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# **Brexit and the Influence on the United Kingdom's Aviation relations**

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## **Synopsis**

Up in the air; Brexit the unfamiliar legislative aeroplane has started taking off. Even though Brexit has just about left the runway, it is inevitable that this journey will involve thick fog, the occasional crosswind and a consistent climate of uncertainty. Ascending towards monumental transformation, this flying machine will undoubtedly change course over the upcoming months and even has the potential of a possible U-turn or two.

Nevertheless, The United Kingdom has already bought the flight-ticket unknowing of where the vessel is going to land. The responsibility now solely rests on the designated pilots of this vehicle to do their best to avoid erratic turbulence and making a catastrophic nose-dive, while still accomplishing a safe and sound disembarkation of its precious cargo.

Even though Brexit's destination is vague and unpredictable, one thing is certain; Brexit is programmed for unprecedented territory and is simultaneously plotting a new course for other entities who wish to book their seat to the same experience in the future.

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# 1. Introduction

It is globally known that Brexit is the portmanteau for “British exit” relating to the withdrawal from the European Union by the United Kingdom.<sup>1</sup> What legal personalities and other individuals do not know, however, are what the exact consequences thereof will be on the United Kingdom’s aviation regime. Although the majority of the United Kingdom’s citizens who voted, voted for the withdrawal from the EU, citizens and legal jurists alike, are still not entirely certain of what the aftermath of this movement will mean for the aviation sectors, for both the United Kingdom (UK) and the European Union (EU). Aviation relations will thus definitely be influenced by this monumental shift of control and jurisdiction, but the gravity thereof shall only be determined by the terms of the upcoming agreements between the UK and the EU. The heightened uncertainty of what the future holds for Europe’s and specifically the EU’s aviation relations, results in an extensive legal problem.

The United Kingdom became a Member State of the European Communities by virtue of the Treaty of Accession in 1973<sup>2</sup> but on 23 June 2016 became the first party to prospectively leave the European Union since its establishment in 1993.<sup>3</sup> The United Kingdom was able to execute this withdrawal through the application of the *Lisbon treaty*.<sup>4</sup> Article 50(1) of the Treaty states that any Member State may decide to withdraw from the EU in accordance with its own constitutional requirements.<sup>5</sup> The particular Article also expresses the procedure that should be followed after a Member State notifies the European Council of its intention to withdraw.<sup>6</sup> The meaning of this divorce between the United Kingdom and the EU can hardly be simplified, but from a regulatory perspective, it is however, possible. Article 50(3) of the *Lisbon Treaty* clarifies in this regard. The provision states that the EU treaties shall cease to apply to the United Kingdom from the date of entry into force of the withdrawal, or two years after the notification of withdrawal. The emphasis thus falls on the separation between the United Kingdom and the regulatory framework, applicable rights and obligations formed by EU legislation. The United Kingdom will thus concurrently forfeit its EU membership and has two years to negotiate exit terms with the EU. The effect of this dissolution is needless to say immense but as previously mentioned, this research paper focuses solely on the implications on aviation relations and the airline regime.

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<sup>1</sup> In Accordance with Art 50 of the Lisbon Treaty (2007)

<sup>2</sup> A O’neill *EU law for UK lawyers* (2011) 55

<sup>3</sup> C Erkelens, P Briggs et al. “How will Brexit affect the airline industry from a regulatory perspective” (2016)

<sup>4</sup> The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007) (from now on referred to as “Lisbon Treaty”)

<sup>5</sup> Art 50 Lisbon Treaty (2007)

<sup>6</sup> Art 50(2) Lisbon Treaty: “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. The agreement shall be negotiated in accordance with Article 218(3) of the Treaty of the Functioning of the European Union”

Before the effect of Brexit on the aviation sector can be studied, a greater understanding of general EU law together with basic air law principles are required. The applicability and foundation of air law can be best described by investigating the development thereof. In the early 1900's there were two leading schools of thought pertaining to trans-border flights and the possible freedom thereof.<sup>7</sup> The "air freedom" theory pursued the notion of freedom of over-flight, over any country's airspace without permission, while the "air zone" theory focused on the sovereignty over a country's own airspace.<sup>8</sup> This debate however, was settled by the adoption of the *Chicago Convention* which reconfirms that by ratifying the Convention each State Party recognises that each state has exclusive sovereignty over the air space above its own territory.<sup>9</sup> Thus, it goes without saying that the most public air law disputes revolves around the fundamental principle of sovereignty and the violation thereof. This same fundamental principle entitles each Member State to conclude its own aviation agreements with other member states on terms that they both agree upon, usually in the form of bilateral agreements.<sup>10</sup> This principle of bilateralism, however, may be altered when a State is a member of the European Union.

## 1.2. Assumptions and research questions

Due to the uncertain nature of this subject matter, assumptions must be made to clarify the possible outcome of this research paper. Assumptions in this regard will correspond with the delimitation of my research and the components on which I will focus. Firstly, it is assumed that Brexit and the changes which it proposes, will have a dramatic effect on the aviation relations between the United Kingdom and the European Union. Furthermore, it is assumed that Brexit will also impact traffic rights and aspects of ownership and control. Lastly, it is assumed, that Brexit will not be beneficial to the United Kingdom's aviation relations due to the universal tendency of globalisation and the loss of membership of the prosperous single aviation market. The objective of the research is thus to determine and clarify these assumptions and to establish the most likely outcome of Brexit on the aforementioned aviation relations.

The research questions of this paper will be formulated according to the previous mentioned assumptions about this fascinating subject and will constitute the three main chapters of the paper. Firstly, it will be asked what the influence of Brexit will be on traffic rights ownership and control, and the regulatory framework of the United Kingdom? Secondly, it will be asked what the possible outcomes may be on the

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<sup>7</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 12.

<sup>8</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 12.

<sup>9</sup> Art 1, Chicago Convention on International civil aviation, 1994, see also Paris Convention 1919.

<sup>10</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 215; The main objective of a bilateral aviation agreement is to guarantee specific air traffic rights in support of commercial services in accordance with Article 5 and 6 of the Chicago convention.

aviation relations between the United Kingdom and EU with regard to technical regulation and legislative framework? Lastly, it is also necessary to determine what exact consequences Brexit will have on the operation of low-cost carriers in the EU?

### 1.3. Overview of EU law and its nature

The European Union is a unique and remarkable form of political and legal organisation,<sup>11</sup> but is rarely clearly defined. The best possible simplified definition describes the EU as a group of liberal-democratic states, acting together through an institutionalised system of decision making.<sup>12</sup> In the last two decades in particular, the EU has sought to shape a role for itself as a significant global entity and has developed a substantial network of relations through which it can influence international matters.<sup>13</sup> The EU is undoubtedly the world's largest trading power and has a population exceeding 500 million citizens.<sup>14</sup> This number will decrease dramatically after the departure by the United Kingdom and the trading power of the EU will most probably, also diminish.

Some writers, however, feel that it can not be named an international organisation at all, due to the fact that the EU does not merely operate between States, but has implicit power over them.<sup>15</sup> To support this statement it is subsequently argued that the EU is more than just the Member States acting together, it is a legal personality of its own. Comprising out of 28 Member States until the withdrawal by the United Kingdom, the basis of European Union's legal personality can best be described as a form of supranational integration.<sup>16</sup> The objective of this paper is not to determine the nature of the EU which is still contested, but this serves as a suitable introduction to the working of the EU legal order and its possible influence on the withdrawal from the United Kingdom.

After discussing the essence of the European Union, it is important to give a brief overview of the character of the European legal order and the applicability thereof on the subject matter of Brexit and its influence on aviation relations. European Union law consists of those rights and obligations which may ultimately be derived from a set of international treaties which have been concluded among a number of European countries for more than 60 years.<sup>17</sup> *The Lisbon Treaty on European Union* which in principle amended the Treaty of Maastricht (1993) and the Treaty of Rome

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<sup>11</sup> D McGoldrick *International Relations Law of the European Union* (1997) 1.

<sup>12</sup> M Cini, NPS Borragán *European Union Politics* (2015) 3.

<sup>13</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 316.

<sup>14</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 316.

<sup>15</sup> TC Hartley *European Union law in a global context* (2004) 1.

<sup>16</sup> S Hix, *The Political System of the European Union* (2011) 12.

<sup>17</sup> A O'neill *EU law for UK lawyers* (2011) 3.

(1957), now forms the basis of European legislation and formally introduced the EU's legal personality.<sup>18</sup>

Treaties on the European Union can be perceived as instruments of progress due to the frequency of the reform of these treaties and their general purpose to continue development of the European Union. Furthermore, it is important to note that the European Union does not have a codified constitution and its laws are vested in the form of multilateral treaties which represents its basic regulatory structure together with other forms of secondary law which will be discussed later on.<sup>19</sup>

The institutions of the EU comprising out of the Commission and its Specialised Agencies, the Court of justice, Parliament council, the European council, and the European Central Bank together with numerous other bodies are perhaps the most significant characteristics of the Union's legal structure.<sup>20</sup> These institutions are distinctly interdependent and interconnected with one another and together form the basis of joint decision making.<sup>21</sup> These institutions, however, must still comply with the limits and the powers conferred on it by Treaties and practice mutual sincere cooperation.<sup>22</sup>

The most important institution and judicial branch with regard to the interpretation of EU law and the possible outcomes of Brexit on aviation relations is undoubtedly the European Court of Justice (ECJ). The nature of the jurisprudence of the ECJ has been compared to that of a federal system and the withdrawal from its authority will definitely influence the agreements between the UK and EU.<sup>23</sup> The claimed federal nature of EU law, however has been frequently ignored by the United Kingdom in political talks over Europe.<sup>24</sup> This is yet another strong rationale for Brexit.

Through the elaboration of the supremacy of EU law and the concept of direct effect, the Court of Justice has been fundamental in shaping the aviation structure of the EU and indirectly aims to assist member states in the interpretation of EU law.<sup>25</sup> If the UK wishes to adopt some or all of the UK aviation legislation after Brexit to circumvent radical changes to its aviation regulatory framework, it must also determine whether it accepts the past and future judicial interpretations of the ECJ.

