

Brexit: What Effect Upon the Aviation Sector?

Alec Burnside

31 January 2017

Dechert
LLP

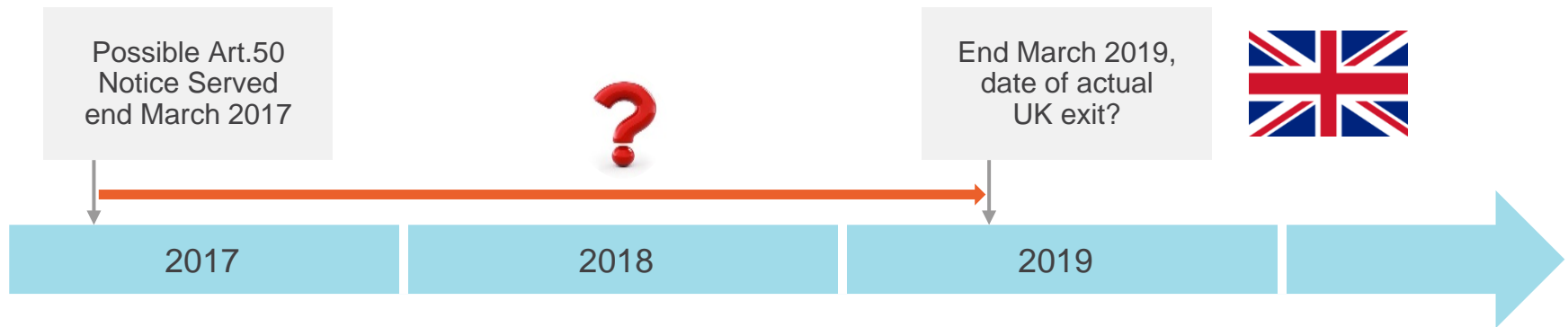
KNect
365 **Comp**
Law

The Brexit Process

Article 50

- 1) Any Member State may decide to withdraw from the Union **in accordance with its own constitutional requirements**
- 2) A Member State which decides to withdraw **shall notify** the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and **conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.** That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, **acting by a qualified majority**, after obtaining the **consent of the European Parliament**
- 3) The Treaties **shall cease to apply** to the State in question from the **date of entry into force of the withdrawal agreement or, failing that, two years after the notification** referred to in paragraph 2, **unless** the European Council, in agreement with the Member State concerned, unanimously decides to extend this period
- 4) ...

Brexit: A Hypothetical Timeline (1)

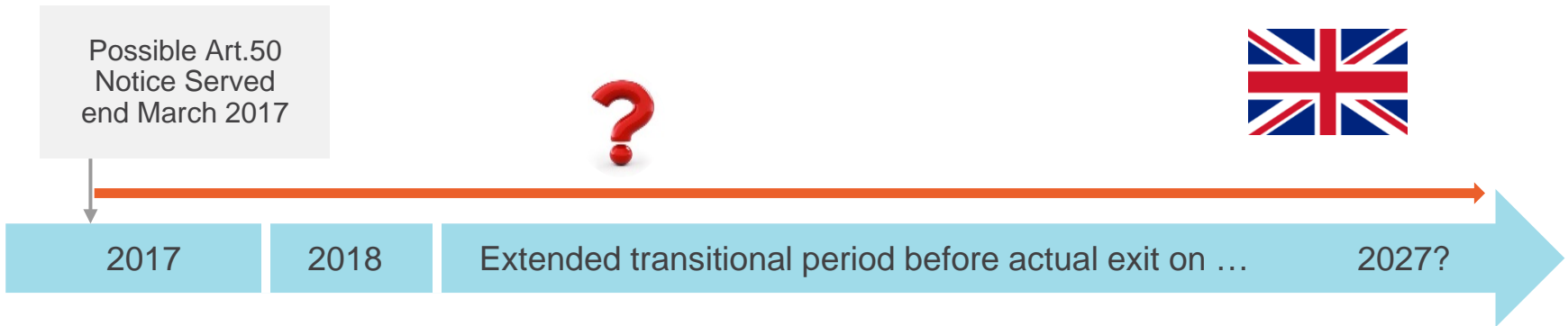


Article 50 process:

- Guidelines agreed for EU negotiation (EU Council only)
- European Commission submits recommendation to EU Council
- EU Council (not UK) authorises negotiations
- EU Commission appoints negotiator
- EU Parliament consents to withdrawal of UK (simple majority)
- Council of EU consents to withdrawal of UK (qualified majority)



Brexit: A Hypothetical Timeline (2)



Could agreement be reached on a transitional period? On what terms?



