follow the rules promoted by it. The Multilateral Agreement on commercial rights of non-scheduled air services entered into force on 21 August 1957 and is still binding between ECAC members (including EU member states). Regulation (EC) 1008/2008 suspended ob-

[8] See also L. Bartels, "The UK's status in the WTO after Brexit", https://www.peacepalacelibrary.nl/ebooks/files/407396411.pdf .

ligations imposed under this agreement by equating scheduled and non-scheduled air services and by giving EU member states non-limited traffic rights between any points within EU, but in case of a Hard Brexit and lack of any traffic rights' arrangements, this agreement could be reactivated between UK and EU member states. It may serve as a temporary prosthesis for non-scheduled flights between ECAC member states, nonetheless it's applicability will not be justified for the purposes of scheduled air services. The ECAC multilateral agreement on traffic rights for non-scheduled flights admit the aircraft registered in a ECAC member state and operated by a national one of such member state duly authorized by the competent national authority of that state, freely to their respective territories for the purpose of taking on or discharging traffic without the imposition of limitations resulting from the second paragraph of Article 5 of the Chicago Convention. It means that in case of carriage by air listed by Article 2 of the ECAC agreement no conditions and limitations regarding cabotage set up by Article 7 of the Chicago Convention and imposed by a country within which the flight is operated may be imposed. It should be also mentioned that alongside the mentioned ECAC multilateral agreement on traffic rights also the International Agreement on the procedure for the establishment of tariffs scheduled air services was concluded. This agreement however infringes rules of EU competition law, as it allows consultations between airlines and therefore it should not be applicable between UK and EU member states.

While the ECAC agreement on traffic rights for non-scheduled flights seems not to be affected by Brexit, particularly because of its small significance for both UK and EU airlines, more complex issues may arise from existing bilateral agreements. In 2002 the CJEU confirmed, in very known cases called commonly "open skies judgements", that the Commission has received a mandate from the Council to negotiate some aspects of air services' agreements, even in the absence of Community provisions in the area concerned, where the conclusion of such agreements is necessary in order to attain the objectives of the Treaty within the area that cannot be attained by the adoption of autonomous rules (the alleged existence of an external competence) [9]. It means that all bilateral agreements already concluded by any

[9] See also L. Vrbaski, "Flying into the Unknown: The UK's Air Transport Relations with the Eu-

EU member state with a third country and which are not in line with EU law should be negotiated either by the particular EU member state with that third country or by the Commission upon the mandate(s) issued by the Council to conclude the so-called horizontal agreement(s), which are limited to specific aspects questioned by the CJEU and included in bilateral agreements. Moreover, following the "open skies judgements", the legal guidelines in relation to such negotiations were established upon Regulation (EC) No 847/2004 [10]. Thanks to that, the EU has got full control over negotiations in an area of shared competence.

Within the guidelines set up by the aforementioned Regulation (EC) No 847/2004, UK changed some of the bilateral agreements by removing the national clause and by replacing it with the clause upon which all EU airlines are entitled to operate in a third country on a non-discriminatory basis (e.g. with Turkey, Ukraine). It would be therefore interesting whether the changes brought by UK with some third countries will remain after Brexit. These agreements are consistent with the EU law and were concluded by UK as an EU member state and therefore hypothetically could be terminated by UK according to the international principle, namely *"rebus sic stantibus"*. The concept of this clause stipulates that, where there has been a fundamental change of circumstances, a party may withdraw from or terminates the international agreement in question. Although, as it was previously mentioned, maintaining by UK the rules of European law, may only help UK airlines to keep the status as close as possible to EU air carriers.

The more problematic issues may arise from the already concluded international agreements upon which EU member states were legally represented by the Commission in negotiations with third countries. EU external aviation policy was defined in the Road Map developed in 2005 by the Council and the Commission and three pillars of international agreements were specified, namely horizontal agreements, comprehensive agreements with global partners and agreements creating the Common Aviation Area with the EU's neighbouring countries.

ropean Union and Third Countries Following 'Brexit', Air and Space Law, Volume 41 (2016), Issue 6, p. 421-444.

[10] Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiations and implementation of air service agreements between member states and third countries, O.J. L 157, 30.04.2004, p. 7-17.