After the discussion of the general EU institutions, it is also important to take into account and make special mention of the European Aviation Safety Agency (EASA). EASA, which is a specialised Agency of the EU, is the centre of the EU's aviation safety strategy and certain functions have been assigned to it. These functions are

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<sup>18</sup> RJ Goebel, EM Fox et al. *Cases and Materials on European Union law* (2015) 28.

<sup>19</sup> RJ Goebel, EM Fox et al. *Cases and Materials on European Union law* (2015) 24.

<sup>20</sup> M Cini, NPS Borragán *European Union Politics* 4<sup>th</sup> edition (2015) 3.

<sup>21</sup> M Cini, NPS Borragán *European Union Politics* 4<sup>th</sup> edition (2015) 3.

<sup>22</sup> Art 13(2) Lisbon Treaty on European Union (2007); this provision emphasises the principle of joint-decision making

<sup>23</sup> A O'neill *EU law for UK lawyers* (2011) 8.

<sup>24</sup> A O'neill *EU law for UK lawyers* (2011) 9.

<sup>25</sup> E Szyszczak, A Cygan *Understanding EU Law* (2008) 43

derived from acts adopted under the competence of Regulation (EC) 216/2008, covering legislation pertaining to various fields of aviation regulation which includes, air safety and environmental protection.<sup>26</sup> Through these competences, EASA obtained separate legal personality and indirectly sets standards that must be complied with by airlines. EASA and the standards it sets through its opinions and draft regulations referred to the Commission becomes relevant in the chapter relating to technical regulation since an airline's licence can only be recognised if it complies with these above-mentioned standards.

It is safe to say that EASA is likely to remain part of the United Kingdom's aviation framework and that Brexit will not have a significant impact on EASA's influence due to the fact that states that are not Member States of the EU, are still allowed to participate in the EASA processes where they have entered into agreements with the EU under which they adopt and apply EU law in the fields covered by Regulation (EC) 216/2008.<sup>27</sup> This statement, however, can only be confirmed after the upcoming negotiations between the UK and the EU. The influence of EASA on technical regulation will once again be mentioned further on in the research paper.

A common misapprehension with regard to the scope of EU law is that it is a set of regulations which apply to only certain areas of specialised practice. This is inaccurate.<sup>28</sup> EU law is not uniform across the whole spectrum of national legislation but can't be regarded as a matter of particular specialist interest.<sup>29</sup> It can thus be argued that a consideration of the relevant EU law principles should always form a fundamental part of the implementation of national law.<sup>30</sup> This responsibility to consider EU law ceases to exist the moment that a country withdraws from the European Union.

The relationship between EU law and national law is based on a principle of supremacy.<sup>31</sup> National courts are required to give effect to EU law, of any rank and to set aside any national law of whatever rank, which could hinder the application and working of the EU law and principles.<sup>32</sup> It can thus be said that any norm of EU law takes precedence over and outweighs any other applicable national law or norm. If the UK withdraw from the EU, their national laws will therefore not be suppressed or overridden by EU principles. Article 4(3) of the *Treaty of the European Union* places a responsibility on Member States to ensure fulfilment of the obligations arising out of Treaties or other acts from the European Union and imposes duties of sincere

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<sup>26</sup> S Hobe, N von Ruckteschell et al. *Cologne Compendium on Air law in Europe* (2013) 167.

<sup>27</sup> Article 6 of EC Regulation 216/2008; This regulation is currently being revised see EC Statement 'Policy initiative on aviation safety and a possible revision of Regulation (EC) No 216/2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency' 2015.

<sup>28</sup> A O'Neill *EU law for UK lawyers* (2011) 1.

<sup>29</sup> A O'Neill *EU law for UK lawyers* (2011) 2.

<sup>30</sup> A O'Neill *EU law for UK lawyers* (2011) 3.

<sup>31</sup> R Schütze, *An Introduction to European Law* (2015), 142.

<sup>32</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 266.

cooperation.<sup>33</sup> In accordance with this implicit obligation, the Member States are also required to refrain from any measure which could jeopardize the accomplishing of the European Union's objectives and to facilitate these objectives.<sup>34</sup> It can thus be argued that national courts play a resounding role in the protection of European law on international level.<sup>35</sup>

This perspective on the supremacy of the EU law, however, is not expressly accepted by the majority of national courts and due to the uncodified nature of the EU's constitution, may result in numerous challenges with regard to the relationship between Member States.<sup>36</sup> The principle of supremacy is nevertheless in line with the need for consistency and uniformity of EU law. From the United Kingdom's perspective, membership of the European Union entailed a permanent limitation of sovereign rights of it as a Member State, to the extent that national laws passed after entry into the European Union could not be given effect to, if it contradicts EU law.<sup>37</sup> This limitation of sovereignty and the responsibility to adhere to EU law would be two of the dominant rationales for withdrawing from the European Union.

European Union law is based on a two-tier system of legislation.<sup>38</sup> The Treaties and the Charter are the primary legislation mainly consisting out of the previous principles of the *Treaty on the European Union* and the *Treaty on Functioning of the European Union*.<sup>39</sup> Primary legislation provides for the introduction of secondary legislation to achieve the objective of integration.<sup>40</sup> Primary legislation are usually adopted by the Council of the EU and the Parliament following a proposal by the EU commission.<sup>41</sup> Due to the nature of EU law-making, when the Member States now participate in the law-making procedures of EU institutions, the Member States no longer represent their own individual interests but the general collective interest of all the members of the EU.<sup>42</sup> It is also important to note that annexes of the Lisbon Treaty form an integral part of its regulatory framework, which deems it as part of primary legislation.<sup>43</sup>

Secondary legislation falls into four different categories and include no formal hierarchy. These are Regulations, Directives, Decisions, Recommendations and

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<sup>33</sup> A O'Neill *EU law for UK lawyers* (2011) 58.

<sup>34</sup> A O'Neill *EU law for UK lawyers* (2011) 59.

<sup>35</sup> M Cremona, *Compliance and the enforcement of EU law* (2012) 159.

<sup>36</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 266.

<sup>37</sup> *Costa v ENEL* (1964) ECR 585 at 593.

<sup>38</sup> W Voermans, JMR Hartmann et al. "The quest for legitimacy in EU Secondary legislation" *Theory and Practice of legislation* (2014) Vol 2, Issue 1, 7.

<sup>39</sup> The Lisbon Treaty (2007) amended numerous principles of these treaties.

<sup>40</sup> E Szyszczak, A Cygan *Understanding EU law* (2008) 22.

<sup>41</sup> J Erne "Primary and Secondary law making in the renewed EU" *Trames* (2010) Vol 3, 258 ; In accordance with Art 294 of the Treaty on the Functioning of the EU.

<sup>42</sup> J Erne "Primary and Secondary law making in the renewed EU" *Trames* (2010) Vol 3, 260.

<sup>43</sup> Art 51 of The Treaty on the European Union (2007)

Opinions.<sup>44</sup> Regulations and Directives are applicable and binding to all Member States and thus have general application. It is important to note that the Council usually needs to delegate legislative authority to the Commission before the drafting of regulations, although exceptions do occur.<sup>45</sup> In contrast, decisions are binding only upon the party to which they are addressed, while recommendations and opinions are not legally binding but only needs to be considered when interpreting EU law.<sup>46</sup> The lack of pedigree of secondary legislation however, causes various legitimacy related problems and is yet another indication of the preference towards Treaty based legislation.<sup>47</sup>

One difficulty relating to primary and secondary legislation is whether the particular provision has direct effect.<sup>48</sup> When legislation is deemed to have direct effect, the rights within it can be invoked and relied on in national courts. There are however certain criteria that needs to be present to constitute direct effect.<sup>49</sup> The same criteria are used to determine whether regulations, a form of secondary law, have direct effect. Directives on the other hand does not require that the provision is not subject to further implementation but rather that the time limit for implementation has expired.<sup>50</sup> Direct effect is therefore an important constitutionalising method to ensure a uniform application of EU law.<sup>51</sup> The supremacy of EU law has been central to the development and widening of the concept of direct effect, and withdrawing from the European Union will result in concluding the relationship between the United Kingdom and the possible rights obtained through the concept of direct effect.<sup>52</sup>

With regard to the European Union single market, the relationship between primary Treaty based principles and secondary legislation is not always clear, apart from the general rule that the Treaty has superiority in the conflict over secondary law.<sup>53</sup> The supremacy of Treaty principles and the functioning of secondary legislation thus plays a substantial role in the development and interpretation of EU law and the satisfying of its aviation and air law objectives.

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<sup>44</sup> E Szyszczak, A Cygan *Understanding EU law* (2008) 23, as stated in Article 288 of the Lisbon Treaty; It is important to note that recommendations and opinions are grouped together as one category.

<sup>45</sup> C Fretten, V Miller *The European Union: a guide to terminology procedures and sources* (2005) 14.

<sup>46</sup> E Szyszczak, A Cygan *Understanding EU law* (2008) 23.

<sup>47</sup> W Voermans, JMR Hartmann et al. "The quest for legitimacy in EU Secondary legislation" *Theory and Practice of legislation* (2014) Vol 2, Issue 1, 3.

<sup>48</sup> E Szyszczak, A Cygan *Understanding EU law* (2008) 23.

<sup>49</sup> *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62 stated that Treaty articles will have direct effect if they are clear and precise, unconditional and not subject to further implementation.

<sup>50</sup> *Van Duyn v Home Office* (1974) case 41/74.

<sup>51</sup> E Szyszczak, A Cygan *Understanding EU law* (2008) 25.

<sup>52</sup> A O'Neill *EU law for UK lawyers* (2011) 57.

<sup>53</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 794.