Agreements Needed To Ensure Continuity of EU-UK Air Services (1)

1) Single European Sky

- Without any agreement UK carriers will no longer have automatic access to the Single European Aviation Market
- The Single European Aviation Market spans a number of areas, eg safety and environmental regulations, interoperability of the European Air Traffic Management Network, etc.

2) European Aviation Safety Agency (EASA)

- Without any agreement UK ceases to be a member of EASA which eg issues certificates for aircraft on behalf of the European Member States
- EASA is open to 3rd countries if they are members of the Chicago Convention and if they adopt all EU aviation safety rules ...
- ... but UK would not have voting rights in the EASA decision-making process
- Current 3rd country members: Iceland, Norway, Liechtenstein and Switzerland

Transitional Agreements To Ensure continuity of EU-UK Air Services (2)

3) Agreements re Air Passenger Rights

- Regulation 261/2004 applies to all passengers departing from an EU airport and departing for a 3rd country's airport and arriving at an EU airport if the operating carrier is an EU carrier
- Without any agreement UK carriers would only be bound by the regulation on flights from an EU country to the UK
- This asymmetry exists already for flights between EU and non-EU states

Effect on Airline Ownership and Operations

EU Airline Ownership Rules

- Regulation 1008/2008 on common rules for the operation of air services in the Community:
 - Not the country of incorporation but the shareholder structure determines airline nationality
 - *“Member States and/or nationals of Member States own more than 50% of the undertaking and effectively control it (...)”* - Article 4(f)
- Commission has recently consulted on draft Interpretative Guidelines on Regulation 1008/2008 – Rules on Ownership and Control of EU air carriers
- These guidelines display some subtlety and (inter alia) invoke parallels to EUMR notions of control

Examples of Airlines At Risk of Losing EU Ownership Status



Rules limit foreign (as in non-EU) ownership of European Union airlines to below 50 per cent. But Ryanair would exceed that limit if the 20 per cent held by UK investors, including HSBC, is considered foreign following Brexit,. About 45 per cent of the company is currently held by non- EU entities, including major US institutions such as Fidelity.

O'Leary warned that, as a consequence of this, Ryanair may need to shift its shareholding structure.



EasyJet too faces similar issues around its ownership, as its chief executive Carolyn McCall recently told Air Transport Weekly: "We know what we have to do, but we will leave our ownership structure until the last possible minute, until we know exactly what the impact will be. There will be some agreement about flying rights, so we will just leave that until then."

Source: The Business Post, "Comment: Brexit has awkward implications for ownership structure of EU airlines"

Examples of Airlines Reacting To Brexit

The easyJet logo is displayed in white text on an orange rectangular background.

easyJet's initial focus will be to accelerate discussions with UK and EU governments and regulators to ensure that the UK remains part of the single EU aviation market. This would enable EU airlines to fly freely within the UK and between the UK and EU, allow UK airlines to fly freely across Europe and would ensure that consumers continue to benefit from low fares and would mean easyJet and other airlines can continue to operate as they do now. easyJet will also continue to develop its alternative options that will fully maintain its existing network and operators.

RNS, 24 June 2016

As a result of the UK's referendum vote to leave the European Union, easyJet plans to establish an Air Operator Certificate (AOC) in another EU member state. This will secure that flying rights of the 30% of our network that remains wholly within and between EU states, excluding the UK. This one-off cost is expected to total around £10 million over two years with up to £5 million incurred in the 2017 financial year. The primary driver of the cost is the re-registering of aircraft in an EU AOC jurisdiction.

Results, 15 November 2016

The Ryanair logo features a yellow harp icon to the left of the word "RYANAIR" in white capital letters, all on a dark blue background.

Political deadlock over Brexit could halt flights between the UK and Europe, according to the chief executive of Ryanair, who warned that Britain's aviation industry is being "walked off a cliff" by the government.

