HOUSE OF COMMONS LIBRARY

Effect on the aviation sector of the UK leaving the EU

By Louise Butcher

Summary

This debate will take place between 2.30 and 4.00 pm on 31 October in Westminster Hall. The Member who secured the debate is Mike Kane MP (Lab., Wythenshawe and Sale East).

Relevant PQs and Parliamentary debates can be found via the following link: Brexit and aviation.

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1. EU's current role in UK transport policy

The EU's competences in transport are set out in the EU Treaties, which provide the basis for any actions the EU institutions take.

> **EU transport legislation**
>
> There is a significant amount of transport law and regulation in the UK that applies as a direct result of our membership of the EU. The **key** legislation is set out in: HMG, *Key EU transport legislation*, 14 May 2013

The EU can only act within the limits of the competences conferred on it by the Treaties, and where the Treaties do not confer competences on the EU they remain with the Member States. There are three different types of competence. Transport is a 'shared' competency, meaning that either the EU or the Member States may act, but the Member States may be prevented from acting once the EU has done so.[1]

The development of the EU's Common Transport Policy (CTP) has resulted in the focusing of action in a number of policy areas, specifically: economic, social, environmental, infrastructure and external relations.[2] The specific provisions of the CTP are contained in Title VI of the *Treaty on the Functioning of the European Union (TFEU)* on Transport (Articles 90 to 100).

Broadly, there is a balance between the common perceived benefits of EU Membership (e.g. the single market for transport services which has brought down costs through liberalisation and competition) and the burdens, (e.g. disproportionate or excessive regulation). There have long been concerns about EU regulatory burdens and the costs these impose, and about the difficulties in finding the right level of legislative prescription which achieves the stated aims without being disproportionate. This is particularly important in an area like transport, which is heavily regulated at a European level.

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[1] HMG, *Call for Evidence on the Government's Review of the Balance of Competences between the United Kingdom and the European Union: Transport*, 14 May 2013, p5
[2] Ibid., pp9-10

2. UK and EU negotiating positions on aviation

2.1 UK Government position

The UK Government's aviation priorities since the vote to leave the EU in July 2016 have been focused on air transport rights to fly and continuing membership of the European Aviation Safety Agency (EASA).[3]

In June 2018 the Department for Exiting the European Union (DExEU) published a framework for UK-EU partnership on transport post-Brexit. This was followed by a White Paper on the future relationship in July 2018. The White Paper sets out the UK's broad ambitions for a Brexit deal, these include an **Air Transport Agreement** which seeks to maintain reciprocal liberalised aviation access between and within the territory of the UK and the EU, alongside UK participation in **EASA**.[4]

The June 2018 framework document provides more detail. It is part of a series produced by the UK negotiating team for discussion with the EU, in order to inform the development of the future framework that will set out the terms of the future relationship, to be translated into legally binding agreements after the UK's withdrawal. It stated that the UK and the EU would "conclude the future framework alongside the Withdrawal Agreement later this year".[5]

2.2 EU27 position

On the EU side, the European Council adopted new negotiating guidelines on 23 March 2018. On transport, they stated:

> … regarding transport services, the aim should be to ensure continued connectivity between the UK and the EU after the UK withdrawal. This could be achieved, inter alia, through an air transport agreement, combined with aviation safety and security agreements, as well as agreements on other modes of transport, while ensuring a strong level playing field in highly competitive sectors.[6]

This is similar to the ambitions expressed in the White Paper, above. The guidelines followed the publication of a number of Brexit preparedness notices issued to the EU27 by the European Commission in February 2018. The notices set out what aspects of EU law will have to change to take account of Brexit (i.e. by the UK becoming a third country) irrespective of what deal is reached. Further notices have since been

[3] See, e.g. HC Deb 23 November 2016, c952; Transport Committee, *Departmental priorities and annual report and accounts*, HC 745, 17 October 2016; and DExEU, *The United Kingdom's exit from and new partnership with the European Union*, Cm 9417, 2 February 2017, paras 8.32-33

[4] DExEU, *The future relationship between the United Kingdom and the European Union*, Cm 9593, 12 July 2018

[5] HMG, *Framework for the UK-EU partnership: Transport*, June 2018, p2

[6] *European Council (Art. 50) (23 March 2018) - Guidelines*, Article 11(i)

published.[7] The EC has also begun publishing legislative instruments to give legal effect to these changes.[8]

The European Commission has also issues Notices to Stakeholders on various aspects of Brexit and transport.