## 1.4. Economic integration and the freedom to provide trans-border services

At first glance, EU law resembles a complex but fascinating subject of study. Although it is common knowledge that the EU law regulatory system has changed dramatically over the last century, some of the past influences and primary objectives are still present. The main economic rationale for the establishment of the EU and a regulatory framework of this nature also stayed the same. It is the development of the single market and the aim of economic integration.<sup>54</sup> The primary objective of the single market was the removal of internal barriers to trade and the establishment of a corresponding common policy towards third countries.<sup>55</sup> The basis of economic integration and the principle of free trade between member states rest on the allocation of the five basic freedoms.<sup>56</sup> These four freedoms were set out and guaranteed in part 3 of the *Treaty of the functioning of the European Union* and includes, free movement of goods, capital, services, and labour. The focus of these freedoms is to ensure that the providers most favoured by customers will be most successful, irrespective of their country of origin and will result in maximising wealth and job creation for the EU.<sup>57</sup>

The particular freedom that is influential regarding aviation is the right to provide trans-border services. The freedom to provide services entails the carrying out of an economic activity for a temporary period in a Member State in which either the provider or recipient of the service is not established.<sup>58</sup> This freedom facilitates the optimal allocation of components of production and the efficient performance of commercial and financial entities throughout the European Union.<sup>59</sup> Being a member state and obtaining this right is therefore pivotal to European airlines who seek to conduct trans-border flights. Article 56 of the *Treaty on the Functioning of the European Union* indicates however that in order to obtain the right to provide trans-border services, the entity must already be established within the EU. This will therefore be a central talking point in my paper due to the prospective withdrawal from the United Kingdom and the possibility of losing this highly sought after economic freedom. First, however, the question should be asked whether air transport can be included into these freedoms as a “service” and thus consequently be included into the system of economic integration?

To understand the relationship between aviation, liberalisation and European economic integration the history and development thereof should once again be examined. Liberalisation of air transport means the reduction of limitations imposed

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<sup>54</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 607.

<sup>55</sup> E Szyszczak, A Cygan *Understanding EU law* (2008) 2.

<sup>56</sup> The Treaty on the functioning of the European Union, 2007.

<sup>57</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 608.

<sup>58</sup> P Graig, G De Búrca *EU law: Text, Cases, and Materials* (2015) 820.

<sup>59</sup> RJ Goebel, EM Fox, et al. *Cases and Materials on European Union law* (2015) 603.

upon existing actors in the aviation sector and is clearly the most straightforward path to regulatory integration.<sup>60</sup> Liberalisation thus concurrently forms the foundation of European economic integration. Prior to April 4, 1974 the common transport market was restricted to only inland water, road and railway transport due to the former Article 80(2) of the *Treaty establishing the European Economic Community* stating that the Council may “acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport”.<sup>61</sup> This provision created the assumption that the Treaty did not apply to air transport which resulted in major airlines being mostly state owned, usually having a near monopoly at national level and air services between European Member States being regulated by bilateral agreements.<sup>62</sup> These agreements between member states were often supplemented by confidential memoranda exchanged between authorities which occasionally modified certain provisions while fares for scheduled air services were ultimately set by states under the auspices of the International Air Transport Association (IATA).<sup>63</sup> At this time numerous international routes were only single designated destinations, so that only one airline of each country could be permitted to operate. This position of air transport in Europe was the result of the former strict and narrow approach to the aforementioned Article 80(2). This provision was the central talking point in the familiar case of *The Commission v French Republic* also known as the “French Seamen judgment”.<sup>64</sup>

The movement towards economic integration of air and sea transport took its first step on 4 April 1974. The above-mentioned case confirmed the universality of the *EEC Treaty* and consequently ruled that Article 80(2) did not exclude the applicability of the Treaty on air and sea transport.<sup>65</sup> Air and Sea transport were thus treated and governed on the same principles as the other modes of transport. After the “Seamen judgment” however, national aviation markets were still fragmented through restrictive bilateral agreements. Even though the European Court of Justice severely criticised the European Council due to its failure to introduce the freedom to provide services in the air and sea transport sectors,<sup>66</sup> it was not until 1987, that true liberalisation of the EU aviation sector started to take place. The most important stepping stones to a liberalised aviation market in the EU, thus occurred in three different stages between 1987 and 1997.<sup>67</sup>

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<sup>60</sup> SK Weinberg, “Liberalization of air transport: Time for the EEC to unfasten its seatbelt” (1997) 3; This however was somewhat contradictory to Article 4 on the Treaty of the Functioning of the European Union which states that “The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6”

<sup>61</sup> S Hobe, N von Ruckteschell et al. *Cologne Compendium on Air law in Europe* (2013) 16.

<sup>62</sup> N Moussis, *Access to European Union: law, economics, policies* (2003) 430.

<sup>63</sup> N Moussis, *Access to European Union: law, economics, policies* (2003) 430; IATA is the abbreviation for International Air Transport Association which was established in 1945.

<sup>64</sup> *Commission v French Republic*, ECR 1974, 359.

<sup>65</sup> *Commission v French Republic*, ECR 1974, 371.

<sup>66</sup> Case 13/83 Slg. 1985,1513.

<sup>67</sup> N Moussis, *Access to European Union: law, economics, policies* (2003) 431.

Before the liberalisation between 1987 and 1997 can be discussed it is also important to note that the “Nouvelles Frontières” decision additionally helped to shape the path and development of aviation liberalisation.<sup>68</sup> In this instance the European Court of Justice decided that rules and policy pertaining to competition are part of general rules which are also applicable to air transport. Shortly after the aforementioned decision, liberalisation came in the form of three distinctly different liberalisation packages.<sup>69</sup> The first package was issued in 1987 and gave the airlines some flexibility to increase capacity and to adjust fares on EU cross border flights without bilateral agreements. The second package from 1990 allowed airlines to carry passengers to and from any other Member State and to carry passengers between any third countries, with origin and destination in the home country.<sup>70</sup>

It was however, only after the third and last package when a considerable liberalised aviation sector was achieved. The third package of rules opened market access, freedom to set air fares, eliminated capacity restrictions and set rules governing the licensing of air carriers in 1992, while stand-alone cabotage rights were only permitted in 1997.<sup>71</sup> Cabotage and its exact influence on EU aviation law will be discussed later on. Nevertheless, these regulations derived from the third package reflected all of the usual areas of air transport that would have been key components of former bilateral service agreements.<sup>72</sup> These regulations also had direct effect but certain changes had to be made to UK legislation where there were regulatory or policy conflicts.<sup>73</sup>

The initial liberalisation movement completed in 1997, has had paramount implications on relations and competition between airlines and Member States and withdrawing from the EU, means withdrawing from all the benefits derived from this long awaited liberalisation.<sup>74</sup> Since 1997 the EU has systematically endeavoured to develop a complete regulatory framework that applies to the Aviation sector with the aim to liberalise the European Union’s aviation and to take advantage of the single market construction, benefitting consumers and businesses. EU legislation have thus changed aviation agreements significantly and flights between points within the EU no longer require an underlying legal framework of traffic rights and bilateral agreements to be adhered to by EU operators.<sup>75</sup> To summarise, the EU thus now possesses over the so called “Single air transport market” and subsequently the European Common Aviation Area (ECAA).

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<sup>68</sup> *Ministre Public v Asjes* 209 bis 213/84 196, 1425.

<sup>69</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 17.

<sup>70</sup> This includes three of the eight possible “freedoms of the air” which will be examined in detail later on.

<sup>71</sup> See Article 7 of the Chicago Convention, SV Gudmundsson, *Liberalization of air transport*, International handbook on the liberalization of infrastructure (2010) 8.

<sup>72</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 18.

<sup>73</sup> PS Dempsey “European Aviation Regulation: Flying Through the Liberalization Labyrinth” *Boston College International and Comparative Law Review*, 1992, Volume 15, Issue 2, 311.

<sup>74</sup> Article 56 of the *Treaty on the Functioning of the European Union* states that in order to obtain the right to provide trans-border services, the entity must already be established within the EU.

<sup>75</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 222.

To retain access to this prosperous single aviation market will most probably be one of the UK's top priorities following Brexit. This however, will be equally important for airlines registered in the United Kingdom or currently owned by a majority of UK citizens. Regulation 1008/2008 effectively grants EU market access and aircraft licencing matters.<sup>76</sup> Although various matters relating to Brexit and aviation will be drawn from the applicable law stemming from Regulation 1008/2008, there are a few of significant relevance. According to this regulation, carriers who hold an operating licence issued by the UK Civil Aviation Authority (CAA) will no longer be regarded as 'Community carriers' for the purposes of the EU single aviation market. Notwithstanding the magnitude of that provision, article 4(f) further states, with regard to conditions for the granting of operating licences, that;

"Member States and/or nationals of Member States own more than 50 % of the undertaking and effectively control it, whether directly or indirectly through one or more intermediate undertakings, except as provided for in an agreement with a third country to which the Community is a party"<sup>77</sup>

It is thus clear that Brexit, without any further agreements, will result in loss of market access to the EU by the airlines that do not meet the requirements of Regulation 1008/2008. This paper will therefore place regulation 1008/2008 central to the discussion of Brexit and its effects on aviation and will concurrently endeavour to examine all the possible options for the United Kingdom to maintain market access.

## 1.5. Conclusion of introduction

After the brief discussion and analysis of the pertinent characteristics of EU law, it is evident that EU legislation and jurisdiction have altered bilateral aviation relations dramatically and resulted in flights between points within the EU no longer requiring an underlying bilateral service agreement or stipulation of traffic rights between Member States.<sup>78</sup> The withdrawal by the United Kingdom will needless to say, influence this position. The UK thus now faces a trade-off between having the policy freedom to set its own aviation regulations and legislation or maintaining the regulation of aviation activities as present and subsequently remaining part of the European Common Aviation Area (ECAA). In this regard, the deliberation between the EU and the United Kingdom will remain preoccupied with economic and political aspects, most probably limited to the short-term desire of reorganising the EU in pursuit of its long-term viability and development.<sup>79</sup> That being said, the outcome of Brexit will set an entirely new precedent due to the UK being the first large country withdrawing from the EU and may pave the way for other States who wish to do the same in the future.

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<sup>76</sup> Regulation EC 1008/2008 of the European Parliament and Council, 2008.

<sup>77</sup> Article 4(f) Regulation 1008/2008

<sup>78</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe*, (2013) 215.

<sup>79</sup> M Avbelj "Brexit: an end to the end of history" (2016) 1 *German law journal* 17<sup>th</sup> edition.