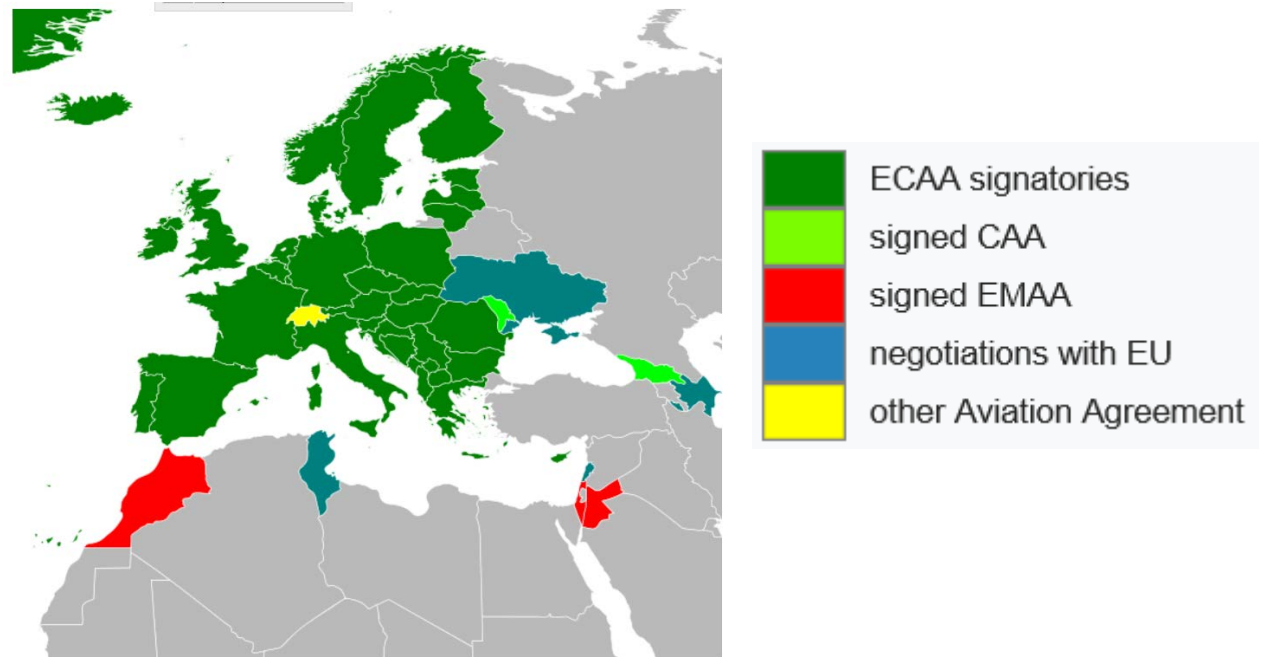
Michael O'Leary said that "mildly lunatic optimism" on the part of the government was masking the risks the UK faced from leaving the EU, with an assumption that it could quickly negotiate new bilateral agreements.

O'Leary said it was a "plausible risk" that no bilateral deal for the airline industry would be forthcoming in time. "Everyone is underestimating in the UK the political situation in Europe. You can see a set of circumstances on the day of Brexit when nobody is flying between the UK and Europe. Even interim arrangements have to be approved by the European parliament."

The Guardian, 22 November 2016

European Common Aviation Area

Any airline owned and controlled by EU nationals is free to operate anywhere within the EU Single Aviation Market and by extension in the European Common Aviation Area (ECAA)



ECAA 36 countries: EU Member States + Norway, Iceland, Bosnia and Herzegovina, Croatia, former Yugoslav Republic of Macedonia, Montenegro, Serbia and Kosovo.

Source of map: Garak E. - Own work in Inkscape, CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=37296998>; 14 December 2014

Without Special Arrangements following Brexit: UK Membership of the EU Single Aviation Area and ECAA Lapses

EU airlines

- Lose automatic rights to operate to/from/within the UK as EU or ECAA member



UK airlines

- Lose automatic rights to operate to/from/within the EU/ECAA
- Lose rights to operate on routes governed by bilaterals between EU and 3rd countries, eg Canada, Morocco, US

ROW airlines

- Lose rights to operate on routes to/from UK governed by bilaterals between EU and 3rd countries