Nearly 1,500 bilateral agreements of EU member states were amended in order to be consistent with the EU aviation law. A significant part of them has been changed by horizontal agreements. If UK ceases to be an EU member state, then according to Article 1(1) of the Model horizontal agreement, UK airlines will lose their EU operating licence and consequently traffic rights assigned to EU airlines and no longer would be entitled to operate under conditions of the Model horizontal agreement. If no compromise is achieved in respect to horizontal agreements on UK-EU level, then at least relevant measures to those established by (EC) Regulation 847 No 847/2004 should be implemented by UK in bilateral relations with interested third countries, unless UK would not be interested in maintaining EU standards.

There is also another group of bilateral agreements concluded by UK which are incompatible with EU law and which may be reactivated after Brexit. One of them is the so-called Bermuda II agreement which has been suspended because of the comprehensive agreement concluded with a very important partner of EU, namely United States of America. In fact, the Commission jointly with EU member states has identified a number of major partners with whom comprehensive agreements were concluded, such as Canada, Australia, Brazil and New Zealand.

Similarly, to the Model horizontal agreement, the air service agreement concluded between EU and USA does not refer to the situation such as a withdrawal of a state from EU, although consequences of Brexit for UK airlines would be the same like in case of horizontal agreements, unless again some solution would be achieved between UK and USA, or UK, EU and USA. It should be also mentioned that the open sky agreement concluded between EU and USA was a passport for trans-Atlantic alliances. Bermuda II contains limited rights to those granted upon the open sky agreement and therefore the status quo cannot be maintained in case of Bermuda II's reactivation. The same concern regards the air services agreements concluded between EU and other aforementioned global partners.

The last group of international agreements which deals with traffic rights and which would be affected by Brexit is a group of agreements falling into the (European) Common Aviation Area. The concept of the Common Aviation Area assumes processes of market opening between the EU and its

neighbours through the adoption, by third countries, part of the *Acquis* containing the European Aviation rules. Whereas ECAA agreements require full transposition and application of EU *Acquis* and are based on free market access, freedom of establishment, equal conditions of competition and common rules including in the areas of safety, security, air traffic management, social and environmental issues. As long as UK is part of EU family for so long UK airlines have an equal access to the (European) Common Aviation Area. Hence CAA agreements stipulate that their provisions prevail over the relevant provisions of existing bilateral agreements, it means that the latter are still binding within the scope not regulated by CAA agreement. It means that in the absence of the compromise in respect to "after-Brexit air services", old bilateral agreements concluded by UK and already changed by CAA agreements could be reactivated.

Very interesting aspects may arise from the obligations concluded by EU on behalf of EU member states in the field of private law conventions, particularly in case of the Montreal Convention which has been ratified by EU according to the Council Decision 2001/539/EC [11]. EU and its member states share competence in the matters covered by the treaty, although it is limited to matters covered by the EU law, especially by the Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air [12]. Therefore, after ratification of the Montreal Convention, EU had a mandate to change the EU law by its adjusting to the newly adopted treaty. Although Brexit will not affect obligations imposed on EU and UK because of their separate ratifications, some extended obligations to those established by the treaty in relation to EU airlines and regulated in EU law, may cease to apply to UK carriers. It would be explained later on. Upon Brexit, obligations imposed on EU member states and consequently their national airlines will cease to apply to UK and its airlines. Other private law conventions have not been covered by EU law, therefore they will not be affected by the Brexit.

[11] 2001/539/EC: Council Decision of 5 April 2001 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention).

[12] O.J. L 140 from 30.05.2002, p. 2.

3. – Nearly 20 EU legal acts have been focused around market access. What has not been achieved so far at the international level, has been done at the regional level by EU. Binding, for decades, restrictions set up by bilateral agreements have been abolished between EU member states and have been replaced by rules to ensure equal access to the air transport market and fair competition. What is also worth emphasizing is the fact, that these EU legal acts differently treat basic market access rights in relation to third countries and mostly rely on the reciprocity principle.