## **2. The effect of Brexit on general aviation elements between the United Kingdom and the European Union.**

### **2.1. Introduction**

The future is unknown and to predict it can be truly troublesome. To establish the exact outcome of Brexit on the aviation sector, even more so. Even though the true effects of Brexit will only be shaped by the finalised terms of the upcoming exit agreements between the EU and the UK, the various possible outcomes may indeed be identified and explored to ultimately limit any unexpected alterations from affecting both parties negatively. The classic saying, prevention is better than cure springs to mind. It is therefore critical to examine the possible and probable outcomes of Brexit on the aviation sector before finalisation of the upcoming agreements between the UK and EU. Before each possibility can be accessed however, various individual key elements pertaining to aviation must be evaluated and discussed.

These forthcoming deliberations will ultimately establish what sort of relationship the UK will have with the EU and how specific individual policy sectors will be influenced. The following chapter will thus endeavour to examine the influence of Brexit on the United Kingdoms' regulatory framework, traffic rights and provisions relating to ownership and control.

### **2.2. The effect on the United Kingdom's aviation legal framework**

As previously mentioned, the United Kingdom became a Member State of the former European Communities in 1973 by virtue of the Treaty of Accession. This resulted in the system of EU law being incorporated into the domestic legal systems of the United Kingdom on a basis of supremacy.<sup>80</sup> The principle of supremacy and the effect thereof can indeed be simplified. EU law and its primacy requires and creates a procedural duty on national courts to where it might otherwise apply a national rule, disapply that rule to the extent that it is incompatible with EU law rights and obligations.<sup>81</sup> The United Kingdom will indeed still be subject to these obligations under EU law for the time being but the principle of supremacy and the overriding effect of EU law ceases to exist the moment a state formally withdraws from the European Union. The question now however, is what the United Kingdom's regulatory framework will resemble after the withdrawal?

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<sup>80</sup> A O'neill *EU law for UK lawyers* (2011) 54.

<sup>81</sup> A O'neill *EU law for UK lawyers* (2011) 60.

No Member State has had a greater impact on the EU aviation regulatory regime than the UK.<sup>82</sup> As mentioned previously, the United Kingdom was one of the key players in liberalising the aviation sector and has also been a consistent supporter of the majority of subsequent EU legislation. Remaining part of the European Union, however, is out of the question and change to the status quo is therefore bound to happen. Article 50 of the Lisbon treaty as discussed earlier, explains the procedure for a Member State of the EU to exit the so-called bloc. According to this provision, EU rules which applied to the United Kingdom will no longer apply “from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification.”<sup>83</sup>

After the two-year time-period elapses, the UK will nevertheless not be without rules and regulations. Should no final arrangements with the EU be concluded before that period passes, the rules, treaties, bilateral agreements and regulations governing relationships which existed before the inclusion of the UK into the EU, will now once again apply. This however, will only be the case should the United Kingdom not reach any further arrangements that would alter the previously implemented UK regulations. There should also be considered that there would be numerous *lacuna* since the UK and Europe in general has had tremendous transformation in the last 40 years. Nevertheless, the outcome thereof can only truly be determined after the deliberations between the EU and UK have finalised. One of the main rationales behind Brexit however, is to free itself from the obligations to adhere to EU regulations and restricting practices.

Whether these EU inspired laws would continue to apply after Brexit would be a matter for the UK Parliament to discuss. A uniform repeal of all the EU imposed regulations and directives would be immensely disruptive and, if substitute UK laws were not in place, it could have substantial detrimental effects.<sup>84</sup> It is more likely that Parliament would “nationalise” the majority of EU incorporated laws and replace or amend them progressively over the years with domestic UK law.

The European directives incorporated into UK law will therefore continue to apply unless repealed. In other words, the European directives may therefore still be enforceable and empowered at a national level by the UK courts but not at an EU level following Brexit. Most EU secondary legislation, however, are by way of regulations, directly effective and are thus not incorporated into UK law, but have legal effect in the UK because of the EU law principle of direct effect.<sup>85</sup> As mentioned earlier the principle of direct effect will cease to apply after withdrawal. These regulations however, will not have effect, as the underlying laws will no longer apply. The primary choice for the UK regarding its regulatory framework is therefore whether to re-enact some or all of the EU regulations in its domestic law, with or

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<sup>82</sup> B Humphreys, ‘Brexit and Aviation: all clear now?’ *Aviation and Space Journal* 2016, 33.

<sup>83</sup> Article 50 of the Lisbon Treaty

<sup>84</sup> G Belsham ‘Status of UK carriers after Brexit’ *Ince & Co*, 2016 accessed on 2017/05/29

<sup>85</sup> A Masutti, A Laconi ‘The impact of Brexit on the aviation industry’ *The aviation and space Journal* 2016, 28.

without modifications.<sup>86</sup> The freedom to modify EU regulations is a major rationale for Brexit but may be limited by the nature of the relationship with the European Union. The possible restricting nature on the freedom of the UK based on the essence of the relationship between the UK and EU will be discussed later on.

To illustrate the effect that Brexit will have on the United Kingdom's regulatory regime, the regulation of safety and security of its aviation passengers will serve as a perfect example. Along with the obligation to adhere to the EU legislative framework the United Kingdom would not be bound by the regulation of the European Aviation Safety Agency (EASA). EASA, the centerpiece and focus of the EU's aviation safety regime is regulated and empowered by Regulation 216/2008.<sup>87</sup> EASA is an agency in terms of the EU treaties and has legal personality. Even though EASA is applicable to all EU Member States by default, Article 66 of Regulation 216/2008 allows for the agency to apply to other non-Member States, if those states adopt and apply all the laws of the fields governed by that same regulation.<sup>88</sup> One of the main objectives of EASA is therefore to maintain uniformity of aviation safety to ensure a certain level of safety standards. Adopting EU law, contradictory to the notions of Brexit is once again a requirement for membership and to benefit from EASA's application. As will become relevant at a later stage in this paper, Iceland, Norway, Liechtenstein and Switzerland all form part of the EASA framework.

Post Brexit, the UK will lose influence over the full development of the EASA legal framework and its various other responsibilities and powers like certification, mutual recognition and oversight. Countries that are not Member States of the EU are merely allowed to participate in the EASA processes where they have entered into agreements with the EU and under which they adopted and applied EU law in the fields covered by the basic Regulation and therefore, lose power to influence EASA on a general scale and to affect the final formation of regulations.<sup>89</sup> Although EASA's role is often limited to making recommendations to the Commission about the content of regulation and simultaneously advising the Commission and other European institutions on associated policy issues, losing the ability to influence EASA will only be to the detriment of the United Kingdom.<sup>90</sup> Article 1 of the Rules of Procedure of the Management Board of EASA describes "members with voting rights" as a "representative of a Member State of the European Union". The United Kingdom, still currently a member of the EU, may endeavor to negotiate with EASA to retain its voting rights after Brexit, but if history is anything to go by, it is highly unlikely.<sup>91</sup>

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<sup>86</sup> A Masutti, A Laconi 'The impact of Brexit on the aviation industry' *The aviation and space Journal* 2016, 28.

<sup>87</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe*, (2013) 167.

<sup>88</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe*, (2013) 168.

<sup>89</sup> C Erkelens, P Briggs *et al* 'How will Brexit effect the airline industry from a regulatory perspective?' 2017, 1 Accessed on 2017/07/15.

<sup>90</sup> Article 17 of EC Regulation 216/2008.

<sup>91</sup> A Little 'The Impact of Brexit on Aviation' Alston & Bird, 2016 accessed on 2017/06/10

Even though this chapter serves as a good indication on how Brexit will affect the regulatory perspective universally, the focus falls on, to what extent the air transport legal framework which is subject to considerable EU influence, will change as a consequence of Brexit. Although the general EU regulatory framework will change after Brexit, the weight of the alterations with regard to aviation relations will differ according to the possible outcomes that will be discussed later on. Before the outcomes of Brexit on air law can be explored, an enhanced understanding about air traffic rights, and ownership and control restrictions are required.

### 2.3. The effect of Brexit on air traffic rights

Air traffic can be defined as the movement of an aircraft from one point to another across the airspace.<sup>92</sup> Sovereignty in an international law context means the right to exercise the functions of a state to the exclusion of all other states and forms the basis of virtually all air law disputes. Air traffic rights thus normally entail certain rights granted to a specific airline or aircraft to move over the airspace of another country due to the principle of territorial sovereignty.

Air traffic rights or freedoms of the air contained in bilateral air service agreements can be divided into three different categories namely; the transit freedoms of the air, the transport freedoms of the air and cabotage rights. Each of these categories will be briefly discussed. The main provisions of the first category namely; transit freedoms entitle each contracting state to (1) fly across the the other contracting state's territory and (2) land for non-traffic purposes.<sup>93</sup> These rights can be viewed as the most basic of air privileges and will always be included in a standard bilateral agreement.

The second category worth discussing is the "transport" freedoms. These freedoms will encompass the third to fifth freedoms of the air. The three privileges include (1) to put down passengers, mail and cargo taken on in the territory of the registered state, (2) to take on passengers, mail and cargo destined for the territory of the registered state and (3) to take on passengers, mail and cargo destined for the territory of any other state and the privilege to put down passengers, mail and cargo coming from such territory.<sup>94</sup>

It is important to note that traffic rights are not only formed on the exclusive basis of these two separate categories and that some traffic rights can be excluded or added based on the preferences of the contracting states. An agreement that does not, however, include the first four freedoms would not be reasonable.<sup>95</sup> The formation of

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<sup>92</sup> FN Videla Escalada *Aeronautical law* 1979, 254. (Sijthoff and Noordhoff)

<sup>93</sup> P Martin, JD McClean, *Shawcross and Beaumont Air Law*, 1997, 208.

<sup>94</sup> P Martin, JD McClean, *Shawcross and Beaumont Air Law*, 1997, 209.

<sup>95</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 220.

categories only serves as an indication of the differentiation of transit and transport air traffic rights. The discussion of individual air traffic rights is therefore pertinent due to the UK's decision to prospectively withdraw from the single aviation market that collectively contained these air traffic rights.