Importance of The Single Aviation Area and ECAA

Examples based on CAPA data

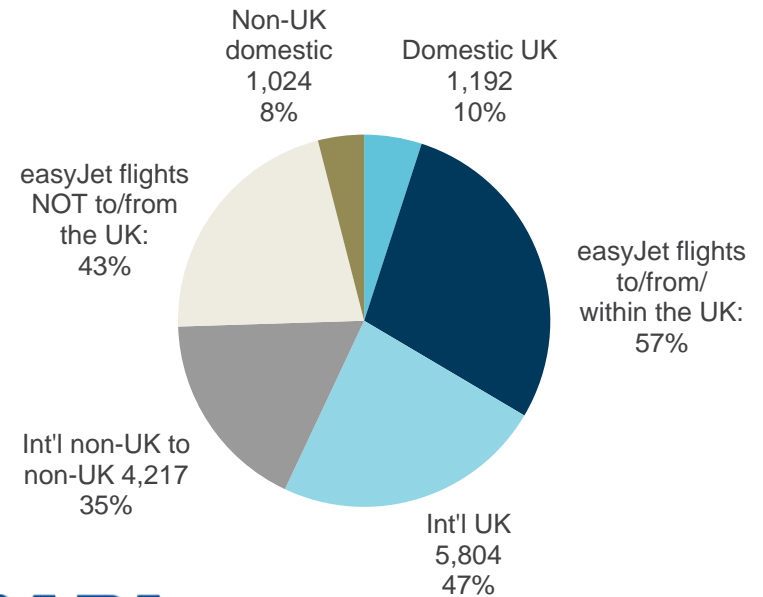
EasyJet

- 43% of easyJet flights in the week commencing 26 June 2016 are not to/from UK
- Single market access has allowed easyJet to fly wholly domestic routes in three countries: France, Italy, and Portugal

Ryanair

- 35% of flights are to/from/within the UK

EasyJet (U2) frequencies by market: 26-Jan-2016 to 02-Jul-2016



CAPA
CENTRE FOR AVIATION

Source: CAPA- Centre for Aviation OAG

Source: <http://centreforaviation.com/analysis/brexit-and-aviation-part-3-importance-of-asian-models-and-liberalisation-moves-will-be-accelerated-288736>

What Options for the UK?

Post-Brexit: What Are The Options for the UK?

Single market/ECAA operations

1. Norway Model

- Member of the ECAA agreement

2. Switzerland Model

- Bilateral Open Skies agreement with the EU

3. Individual Bilaterals



Transatlantic operations

Renegotiate EU-level bilaterals

- If UK not part of ECAA, it will have to negotiate individual bilaterals

Retain or abandon “community carrier” clauses in UK bilaterals

- UK’s bilaterals allow EU airlines to compete with UK carriers on international routes from the UK

Norway Model?

- Full access to EU and ECAA market
- EU-level bilaterals likely remain valid
- **Challenges:**
 - UK limited influence on EU policy
 - No provision in ECAA agreement regarding a Member State exiting the EU
 - ECAA conditions: UK to accept the entire EU aviation acquis, incl. eg rules re state aid, environmental and labour issues **and** establish a close economic cooperation with the EU (free movement!)
 - Possibility that ECAA member raises objections regarding UK 'rejoining' to protect its domestic airlines from competition



Swiss Model?

- Negotiated access to EU and ECAA market
- Negotiation regarding validity of EU-level bilaterals likely
- **Challenges:**
 - UK no influence on EU policy
 - Swiss air transport agreement forms part of a broader package that eg also binds Switzerland to the EU's four freedoms so a bilateral agreement, just like joining the ECAA, likely comes with significant conditions requiring the UK to adopt much of the EU's acquis



Individual Agreements?

- Country-by-country negotiation regarding access to individual markets
- Negotiations needed regarding the validity of each EU-level bilateral
- **Challenges:**
 - Although this approach may avoid the need for the UK to adopt much of the EU's aviation acquis, the individual countries are still bound by the applicable EU rules and may hold onto them in any individual UK agreement
 - This approach would not only require negotiations about flights between the two partner countries (eg UK and NL) but also to flights continuing from eg UK and NL



Contact Information



Alec Burnside

Partner, Dechert LLP

Brussels

alec.burnside@dechert.com

+32 2 535 5433