The mostly harmful consequence for UK airlines would be to lose traffic rights which are only attributable to EU and EFTA member states. EU legislation has established freedom in the air for intra-EU flights. Scheduled and non-scheduled flights have been aligned in EU regulations and restrictions on freedoms of the air were lifted. While, the third and fourth privileges are commonly granted on the basis of reciprocity and this practise will not be changed because of Brexit (but in the worst case scenario may be limited to home markets as explained later), the most uncertain situation concerns other freedoms above the fifth one, although in case of extra-EU flights, the fifth privilege can also be threatened. It may happen due to the conditions which have been laid down in the Regulation (EC) 1008/2008 for applying the principle of the freedom to provide services in the air transport sector. According to Regulation (EC) 1008/2008, an EU carrier should be owned in more than 50% and effectively controlled by EU member states or their nationals. Moreover, the operating license is only given upon conditions that the establishment is on a territory of an EU member state and a carrier holds valid AOC issued by a national authority of the same member state whose competent licencing authority is responsible for granting, refusing, revoking or suspending the operating licence of the EU air carrier. Prior to the adoption of the EU rules, the UK ownership and control rule was in some ways more restrictive, but less restrictive in others. Operating licences were granted to the air carrier which was UK owned and controlled unless specifically exempted by the Secretary of State [13]. It contradicts Regulation (EC) 1008/2008 upon which no exemption has been allowed. Although it should be mentioned that EU is currently working on some changes to the ownership and control prin-

[13] S. 65(3) of the Civil Aviation Act 1982, 1982 c.16.

ciple to allow more flexible cash flow coming from foreign investments [14]. It is therefore possible that a more liberal solution would be agreed because of Brexit if both EU and UK are ready for concessions.

Following the withdrawal from the EU, UK airlines will lose their status of the EU airline for the purposes of the aforementioned regulation. No matter which scenario would be agreed between EU and UK, it seems unlikely that UK airlines will maintain 7th-9th privileges as they are granted only within ECAA and EU territory and only for EFTA (except Swiss airlines) and EU air carriers. No such right has been established in international agreements concluded between EU and third countries and moreover, these agreements are mostly limited to the Chicago freedoms of the air (five privileges).

More actively rights in the common market are exercised by LLC and therefore full-service airlines might even benefit from rescinded LCC operations [15]. They also may be interested in coming back to the restrictive bilateral system. In the worst case scenario UK LCC could however establish affiliated airlines in other EU jurisdictions to be able to access traffic rights on a point to point basis.

The adverse effect may also affect carriers focused on the seventh freedom. Airlines such as Ryanair, Norwegian and Wizzair build their connections on routes between the UK and other countries outside their home countries [16]. In the majority of bilateral agreements which were in full scope of application before the EU market liberalization, even 3rd and 4th freedoms of the air could only be provided between two interested countries by national carriers owned in more than 50% by countries (or its nationals) being parties to the bilateral agreement. It means that in case of hard Brexit and reactivation of bilateral agreements, the EU operating licence will no longer work for EU airlines from any EU member state to UK and they will not be allowed to operate between their home market and the UK.

[14] Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: An Aviation Strategy for Europe, 7 Dec. 2015, COM/2015/0598 final.

[15] https://centreforaviation.com/insights/analysis/brexit-and-aviation-part-3-importance-of-asian-models-and-liberalisation-moves-will-be-accelerated-288736.

[16] https://www.flightglobal.com/news/articles/analysis-risk-of-brexit-pratfalls-if-ecaa-deal-not-433635.

Regulation (EC) 1008/2008 is a key point for market access within EU both for EU, EFTA and Swiss airlines [17]. EU operating license gives airlines many commercial opportunities which were prohibited or limited upon bilateral agreements. Additionally, to traffic rights which have been granted without limitation to EU airlines, other restrictions applicable in bilateral agreements and lifted in the process of liberalization were also abolished by the aforementioned regulation and replaced by rules compatible with the EU competition law. It mainly concerns capacity and tariffs' rules. Capacity limits may only be imposed on carriers on a non-discriminatory basis under objective criteria relating to safety, security, the protection of the environment and the allocation of slots. Whereas the objective criteria for traffic distribution and exercise of traffic rights have been established to all carries, regardless of their nationality, pricing freedom set up by the regulation, applies to all EU airlines and to air carriers of third countries only on the basis of reciprocity. Moreover, notwithstanding the provisions of bilateral agreements between EU member states, none of them may discriminate on grounds of nationality or identity in allowing EU carriers to set fares and rates for air services between their territory and a third country. Regardless of which scenario would be chosen between UK and EU, it seems unlikely, that less favourable rules than those laid down in the Regulation (EC) 1008/2008 would be agreed for capacity and pricing aspects.