The most sought after and final air traffic right that will be discussed is the coveted right of cabotage. This traffic right is embodied in Article 7 of the Chicago convention which states that "each contracting state shall have the right to refuse permission to the aircraft of another state to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory". The term cabotage was borrowed from maritime law and meant that every state has a recognised right to reserve trade options for its own ships.<sup>96</sup> The fact that the right is granted or prohibited through the conduct or permission of another state is reflective of the supremacy of the principle of sovereignty. Cabotage in an air law context can thus simply be defined as transport where the places of departure and destination are within the territory of the same state.<sup>97</sup> The right to refuse cabotage is thus based on favouring the economic interest of each country and its own domestic airlines.<sup>98</sup> In order to ensure that its own industry benefits from the forming of a bilateral agreement, traffic rights are only granted on a reciprocal basis.<sup>99</sup>

Through the liberalisation packages and the establishment of the single aviation market, bilateralism between EU member states no longer exists with regard to aviation. Instead, airlines now derive their respective traffic rights from regulations and multilateral treaties. Multilateral exchange of traffic rights is in accordance with the objective of integration and liberalisation of air transport. Intra-EU aviation has therefore shifted completely from bilateralism to multilateralism. The relationship between EU and Non-EU countries however, may differ.

As mentioned earlier air traffic rights between the UK and non-EU countries were originally negotiated on a bilateral basis and many still are.<sup>100</sup> The core objective of a bilateral service agreement is to guarantee specific air traffic rights in support of commercial air services on the basis of reciprocity.<sup>101</sup> Recently, however, there has been an increasing tendency to establish air service agreements on a pan-EU basis with third countries due to the principle of the EU being a recognised international entity. This allows airlines from any EU Member State to operate to the third country and airlines of the third country to operate to EU Member States consistent to such agreements.<sup>102</sup> It is evident that UK carriers currently benefit from traffic rights with relevant third countries mainly by virtue of those EU aviation agreements

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<sup>96</sup> P Martin, JD McClean, *Shawcross and Beaumont Air Law*, 1997, 197.

<sup>97</sup> FN Videla Escalada *Aeronautical law* 1979, 258. (Sijthoff and Noordhoff)

<sup>98</sup> FN Videla Escalada *Aeronautical law* 1979, 258. (Sijthoff and Noordhoff)

<sup>99</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 220.

<sup>100</sup> A Masutti, A Laconi 'The impact of Brexit on the aviation industry' *The aviation and space Journal* 2016, 26.

<sup>101</sup> S Hobe, N von Rucketshell et al. *Cologne Compendium on Air law in Europe* (2013) 215.

<sup>102</sup> A Masutti, A Laconi 'The impact of Brexit on the aviation industry' *The aviation and space Journal* 2016, 26.

established in an EU capacity, rather than by virtue of bilateral arrangements conducted in a state capacity.<sup>103</sup> The right to conduct agreements in this manner originates from Regulation 847/2004.<sup>104</sup> Article 5 of the regulation stipulates that “community air carriers” can be eligible for designation as beneficiaries of new Air Service Agreements with non-EU countries. After Brexit, it is evident that without any supporting agreements, the United Kingdom will forfeit this advantage to conduct aviation agreements in this manner and to take part in the distribution of traffic rights among EU member states.

It is therefore evident that the EU has altered the way traffic rights are granted from one state to another drastically, but the possible effect of Brexit on the status quo thereof should still be investigated. This will be accomplished by examining how the current state of affairs will be diverted through UK carriers and airlines forfeiting their membership of the single aviation market. It would be injudicious to not place the relevance and pertinency of Regulation 1008/2008 central in this examination.<sup>105</sup>

Even though the aforementioned Regulation will essentially be discussed under the chapter of Ownership and Control, its relevance pertaining to traffic rights should not be disregarded. Article 1 of this regulation states that it encompasses the regulation of licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services. Chapter 3 of this regulation deals specifically with traffic rights and access to routes.<sup>106</sup>

In regulation 1008/2008 a traffic right is defined as the right to operate an air service between two Community airports. The focus therefore falls on “two community airports” and not on “community carriers”. This is somewhat contradictory to principle of the state of registration. Even though the place of registration or the nature of airlines are not mentioned in the definition, it still makes sense. If a country like the United Kingdom for example, should withdraw from the EU, its airports will not be accessible by EU-carriers through mere principles situated in multilateral treaties. However, as mentioned earlier only carriers deemed to be “community carriers” will be entitled to to operate intra-community air services.<sup>107</sup> This definition of “traffic rights” as per regulation 1008/2008, without the combined interpretation of “community carriers” would mean that an airline of non-EU Member States would still be able to conduct air services as long as it does not land or stop on its own State’s airports. Needless to say, this is not the case.

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<sup>103</sup> P Martin, JD McClean et al. *Shawcross and Beaumont: Air law* Issue 61, 1995, 28; It is also important to note that a treaty is formed on the principle of consent and that it cannot create rights nor obligations for a third state without its accord. Rights and obligations however, arise for a third state if the parties intend the provisions to accord to that state and the third state assents thereto.

<sup>104</sup> Regulation (EC) No 847/2004.

<sup>105</sup> Regulation (EC) No 1008/2008 of the European Parliament and of the Council (hereinafter “Regulation 1008/2008)

<sup>106</sup> Article 1 of Regulation 1008/2008

<sup>107</sup> Art 15 of Regulation 1008/2008

Another principle worth examining under traffic rights, is the proposition of non-discrimination. EU member states may not discriminate with regard to another EU Member State and may not give any preference or advantage to its own carriers and airlines.<sup>108</sup> Post Brexit, this principle will no longer apply to the United Kingdom. The United Kingdom will therefore be able to conduct bilateral agreements with States with whom they wish, and determine the air traffic rights situated in those bilateral agreements. The UK will therefore not be obliged to conduct aviation relationships with each and every EU state, should there be no other agreements. The loss of the non-discriminatory principle is unfortunately for the UK, reciprocal. This would therefore also entail that the EU does not need to treat the UK the same as other EU Member States as in the past. The existence of reciprocity in aviation agreements and relationships will always be present.

Furthermore, it is important to consider that due to the tendencies of liberalisation and globalisation, the UK, along with other EU Member States, have accordingly amended a lot of its original air service agreements to incorporate the concept of 'community carrier' in accordance with EU persuasions and Regulation 847/2004.<sup>109</sup> This means that in any UK bilateral agreement containing the abovementioned clause, airlines from any member of the EU have equal status in accessing the relevant traffic rights.<sup>110</sup> Dutch carriers for example, will continue to be treated as "UK" airlines until every one of the relevant service agreements has been renegotiated and amended, while UK carriers will cease to have similar beneficial treatment in other bilateral agreements due to the loss of its airlines' status as "community carriers".<sup>111</sup> This will automatically result in a disadvantageous position for UK carriers without any amending negotiations, and the reciprocal nature of aviation relations will partially degenerate. The United Kingdom allowing this to happen seems rather unlikely. Nevertheless, airlines and its vessels can only be deemed and classified as "community carriers" if it complies with the inflexible and uniform rules of ownership and control.

## 2.4. The effect of Brexit on ownership and control

In terms of access to other Member States and their airports, the EU single aviation market has little to none restrictions for airlines who comply with the requirements of EU law and regulations. Under the Chicago Convention, an aircraft has the

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<sup>108</sup> S Hobe, N von Ruckteschell et al. *Cologne Compendium on Air law in Europe* (2013) 223.

<sup>109</sup> Article 1(1) of Regulation 847/2004 states that "A Member State may, without prejudice to the respective competencies of the Community and its Member States, enter into negotiations with a third country concerning a new air service agreement or the modification of an existing air service agreement, its Annexes or any other related bilateral or multilateral arrangement, the subject matter of which falls partly within the competence of the Community, provided that: any relevant standard clauses, developed and laid Down jointly between Member States and the Commission, are included in such negotiations. This therefore includes the incorporation of "Community carrier"

<sup>110</sup> B Humphreys, 'Brexit and Aviation: all clear now?' *Aviation and Space Journal* 2016, 36.

<sup>111</sup> B Humphreys, 'Brexit and Aviation: all clear now?' *Aviation and Space Journal* 2016, 36.

nationality of the state in which they are registered.<sup>112</sup> The basic criteria for determining nationality of an aircraft thus lies in administrative registration and has a direct influence on the legal international relationships of that airline.<sup>113</sup> With regard to the EU single aviation market and their aviation relations, the state of registration and nationality of airlines are not the only factors that account for the inclusion of that airline into the single aviation market.

As mentioned earlier, the well-known Regulation 1008/2008 governs the ownership and control requirements of the single aviation market.<sup>114</sup> Needless to say, it is imperative to understand the application of Regulation 1008/2008 to comprehend the requirements to form part of the EU single aviation market and subsequently truly grasp the effects that Brexit will manifest on airlines in this regard. Article 3 of Regulation 1008/2008 creates the obligation to obtain an operating license. It states that;

“no undertaking established in the Community shall be permitted to carry by air passengers, mail and/or cargo for remuneration and/or hire unless it has been granted the appropriate operating licence”.<sup>115</sup>

The main stipulation from Regulation 1008/2008 pertaining to ownership and control is encompassed in Article 4. This article requires numerous conditions to be met to obtain an operating licence for a certain Member State as prescribed in Article 3. However, there are only two provisions that are pertinent to the nature of this paper. These two fundamental provisions require that an airline’s principal place of business is located in a Member State and that Member States and/or nationals of Member States own more than 50 % of the specific airline.<sup>116</sup> To operate intra-European routes, an airline must therefore have a formidable base on EU territory and a majority of their capital shares must be owned by EU nationals or Member States.

The concept of ownership is easier to define than control due to the fact that control can not be determined based on a pure numerical value.<sup>117</sup> Factors such as entitlement to appoint directors and percentage of equity held is taken into account but the true yardstick to determine control remains vague. On the other hand, to determine ownership can be defined based on a numerical value. Ownership of an EU airline by a non-EU national must be limited to a maximum of 49.9% to qualify as a “community air carrier”. Thus, if a valid operating license was obtained through a

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<sup>112</sup> Chicago convention on Civil Aviation 1944, Art 17.