However, more doubtful would be maintaining rights granted to airlines based on EU nationality. Public service obligation (PSO) rules clearly state that PSO may only be granted to the EU air carrier, therefore if UK is no longer at least an EFTA member state, then UK airlines will not be allowed to provide PSO between EU and EFTA member states. It should be clarified that EFTA membership does not allow EEA membership, but only EU and EFTA member states can currently be contracting parties to the EEA Agreement. Therefore, to re-join EFTA after Brexit, UK will have to accept commitments that currently seem to be not acceptable, like the whole heritage of air transport *acquis communitaire*, jurisdiction of the ECJ or even commit-

[17] Whereas upon the Swiss-EU air transport agreement, thr 7th freedom right has been accepted, only cabotage (9th freedom right) has been excepted so far from this comprehensive grant of traffic rights.

ments related to other aspects of trade which are more controversial for UK [18].

Some operational opportunities have been also created in relation to the forms of possible cooperation between airlines, which in case of bilateral agreements are given only upon reciprocity basis. Subject to the EU competition law, EU air carriers are allowed to combine services and to enter into code share arrangements with any air carrier on air services to, from or via any airport in the territory of an EU member state from or to any point(s) in third countries. A member state is also entitled to impose restrictions on code share arrangements between EU air carriers and carriers from third countries, in particular if the third country concerned does not allow similar opportunities to EU airlines. Depriving this right of UK airlines, should not however affect cooperation with airlines from EU, because majority of bilateral agreements is very liberal in this matter.

While, the regulation generally establishes freedom in cooperation between EU airlines, including aspects of wet lease agreements of aircrafts registered within EU, some limitations have been introduced in case of dry lease and lease of aircrafts registered in a third country. If UK airlines lose their EU license, then these limitations will no longer be valid for them and they will be able to freely lease aircrafts. Although, regardless of the scenario after Brexit, in case of aviation safety, surely some limitations would be maintained or imposed on UK airlines flying to/from EU.

Less concerns are raised about ancillary rights, although certain aspects arising particularly from the EU competition law should be followed by UK airlines in case of their commercial activity within the territory of EU and it would be explained later on. Market access rules, like for example rules regarding computerised reservation systems (CRS) or ground handling services, mainly focus on a non-discriminatory treatment or a principle of reciprocity. Therefore, performance of ancillary rights will dependent on the status of UK airlines' operating licence which, for the purposes of market access rights should have the same value like EU or EFTA carriers' licences.

[18] One of the condition for Norway to joint the EAA/ECAA was to accept the free movement of labour. Having in mind reasons which were behind the UK referendum, it seems rather obvious that this condition cannot be accepted by UK.

EU competition rules will continue to apply irrespective of UK's withdrawal from EU to all agreements and concerned practices affecting EU market. The general antitrust rules are set out in Articles 101 and 102 TFUE. The first rule prohibits any agreement or concerned practice that is made between two or more undertakings that may affect trade between EU member states and that has the object or effect of preventing, restricting or distorting competition. The second one makes it illegal for dominant companies to abuse their market power in a way that may affect trade between EU member states. The merger rules complement these articles by allowing the Commission to control certain concentrations within the common market. There are also strict additional rules which prevent member states from distorting competition through the grant of State aid.

Hence the EU competition rules are applicable to all undertakings regardless of their nationality, all UK market players will continue to follow the rules. There would be however an impact on competition law and the nature of it would depend on the model agreed between UK and EU. Particularly, significant changes may affect the current cooperation between UK competition authorities and the EU Commission, as the latter will no longer have power to carry out investigations in UK, however in case of closer EFTA scenario, the power of Commission would be maintained on a very similar level as currently. The competition rules under the EEA Agreement correspond to those in the EU. While the EFTA Surveillance Authority (ESA) is responsible for ensuring that the competition rules are applied within the EEA EFTA states, in case of appreciable implications for competition in the EU, investigations are handled primarily by the Commission. EU competition rules have been also implemented in CAA type agreement, although their interpretation is outside the CJUE's competence. The independency of the Commission and foreign competition authorities' competences is maintained in air transport comprehensive agreements, like in case of US-EU air transport agreement. The latter however, causes more problems in the face of the coming Brexit, as it involves issues of antitrust immunity and has a huge impact on existing alliances, such as Oneworld (whose members include British Airline), SkyTeam and Star – all of them with participation of US and EU airlines. The US-EU agreement has introduced more flexible performance of market access rights and allows both US