<sup>113</sup> FN Videla Escalada Aeronautical law 1979, 128. (Sijthoff and Noordhoff)

<sup>114</sup> Article 1 states that; “This Regulation regulates the licensing of Community air carriers, the right of Community air carriers to operate intra-Community air services and the pricing of intra-Community air services”

<sup>115</sup> Article 3, Regulation (EC) No 1008/2008 of the European Parliament and of the Council.

<sup>116</sup> Article 4, Regulation (EC) No 1008/2008 of the European Parliament and of the Council; the two provisions highlighted are Article 4(a) and 4(f)

<sup>117</sup> CAPA Report ‘Airline ownership & control. Why might Europe uphold something its officials call "stupid"?’ 2014 accessed on 2017/08/01

competent licensing authority and that airline complies with the above-mentioned criteria, that airline will ultimately be deemed a “Community air carrier”.

The question now arises, how will the United Kingdom withdrawing from the EU influence the status of airlines’ operating licenses? Article 8(1) states that an operating licence shall only be valid as long as the “Community air carrier” complies with the requirements of the Regulation and specifically Article 4.<sup>118</sup> Lacking an EU aviation agreement before the Brexit two year period elapses will in all probability result in UK air carriers not being able to set up operations in EU Member States because it will no longer satisfy the nationality requirements for the issuing of an operating license as required by Regulation 1008/2008.

Nevertheless, Article 14 provides for an airline’s right to be heard and indicates that the competent licensing authority shall ensure that, when adopting a decision to suspend or revoke the operating licence of a Community air carrier, the Community air carrier concerned shall be given the rightful opportunity of being heard, and subsequently an opportunity to state why the licence should not be revoked. For airlines currently registered as UK airlines, this might serve as a safeguard against a Brexit without any deliberations before the two-year period elapses. An airline may, through this clause, probably be able to convince the licencing authority to not revoke the licence for the time being, if an agreement between the UK and EU might be settled shortly.<sup>119</sup> Once again, this is merely speculative and airlines or licencing authorities has never been placed in this position before.

Migration off a state’s register is possible and more than likely to happen if the UK fails to set any form of agreement in place before Brexit. UK Airlines therefore are already facing a scramble to ensure that they are majority owned by EU nationals after Brexit.<sup>120</sup> According to the Chicago convention however, registration or transfer of registration of an aircraft is also subject to the laws, regulations and requirements of that particular state.<sup>121</sup> If the registration of the aircraft is transferred to another EU Member State before Brexit commences, the United Kingdom will still be adhering to EU law, and transfer of registration therefore, will be less problematic than after Brexit.<sup>122</sup> However, this may result in UK investors disposing of their shares and

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<sup>118</sup> Article 8(1) Regulation (EC) No 1008/2008 of the European Parliament and of the Council; the two provisions highlighted are Article 4(a) and 4(f)

<sup>119</sup> This assumption is based on Article 14 of Regulation 1008/2008 and the discretion awarded to the licencing authority.

<sup>120</sup> P McClean ‘Airline Investors face forced share sale after Brexit’ Financial Times. Accessed on 2017/07/30

<sup>121</sup> Chicago Convention on Civil Aviation 1944, Art 19.

<sup>122</sup> This inference is drawn due to the fact that if the licence is transferred to another EU Member State post-Brexit the aircraft and its transfer of registration will have to adhere to both the EU and UK regulations.

control over their former airlines, resulting in a diminishing contribution of UK citizens in EU airfare.<sup>123</sup>

Furthermore, or alternatively, if the UK is unable to gain the same air traffic rights on similar or equivalent terms as it currently enjoys, it is possible that UK based airlines could be forced to base themselves elsewhere. Airlines, like EasyJet, may consider relocating or restructuring their businesses to continue to benefit from the single EU aviation market in the absence of a post-Brexit aviation deal with the EU, although they would have to be able to show that their principal place of business was in an EU Member State and that they were majority owned and effectively controlled by EU nationals in an EU Member State, before Brexit commences to avoid most complications. "Principal place of business" according to Article 2 of Regulation 1008/2008 means that the head office or registered office of a Community air carrier is situated in a Member State within which the principal financial functions and operational control, including continued airworthiness management, of the Community air carrier are exercised. Once again, to transfer registration and to relocate its principal place of business to another EU Member State, although expensive and inconvenient, should not be a problem.

For the UK and for its citizens who currently enjoy a majority ownership in an airline who will need to make drastic changes to their business structure may however be extremely unsettled and disadvantaged. Detriment and disadvantage however, is not exclusively attributed to currently UK based airlines following Brexit. EU airlines that wish to base themselves in the UK or set up a separate base of operations in the UK following Brexit will needless to say also be hindered and prohibited by the regulation of the UK. This is once again a clear indication of the reciprocal nature of aviation.

If the UK decides to adopt different ownership rules after their new-found freedom of policy, it may desire to modify and lighten the current ownership and control rules to allow foreign non-EU investors into the UK aviation market. Although this will enable foreign investors to diminish the contribution and ownership by UK citizens on UK based airlines, it will result in a form of modest liberalisation of the UK's own aviation laws, should they choose to take this route. However, by allowing only non-EU foreign investors will simultaneously place the EU and its citizens who currently enjoy ownership in UK air carriers in an adverse and unfavourable position. This would seem the most likely outcome if the EU decides to exclude UK carriers from the single aviation market after Brexit.<sup>124</sup> Nevertheless, it would be more advantageous than disadvantageous for the majority of EU and UK airlines alike, to retain the EU and UK ownership and control requirements relatively close to the status quo.

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<sup>123</sup> Since the state where airlines were licensed not being a pivotal consideration in determining ownership and control, UK-licensed airlines which are currently majority owned by non-UK EU nationals will be able to continue to hold their operating licence without any complication.

<sup>124</sup> C Erkelens, P Briggs *et al* 'How will Brexit effect the airline industry from a regulatory perspective?' 2017, 1 Accessed on 2017/07/15.

## 2.5. Conclusion

Technical regulation, traffic rights, safety and ownership and control, although only a few key European aviation components, will undoubtedly be influenced by the United Kingdom's exit from the EU aviation regime. Straightforwardly, a Brexit without any amending alterations will change the position of the above-mentioned elements drastically and airlines and airports alike, will suffer monumental modifications. The safest alternative for current UK-based airlines would be to take adequate measures to restructure their corporates to comply with EU laws after Brexit. Nevertheless, the status quo from a traffic rights, ownership and control perspective would entail the lowest risk for airlines. For the bold, there are however, other options available but as seen historically, the conduct of airlines are contingent on the behaviour and decisions of states.

### **3. The possible outcomes of Brexit on the United Kingdoms' aviation relations**

#### **3.1. Introduction**

Change brings opportunity and opportunities result in change. Even though there are countless feasible benefits derived from the United Kingdom's withdrawal from the EU as a whole, there are unquestionably fewer advantages relating to the aviation sector. The EU single aviation market is the world's largest and most prosperous example of regional market integration and liberalisation in air transport.<sup>125</sup> Provided the chance, any European airline would relish the opportunity to form part of this liberalised community and its multilateralism nature. Airlines from the United Kingdom however, without any further agreements with the EU will lose its position in this thriving society. The complete lack of measures to be taken to result in the UK airlines not being able to conduct intra-EU flights, are highly unlikely but the nature of the outcome of Brexit on aviation is still far from decided.

When attempting to establish the most probable future relationship between the EU and UK, there must also be determined which party would have the most authority regarding the changes of the aviation relationship and relevant individual policies, which can possibly be derived from analysing the probable benefits and drawbacks of each outcome on the United Kingdom and the European union respectively. While there is no formal obligation on the United Kingdom to settle for a certain outcome, the Treaty on European Union expressly says: 'The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation'<sup>126</sup> This provision might influence the approach by the EU in the upcoming deliberations.

Currently there is an almost complete lack of certainty regarding the most likely outcome of the Brexit negotiations on the aviation sector. All one can really do at this stage is to examine the feasible options available. The various possibilities that will be discussed will not only highlight the options available to the UK but will simultaneously pave the way for any other states that wish to follow in the United Kingdom's footsteps. Even though the European Union will still have to grant consent to the feasibility of each outcome, the preferred outcome for the majority of UK airlines is relatively clear; to retain membership of the Single aviation market and subsequently the European Common Aviation Area.

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<sup>125</sup> A Masutti, A Laconi 'The impact of Brexit on the aviation industry' The aviation and space Journal 2016, 25.

<sup>126</sup> Art 8(1) Treaty on European Union

### 3.2 The Norway construction

On 1 January 1994, the European Economic Area (EEA) agreement came into force.<sup>127</sup> The aim of this agreement was to create an economic area in which the European Union's competition policy and free trade rules would apply. It is however possible to be part of the European Economic Area and not be a member state of the EU. States that occupy that position include Iceland, Lichtenstein and Norway.<sup>128</sup>

The European Common Aviation Area (ECAA), established in 2006 and built upon the principles of the EEA, is a multilateral agreement between the EU, its 28 Member States individually and the additional states that wish to form part of the liberalised single aviation market of the European Union. The ECAA, comprising out of 36 countries, has a population exceeding 500 million and is extremely prosperous.<sup>129</sup> Brexit, without any transitional arrangements or negotiations, would conclude the UK's membership of the ECAA, removing the UK carriers' and airlines' right to fly to and within the EU. This seems highly improbable.

The simplest way to maintain the status quo or to deviate as less as possible from it, would be for the UK to rejoin the ECAA, which would also ensure that all bilateral agreements between the EU and third countries continue to apply after Brexit.<sup>130</sup> The ECAA agreement furthermore has the effect that if there are any existing bilateral agreements or provisions of bilateral air transport agreements in force between the associated parties in the agreement, that the agreement will prevail<sup>131</sup> This will result in a swift transition without lengthy procedures to re-incorporate and reform bilateral agreements with third countries. Remaining part of the ECAA, seems *prima facie* like the premier solution and outcome for the United Kingdom aviation sector. Remaining part of the ECAA however, does not come without sacrifice.

To remain part of the ECAA, requires a "framework for close economic cooperation" with the EU and the acceptance and recognition of EU aviation laws.<sup>132</sup> The option to form part of the ECAA and not the European Union simultaneously, facilitates the expansion of the ECAA to include other countries that are satisfied to comply with the two broad conditions stated above and not simultaneously benefit from the other advantages that the EU has to offer. After the notion to change the aviation *status quo* as little as possible, it seems more than reasonable that the United Kingdom would want to opt to remain part of the ECAA. The UK however, would need to comply with the two requirements for membership that includes adhering to EU law and principles, contradictory to the main rationale for Brexit.

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<sup>127</sup> A O'Neill *EU law for UK lawyers* (2011) 54.

<sup>128</sup> A O'Neill *EU law for UK lawyers* (2011) 54.

<sup>129</sup> B Humphreys 'Brexit and Aviation: all clear now?' *Aviation and Space Journal*, 2016, 34.

<sup>130</sup> Alec Burnside, Marjolein De Backer 'Micawber meets Icarus: Hard Brexit and the Aviation sector' *Competition law Insight*, 3.

<sup>131</sup> Article 28 of the European Common Aviation Area Multilateral Agreement

<sup>132</sup> See Article 32 of the European Common Aviation Area Multilateral Agreement.

Membership of the ECAA would require the UK to adopt the entire EU aviation regulation scope (the so-called 'air transport *acquis communautaire*') which includes areas of law that the UK no longer wants to apply.<sup>133</sup> Furthermore, this would presumably also include the acceptance of any future EU aviation legislation and amendments without the UK having authority to influence them.<sup>134</sup> Additionally the UK will also have to contribute to the EU legislative sector financially to promote its development. Remaining part of the ECAA is thus not just advantageous, and will encompass many downsides and stumbling blocks for the UK.

After establishing that the UK would have to adhere to the EU aviation regulations to form part of the ECAA, the other requirement for membership must also be discussed. After Brexit, the United Kingdom must establish a "framework of close economic cooperation". What this requirement exactly entails is open for interpretation but naturally comes down to the United Kingdom being required to adhere to the EU regulations cooperatively and contributing positively to its economy and financial growth. This requirement, once again can only be contradictory to the notion of a pure or "hard" Brexit. It is therefore evident that before the United Kingdom must negotiate with the EU about the outcome on the aviation sector, they must first deliberate amongst themselves to weigh the advantages from remaining part of the ECAA, with the limitation of authority to influence policy and future regulations. From an aviation perspective, merely remaining part of the ECAA will place UK aviation in a weaker position than it was before Brexit.

Even though the ECAA has been opened to numerous medium to small countries like Kosovo and Norway it has never been agreed upon to a country of the United Kingdom's magnitude. This being the case, other EU Member States might see a competitive advantage for their own airlines in denying the United Kingdom airlines access to the ECAA and the prosperous aviation market. Remaining part of the ECAA is therefore not a definite and is still contingent on the acceptance of the other EU Member States. In conclusion to determine the likelihood of the UK remaining part of the ECAA, two questions must be asked; How eager are the UK to remain part of the EU regulatory body and restricting rules, and secondly, how desirous are the EU Member States to remain partners with the United Kingdom aviation regime and its airlines?

### 3.3 The Switzerland construction

Another way for the UK to ensure that its airlines retain access to the EU's single aviation market would be to negotiate a new EU-UK bilateral aviation agreement.

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<sup>133</sup> A Burnside, M De Backer 'Micawber meets Icarus: Hard Brexit and the Aviation sector' *Competition law Insight*, 3.

<sup>134</sup> B Humphreys 'Brexit and Aviation: all clear now?' *Aviation and Space Journal*, 2016, 38.

Geographically based in the heart of Europe, Switzerland not being a member of the European Union, nor the ECAA, has no representation in any of the EU institutions nor the right to participate in the majority of EU decisions. Furthermore it does not form part of the European Economic Area (EEA).<sup>135</sup> Switzerland has nevertheless chosen to cooperate with the EU in a number of specific areas or sectors to the benefit of both parties through the application of the Agreement on Air Transport which entered into force in 2002.<sup>136</sup> One of these agreed upon areas is the inclusion of the Swiss into the single aviation market<sup>137</sup> In essence, the agreement binds Swiss aviation sector to the EU market by adopting the 'Third Liberalisation Package' of aviation regulations, including unrestricted cabotage rights and requires Switzerland to comply with all EU aviation rules and regulations.<sup>138</sup>

Through the abovementioned agreement and its progressive development, Switzerland adopted most of the European Union's secondary aviation legislation including EU Regulation 1008/2008.<sup>139</sup> The Switzerland construction has had its benefits for both parties, including but not limited to, more aviation competition and diminishing air fares.<sup>140</sup> As we already know however, each possible outcome of Brexit on the aviation sector has its own unique drawbacks.

There are a few material differences between the Switzerland bilateral agreement and member's that are included in the ECAA.<sup>141</sup> Firstly, the Swiss agreement does not include automatic application of bilateral agreements between third countries and the EU in the same way than the ECAA. The Switzerland construction incorporates application of bilateral agreements through horizontal agreements or new EU-based bilateral agreements.<sup>142</sup> Switzerland therefore maintains its own set of bilateral agreements with third parties/states isolated from EU-level agreements.<sup>143</sup> This would therefore result in the United Kingdom having to conduct new bilateral agreements with third countries where there haven't been any bilateral agreements formed before the UK were included into the EU. This is in contrast to the previously discussed ECAA (Norway construction), who have signed multiple horizontal agreements to integrate their carriers into EU-level bilateral agreements such as the EU-US Open Skies agreement. The Switzerland construction is moreover unique from normal bilateral agreements in the sense that their agreements of EU aviation regulations evolve over time, whereas other normal bilateral agreements remain

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<sup>135</sup> A Thorp 'Switzerland's relationship with the EU' *Library House of Commons*, 2011.

<sup>136</sup> Agreement between the European Community and the Swiss Confederation on Air Transport, 2002.

<sup>137</sup> OJ 2002, L 114/73

<sup>138</sup> InterVistas Consulting 'Brexit's Impact on the aviation industry' 2016 accessed on 2017/07/09

<sup>139</sup> A Fankhauser 'Vote restricting EU migrants puts air transport agreement at risk' *International Law office* 2014 accessed on 2017/08/20

<sup>140</sup> <sup>140</sup> A Fankhauser 'Vote restricting EU migrants puts air transport agreement at risk' *International Law office* 2014 accessed on 2017/08/20

<sup>141</sup> InterVistas Consulting 'Brexit's Impact on the aviation industry' 2016 accessed on 2017/07/09

<sup>142</sup> InterVistas Consulting 'Brexit's Impact on the aviation industry' 2016 accessed on 2017/07/09

<sup>143</sup> Article 16 of the Agreement between the European Community and the Swiss Confederation on Air Transport, 2002.

uniform and fixed.<sup>144</sup> This anomaly allows future changes in EU aviation regulation to apply to Switzerland's agreement irrespectively if the bilaterals were amended or renegotiated.

Although the EU granted air traffic rights to Switzerland on a reciprocal basis in 2002, Swiss airlines were only granted cabotage rights in the EU two years after entry into force of that agreement.<sup>145</sup> Needless to explain, if the United Kingdom's bilateral agreement with the EU would be conducted on the same grounds as this, and cabotage rights were only to be granted on a later stage, it will hold catastrophic implications for UK-based and owned low-cost carriers which thrives on short distance flights. Even if cabotage rights were granted on the same stage as incorporation of the bilateral agreement with the EU, this process will definitely be more time consuming for the United Kingdom. Pre-occupied with numerous other sectors, the UK would now have to spend additional time in drafting and amending bilateral agreements with third countries, whereas membership of the ECAA would not have required it.

Be it as it may, the Switzerland construction seems to be the most viable option after remaining part of the ECAA. Concluding a bilateral agreement with the EU will not enforce EU regulations and rules on the United Kingdom, but does not come without numerous drawbacks. The Norway construction and the Swiss construction are however, not the only possible options for the EU aviation sector.

### **3.4 Conducting individual Air Service Agreements (ASA)**

Rather than establishing one bilateral agreement with the EU like the Swiss Construction, the UK may attempt to conduct individual bilateral agreements with other Member states. This however, will be no easy task. The UK in the absence of any other agreement with the EU are to rely upon pre-existing bilateral aviation agreements with individual Member States. Needless to say, these agreements were formed before the creation of the Single Aviation Market. Their validity and legality of stipulations in the bilateral agreements are therefore more than questionable due to the liberalisation of air transport between such countries who are included in those former air service agreements (ASA).

The nature of bilateral agreements has the effect that States can withhold traffic rights from an airline of another State if that airline is not substantially owned and effectively controlled by that other State or its nationals.<sup>146</sup> ASA's are reciprocal and require the consent of each contracting state. This means that every individual

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<sup>144</sup> InterVistas Consulting 'Brexit's Impact on the aviation industry' 2016 accessed on 2017/07/09

<sup>145</sup> Article 15 of the Agreement between the European Community and the Swiss Confederation on Air Transport, 2002.

<sup>146</sup> The right to deny air traffic rights is based on the principle and essence of the sovereignty.

bilateral agreement the UK wishes to conduct with EU countries will be postponed until consented to by that particular state. Needless to explain, this will be an extremely time-consuming procedure and the United Kingdom can not afford to wait several years for legal proceedings to be finalised due to the tendency of the aviation sector evolving rapidly.<sup>147</sup>

However as mentioned above, in the absence of any other arrangements, the old bilateral agreements between the UK and the other EU Member States which were overtaken by EU liberalisation of aviation, would become effective again, and although time consuming, should provide an adequate legal framework for most 3rd and 4th freedom services.<sup>148</sup> To determine the applicability of these standard bilateral aviation agreements in 2017, the original agreement between the government of the United Kingdom of Great Britain and the Government of Northern Ireland will be examined.<sup>149</sup>

It is important to consider that only the provisions regarding aviation relations, and elements relevant to the discussion of this paper will be inspected. The relevant provisions in this agreement are likely to be included in most modern and present-day air service agreements. The first relevant provision in this bilateral agreement is that of the granting of specific traffic rights. In this provision, it is clearly stipulated which traffic rights would be granted to each contracting state based on the agreed upon freedoms of the air. Cabotage rights, however, were not agreed upon in this instance probably due to the “state-owned” nature of the airlines before liberalisation of EU air transport. In present day, most states might also be reluctant to grant cabotage rights to a foreign non-EU airline if it wishes to exclude foreign competition. If the United Kingdom’s colossal airlines like Easyjet are prohibited to operate and conduct intra-state flights in a specific country where it normally conducted business in, it will result in financial advantage to its local airlines and a massive disadvantage for the non-EU airline.