and EU carriers to compete on air service to each other's countries. The US DOT has taken a consistent position, that antitrust immunity is granted only if a US carrier's foreign alliance partner is coming from a country that has acceded to the open sky's type agreement with the US. Brexit will deprive the justifications for allowing, particularly British Airlines and airlines focused in Oneworld alliance to serve routes covered by the US-EU agreement. The Commission has approved all three alliances, although it has imposed commitments on participants. Some of them concern UK-EU and US-UK routes and should be still performed by applicants. It would be therefore interesting whether the Commission would be forced to review already granted immunities (the same may also concern other joint venture cases cleared by the Commission or which have been approved upon accepted commitments). If, however airlines (including particularly British Airlines) wish to maintain antitrust immunities granted by the US DOT, then the open sky agreement between UK-US or UK-EU-US should be taken into consideration.

4. – Another area of aviation which should be considered because of Brexit is aircraft leasing. Although aircraft financing is rather roughly treated by EU law and aviation lessors do not need EU market access to operate, some aspects that are within shared competences between EU and EU member states, should be put on the table. English law is commonly chosen as the governing law of a financing transaction. The substance of English contract law will not be affected after Brexit, hence the Rome I Regulation requires EU national courts to respect the parties' choice of law for contractual obligations and it will not be changed after Brexit. Also, the EU law affecting aircraft financing will remain applicable in the territory of EU without a particular impact on UK law.

EU, however, ratified the Cape Town Convention as a Regional Economic Integration Organisation and within its competences EU member states cannot interfere by introducing their own declarations [19]. The primary aim of the convention and its Protocol on Matters Specific to Aircraft Equipment is to resolve the problem of obtaining certain and opposable rights to aviation assets, which by their nature, have no fixed location. UK

[19] Convention on International Interests in Mobile Equipment.

also ratified the convention on 27 July 2015 and it came into force on 1 November 2017. Relevant regulation has been also implemented into the UK national law, in particular the specific issues of Article VIII (choice of law) and XI, alternative A (insolvency) on which the UK could not make declarations due to a full or shared EU competence. There are competing arguments that refer to UK status as a contracting state to the Cape Town Convention. The problem is however more serious, hence it regards mixed agreements, that have been ratified both by EU and individual EU member states. UK will have to decide which of these treaties would be maintained and which would be withdrawn. Following Brexit, the UK's ratification of the Convention will be incomplete at least in matters currently covered by EU's competence and moreover UK regulation implementing the convention should be at least changed and adopted in the UK national rules which will replace or repeat EU rules [20].

5. – The EU has largely contributed to the increased protection of consumers. It particularly had an impact on the aviation sector, where special regulations have been introduced for enhanced protection of passengers. At the international level, unified rules have been adopted in the so-called Warsaw Convention from 1929 and in the Montreal Convention which was adopted exactly 70 years later. Both of them lay down rules of liability of air carriers in international carriage by air and both of them were ratified by UK. Although both of them apply simultaneously depending on the contract made between parties, only the Montreal Convention was ratified both by EU and UK. The EU ratified the convention within the competences confirmed by the EU secondary law, namely Council Regulation (EC) No 2027/97 of October 1997 on air carrier liability in the event of accidents [21], which was amended after ratification by Regulation (EC) No 889/2002 [22]. The latter eliminates the distinction between national and international transport and establishes the same level of liability (set up by the Montreal Convention) in both international and national carriage by air within the in-

[20] K. Gray, "CTC in Europe: assessment of ratifications to date and implications of Brexit on the ratification by the UK", https://www.law.ox.ac.uk/sites/files/oxlaw/kenneth_gray_-_ctc_in_europe.pdf.

[21] O.J. L 285, 17.10.1997, p. 1-3.

[22] O.J. L 140, 30.5.2002, p. 2-5.

ternal aviation market. Moreover, the same liability rules have been introduced outside the international market for all EU licensed air carriers. Brexit may therefore surprisingly help UK airlines by eliminating obligations imposed by the EU law and restoring regime of liability established by international conventions limited to the international carriage by air. There are more regulations in favour of passengers and less gracious for carriers. A very well-known Regulation (EC) No 261/2004, which has been questioned by lawyers on many occasions in relation to international obligations imposed by the aforementioned conventions, also may stop to apply after Brexit or at least will be applicable in a very limited scope [23]. Under this regulation passengers are eligible to claim compensation in situations such as a delayed or cancelled flight due to extraordinary circumstances or in case of denied boarding or downgrading and worth mentioning is the fact, that the time limit for action against airlines is relatively longer in UK than in other EU member states. The Regulation (EC) No 261/2004 also imposes obligations on airlines in case of irregularities caused by circumstances beyond their control, such as arrangements of accommodation, rerouting and access to refreshments, where all cost must be borne by airlines. Brexit may therefore release UK airlines from these obligations and in some way, may put them in a more favourable position.