Another provision which is relevant to aviation relations and the scope of this paper is revocation or suspension of operating authorisations. This particular bilateral agreement states that each contracting party shall have the right to revoke or suspend the exercise of the agreed upon traffic rights if it is not satisfied that substantial ownership and control of that airline are vested in the contracting party, failure of that airline to comply with the laws or regulations or if the airline fails to cooperate in accordance with the agreed upon conditions in the bilateral agreement.<sup>150</sup> In a post-Brexit era this will have the effect that UK-airlines who restructured their ownership to be incorporated into the single aviation market will be excluded from the former UK bilateral agreements. Should the airlines however, still

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<sup>147</sup> S Hobe, N von Ruckteschell et al. *Cologne Compendium on Air law in Europe* (2013) 217.

<sup>148</sup> J Balfour ‘The EU air law consequences of Brexit for the UK’ *Clyde and CO*, 3 accessed on 2017/07/01.

<sup>149</sup> As provided in; P Martin and E Martin *Shawcross and Beaumont: Air Law*. 4<sup>th</sup> edition, A 425

<sup>150</sup> P Martin and E Martin *Shawcross and Beaumont: Air Law*. 4<sup>th</sup> edition, A 427

be majority UK-owned and controlled, the former bilateral agreements will still be applicable.

The last provision which is germane to aviation relations is that of the principles governing operation of agreed services. This provision as a whole entails the mutual cooperation of the signatory states, the consideration of the other states' interests and to ensure that both states benefit from this agreement. The provision is based on the fact that bilateral agreements are reciprocal. This provision would still be viable in the present-day if both states consented to the bilateral agreement. This may complicate the process. If EU law, and UK law which governs the parties respectively decide that before the bilateral agreements are re-instated consent must be re-given, some bilateral agreements will not be given effect to before the Brexit two-year period elapses or at all. If this is the case, States will decide amongst themselves whether it would be advantageous for them to grant consent to the United Kingdom, placing the UK in a less favourable position.

It is also important to note that civil aviation is built on a non-discriminatory principle according to the Chicago convention. This principle obliges contracting states not to discriminate between their own and "foreign" aircraft or between aircraft from different states.<sup>151</sup> This obligation has its exceptions, most notably the right to refuse cabotage. The fact that cabotage rights are excluded from this non-discriminatory principle provides the mandate for other countries to refuse bilateral agreements with the United Kingdom in this regard. In conclusion, even though the probability of the United Kingdom settling for this outcome above the Swiss and Norwegian constructions seems farfetched, it is still a possible outcome that should be accounted for.

### 3.5 Conclusion

To predict the exact outcome of something that has never happened before is impossible. To determine the most probable and feasible list of outcomes however, are indeed achievable. The above-mentioned catalogue of options all have a few traits and characteristics in common. The biggest of these are the contrasting nexus between benefits for the UK and surrendering authority. Brexit as we know has many rationales, one being the complete freedom from the rules of the EU. Should the UK-EU deliberations end with a complete separation between the two, the UK aviation regime would most likely be deprived of fortune and prosperity. Should the post-Brexit arrangements resemble close to that of the Swiss or Norway constructions, United Kingdom's aviation policy would not be immensely disadvantaged or affected. The United Kingdom therefore face a trade off between the freedom of aviation policy and rules or the safer option which is to deviate as less as possible from the status quo.

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<sup>151</sup> P Martin, JD McClean, *Shawcross and Beaumont Air Law*, 1997, 197.

#### 4. The effect of Brexit on low-cost carriers

Low-cost carriers (LCCs) whose wealth is largely dependant on short-haul transfers and travel across the borders of neighbouring and other EU countries, might be heading for the hardest landing of them all. After the previous discussion, it is evident that the potential loss to market access and the prosperous liberalised EU aviation system will only be to the detriment of UK incorporated, owned and controlled LCC airlines.

If the UK is not to retain access to the single aviation market, UK based LCC airlines could be forced to base themselves elsewhere to comply with ownership and control requirements. Airlines, like EasyJet may therefore need to consider relocating or restructuring their business to be able to show that their “principal place of business” is situated in an EU Member State.<sup>152</sup> Another strategy to comply with the aforesaid requirements is to buy over another airline, introduce a new subsidiary base in an ECAA state or merge with an existing airline currently situated and incorporated in another EU Member State.

That being said, the regulatory risk for individual airlines depends partly on their route networks and schedule.<sup>153</sup> If an airline’s flights were mostly conducted between the United Kingdom and other EU Member States, Brexit without any other relationship arrangements, will needless to say have an extremely limiting effect on that specific airline and its business. However, this will also have a detrimental effect on other non-UK LCC airlines who obtained cabotage rights in the United Kingdom or who’s flight schedule was largely contributed by UK traffic. As an example Ryanair has already announced the allocation of 10 additional aircraft previously destined for the UK to other EU countries including Germany, Poland and Italy.<sup>154</sup> This is a strong indication that it will be highly unlikely that LCC’s allocate new airlines to the UK in the short term after Brexit.<sup>155</sup> On the other hand, LCC airlines who rarely conducted short-haul flights to the United Kingdom will not be as effected by Brexit and may even benefit from decreased competition in their route network.

Even though LCCs will be effected more by Brexit than big legacy carriers they will be able to adapt faster and more efficiently to change. LCC’s can designate and alter aircraft routes around their networks easily to mitigate possible disadvantages and respond to temporary disruptions like Brexit. This flexibility by low cost carriers however, will only assist airlines should the UK strike an aviation deal with the EU before the Brexit period elapses. As mentioned above, the majority of legacy carriers and LCC’s will prefer the aviation relationship between the EU and UK to remain close to the status quo.

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<sup>152</sup> A Masutti, A Laconi ‘The impact of Brexit on the aviation industry’ *The aviation and space Journal* 2016, 28.

<sup>153</sup> B Humphreys, ‘Brexit and Aviation: all clear now?’ *Aviation and Space Journal* 2016, 34.

<sup>154</sup> B Humphreys, ‘Brexit and Aviation: all clear now?’ *Aviation and Space Journal* 2016, 35.

<sup>155</sup> G Paton ‘Brexit vote clips Ryanair’s wings’ *The Times*, 2016.

If the UK is able to negotiate their way into the ECAA, low cost carriers should not be effected dramatically, and would most probably be content with the outcome due to it being the closest option to the status quo. If the UK-EU relationship resemble that of the Swiss-construction however, UK-LCC's status might alter. As mentioned earlier, Switzerland maintains its own set of bilateral agreements with non-EU states isolated from EU-level agreements. This would mean that for short-haul carriers who conduct flights between a post-Brexit UK and Switzerland or other non-EU Member States like Belarus would have to renegotiate access and reciprocal traffic rights before flights may be conducted.

Should the post Brexit UK-EU aviation relationship comprise out of individual bilateral agreements between the UK and other EU Member States, airlines that are not UK-based airlines like Ryanair, may not necessarily be allowed to fly directly from the UK to countries other than Ireland due to nationality clauses and EU restraints. UK-based airlines like EasyJet on the other hand will not be affected on routes to and from the UK, but it will most likely not be able to conduct cabotage flights within the EEA, unless it is via the UK.<sup>156</sup> Easyjet will in this instance lose all its cabotage rights in other Member States without any other arrangements. To avoid this from happening, airlines like Easyjet have already taken measures by setting up a subsidiary Austrian base to ultimately comply with ownership and control regulations and to be located in an ECAA Member State. Migration off the United Kingdom's register is therefore no longer a possibility but a reality.

In conclusion, low cost carriers currently situated and incorporated inside or outside of the United Kingdom would be recommended to take adequate actions and preventive measures, most probably including relocation and restructuring to ensure that they are able to conduct intra-EU flights irrespective of the outcome of Brexit, to ensure that they retain coveted membership of the prosperous EU single aviation market and subsequently mitigate the majority of the disadvantages that Brexit has to offer for the current aviation regime and its airlines .

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<sup>156</sup> See, A Burnside, M De Backer 'Micawber meets Icarus: Hard Brexit and the aviation sector' *Competition law insight*, 2017, 4.

## 5. Conclusion

Brexit, albeit a familiar and contemporary term for most legal and economic entities around the world, is still far from determinable and is yet to be completely comprehended. This is due to the upcoming EU-UK deliberations and the dissimilarities between both parties' desired outcomes, possible advantages and mitigation of possible disadvantages which stems from a post-Brexit era. The situation is no different for the aviation sector. Since the commencement of this paper, Brexit has taken numerous U-turns and flew through various cross-winds and will continue to do so long after this paper has been finalised.

Airlines, especially low-cost carriers face a scramble to ensure that the soon to be initiated Brexit, does not handicap its proficient application, its economic efficiency and its aviation relations which it currently savours. As made abundantly clear, Brexit without any determining deliberations and agreements will have monumental implications on the United Kingdom's traffic rights, regulatory framework, ownership and control clauses and freedom of its low-cost carriers. As we know, Brexit's impact on aviation is not merely limited to the fixed list as discussed in this paper.

Even though Brexit was supported by the majority of UK citizens who voted, the overall feeling towards the aviation sector lacks the same enthusiasm. Airlines who will unquestionably be disadvantaged by Brexit such as Easyjet and Ryanair has launched and continued numerous major campaigns against Brexit due to the foreseeability of its imminent detrimental consequences. This was done to no avail. Brexit is here to stay and to Bremain is out of the picture.

Brexit and its outcome on the aviation regime therefore serves as a pilot study and is plotting a new course for other States who wish to withdraw from the EU in the near future. However, what exactly the UK-EU deliberations has in store for the aviation regime and all the United Kingdom airlines, still resembles a thick fog of uncertainty. Whether Brexit indeed has a silver lining for the UK and EU aviation regimes, remains to be seen.

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