6. – More problematic issues may arise in relation to aircrew's social rights which fall into the heaviest negotiating area. The EU coordinates social security for aircrew in Regulation (EC) No 883/2004. A person employed as aircrew can only be covered by one country's social security legislation at a time and the country is understood as a country in which the person has their home base (i.e. the place where the person's actual work begins and ends). There are also unified rules related to flight and duty times, that are applicable regardless of the form of employment [24]. These unified rules

[23] According to Article 3 of the Regulation (EC) No 261/2004 it applies to passengers departing from an airport located in the territory of an EU member state to which the Treaty applies and to passengers departing from an airport located in a third country to an airport situated in the territory of a member state to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating carrier of the flight concerned is an EU air carrier.

[24] Commission Regulation (EU) No 83/2014 of 29 January 2014 amending Regulation (EU) No 965/2012 laying down technical requirements and administrative procedures related to air opera-

will cease to apply if UK leaves the EU and will not be a member of EASA. Airlines employ aircrew from different EU member state and what is beneficial, particularly in case of LSS, they may choose between different jurisdictions to avoid more restrictive rules applicable in some EC member states (forum shopping). Brexit will stop the practise and national aliens' legislation would be applicable, since the EU law does not govern employment in relation to third-country nationals working on board aircraft. This in turn may lead to a fragmentation of coverage across multiple member states and a multiplication of compliance obligations for airlines.

7. – The aviation sector has been also included since 2012 in the EU emissions trading system (EU ETS) [25]. Initially, under the EU ETS, all airlines operating in Europe, European and non-European alike were required to monitor, report and verify their emissions, and to surrender allowances against those emissions. Meanwhile, because of a very big debate regarding the extraterritorial application of EU provisions in relation to operators from third countries and works at the international level to globally govern aviation emissions, EU has decided to limit the scope of the EU ETS to flights within the EEA until 31 December 2023. Were the UK to quit this scheme when leaving the EU, airlines would no longer be required to purchase allowances. An exemption from this purchasing requirement would amount to a distortion of competition. It is however doubtful that the UK will not adopt (in case of the hard Brexit scenario) its national rules governing aviation emissions similar to those of EU. The UK informed the Climate Change Committee of the adoption of the law on 27 December 2017 by which the compliance deadline for 2018 emissions has been advanced to 15 March 2019 in accordance with the amendment to the EU ETS Registry Regulation. While the Commission formally adopted the amendment to the EU ETS Registry Regulation to implement safeguard measures to protect the environmental integrity of the EU ETS when EU law ceases to ap-

tions pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council, O.J. L 28, 31.01.2014, p. 17.

[25] Aviation activities were included in the EU ETS by Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, O.J. L 8, 13.01.2009, p. 3-21.

ply in UK [26]. The revised regulation provides for marking and restricting the use of allowances issued by UK as of 1 January 2018, unless EU law would not cease to apply in the UK by 30 April 2019 or it is sufficiently ensured that the surrender of allowances takes place in a legally enforceable manner by no later than 15 March 2019. It seems therefore that the environmental protection area is outside the dispute in the context of UK's withdrawal from the EU.

8. – Brexit will have a huge impact on UK's courts and CJEU judgments. It is not certain what would be the UK position in relation to the CJEU, although during the election campaign, the Prime Minister promised the divorce with the CJEU and taking back the control of UK law. CJEU's competence within the aviation area would be mainly dependent on the model of agreement agreed between EU and UK and the scope of EU law maintained in the UK law. There are many legal issues which should be considered and agreed during EU-UK negotiations, like for example interpretation of UK and EU-derived laws or pre-Brexit and post-Brexit case law. Existing models of air transport agreements concluded by the EU show that the power of CJEU in relation to the aviation sector may be adjusted to third countries' concessions related to the acceptance of CJEU' competences or in some cases, CJEU's role, can be replaced by a joint committee established under air services agreements. If, however the UK government decides to stay in the single market by re-joining the European Economic Area, then the so-called "Norway option" can be applicable with the jurisdiction of the Court of Justice of the EFTA and a substantial role for the future case law of the CJEU. If no compromise is achieved during negotiations, then the CJUE will no longer have power over the UK law and the post-Brexit UK law will take precedence over old EU laws.

Another aspect which should also be considered within the judiciary area is the principle of mutual trust and recognition between the courts of Member States established under Regulation (EU) No 1215/2012 [27]. All judgements is-

[26] Commission Regulation (EU) 2018/208 of 12 February 2018 amending Regulation (EU) No 389/2013 establishing a Union Registry, O.J. L 39, 13.02.2018, p. 3.

[27] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, O.J. L 351, 20.12.2012, p. 1.

sued by the UK courts are currently automatically recognised and enforced in other EU member states, and *vice versa.* Even though the UK would be ready for implementation of the aforementioned regulation into national law, it will not be sufficient to maintain the regime established by the regulation. Therefore international arrangements should be in place between UK and EU member states in the form of a convention or bilateral agreements [28].

9. – The transition period is expected to begin straight after the UK officially leaves the EU on 29 March 2019, and end on 31 December 2020. EU said that its rules should still apply during this period, as will rulings of the CJEU. The European Commission also said that Brexit would negatively impact the region's aviation industry. It means that the current position of the aviation sector guaranteed under *acquis communautaire* will not be maintained and both UK and EU airlines will lose opportunities created by the liberalization process over the last few decades. It is also certain that the UK would not remain in the EASA because it will not accept the supremacy of the CJEU, which is a pre-condition to staying in the agency. This, in turn, will affect the shape of the air transport agreement upon which CJEU' s competence would be excluded. It also seems certain that ECAA model agreement concluded with EFTA would not be taken into consideration during the process of negotiations, because the UK is not ready to re-join the EFTA. The most possible scenarios which should be taken into consideration because of the aforementioned UK's declarations regarding EASA and CJEU are the CAA agreements, EuroMed aviation agreements and the comprehensive air transport agreements. While the first two models of agreements are much more limited in providing freedoms of the air (3rd and 4th, rarely elements of 5th) and a gradual market opening is linked to regulatory convergence through implementation of EU rules, it seems that the latter model of a comprehensive air transport agreement is the most possible scenario. What is also important from the current position of the UK, it does not require EASA membership and acceptance of CJEU's competence.

UK and EU may also shape a new model of an agreement which would be a prosthesis between ECAA model agreement and a comprehensive model

[28] The UK could for example ratify the Convention of June 2005 on Choice of Court Agreements, which was ratified by the EU on behalf of the EU member states, although its scope is much more limited than the scope of the Recast Brussels Regulation.

agreement. It is also not excluded that a new model of agreement would be created to reconcile interests of aviation players from the UK, EU and other parts of the world. This however requires much more time for negotiations.

One could say that the best solution for aviation would be the Brexit reversal and the maintenance of UK's *status quo* in the EU. There are however two aspects which should be taken into account in this scenario. Firstly, unfortunately Article 50 of the EU's Lisbon Treaty is silent in the matter of reversal and the only competent institution to interpret this Article is the CJEU, to which the matter could only be addressed. It seems however that the right of revocation cannot be executed unilaterally without a mutual consent of all EU member states. Secondly, even if the Brexit reversal is confirmed by the CJEU, there should be a general conviction on the part of British citizens, that the EU Withdrawal Bill is the only right solution.

Abstract

The Brexit process heralds complex aviation challenges. This article analyses some of the key issues of concern to the aviation as there are still more questions than answers when it comes to it after Brexit. It seems that air transport is a hostage in negotiations between UE and UK. The notice of withdrawal was provided over one year ago but there is no concrete road map regarding this subject. Is it therefore possible to return to the regime of bilateral agreements which was applicable before liberalization? The paper reveals what could happen to airlines that are both based in EU and UK if the agreement is not reached. Both EU and UK have taken a very active role in the process of air transport liberalization. A step back would be considered a defeat in this joint worthwhile undertaking, although it seems also that some big airlines and states have not overcome the spirit of a protectionist approach. The author of this article considers possible scenarios in regulating the most precious rights for airlines after Brexit by targeting the most possible one. It finally analyses the existing regime of law applicable to UK airlines and the possible changes which would be enforced in UK after its withdrawal from EU.