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[7] EC, *Preparedness notices*, February-July 2018
[8] Available at: EC, *Legislative initiatives* [accessed 23 August 2018]

3. DfT preparations for the aviation sector and Brexit

In May 2018 the DfT published an exchange of letters between the Department's Permanent Secretary, Bernadette Kelly, and the Secretary of State, Chris Grayling about requesting and confirming a ministerial direction relating to EU exit preparations.[9]

In July the National Audit Office (NAO) published a report looking at how the DfT is organising itself to support a successful exit from the EU, and set out what the Department had done to date to prepare for exit. The NAO stated that the DfT has two EU Exit objectives:

> to maintain and develop the current levels of transport connectivity between the UK and the EU to underpin the UK's future trading relationship; and

> to continue to collaborate, in certain areas, with the EU and international agencies to maintain critical regulatory arrangements, and to manage transport impacts at the border resulting from any change, for example in customs.[10]

To meet these objectives DfT is:

> supporting the government's negotiations on those issues where the Department has a direct interest;

> preparing the necessary primary and secondary legislation; and

> planning for both a 'no deal' scenario and a negotiated settlement for 18 of the 314 work streams (as at June 2018) supporting EU Exit across government.[11]

According to the NAO, the DfT's aviation workstream includes air traffic management systems; the air service agreement with the EU; future access to the European Aviation Safety Agency; air service agreements with other countries; the future of security regimes; and UK participation in the EU-wide emissions trading scheme.[12]

In terms of required secondary legislation to prepare the transport sector for Brexit, the NAO reported the DfT's estimate that:

> … it still has to prepare 127 SIs [statutory instruments, or secondary legislation] before 29 March 2019 – 64 of which relate to 'business-as-usual' activities, and 63 of which relate to exit. It has laid 45 'business-as-usual' SIs since December 2017. Programming and preparing the legislation will be a significant challenge for the rest of 2018 and early 2019.[13]

However, NAO did say that DfT had "done a significant amount of work to reduce, reprioritise and plan its programme of secondary legislation to make the programme manageable". This included 'triage' exercises, which challenged DfT to reduce the number of secondary instruments

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[9] DfT, *EU exit preparations: DfT ministerial direction*, 29 May 2018
[10] NAO, *Implementing the UK's Exit from the European Union: Department for Transport*, HC 1125 2017-19, 19 July 2018, para 3
[11] Ibid., para 4
[12] Ibid., Figure 1, p7
[13] Ibid., para 2.22

as much as possible" and creating a specific 'Legislation Programme Board' to oversee the preparation of exit-related legislation.[14]

In October 2018 the Hansard Society reported that DfT had laid the most Brexit SIs of any Government Department (18).[15]

Proposed negative SIs relating to transport, made under the Withdrawal Act, are listed on the Gov.uk website. Before the SIs are formally 'laid' in Parliament, they have to go through a new sifting process to determine whether the negative procedure is appropriate or whether they should be debated. The process is set out on the Parliament website.

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[14] Ibid., para 2.23
[15] "Westminster Lens: Brexit Statutory Instruments Dashboard", *Hansard Society*, 26 October 2018

4. Access to the European Common Aviation Area (ECAA)

> **A word on terminology…**
>
> The EU's internal market for air transport is referred to by a number of different names, depending on the publication, organisation or person talking about it. For the sake of clarity, this paper uses the following terms:
>
> - The EU internal aviation market is referred to throughout as the **European Common Aviation Area (ECAA)**; it is comprised of the EU28, Norway, Iceland, the Balkan countries and Lichtenstein and is founded on the single aviation market which was developed across the EU in the early 1990s;
>
> - The term **'open skies'** is sometimes used to refer to the single aviation market (including by airlines and others in the industry). This paper only uses the term to refer to the EU-US Open Skies Agreement.

4.1 What is the ECAA?

The advent of cheap short haul flights across Europe in the early 1990s has revolutionised both the way people travel and the airline industry. It owes a large part of its success to the liberalisation of air transport across the EU and the single aviation market, or European Common Aviation Area (ECAA).[16] This created a number of 'freedoms' for EU-registered airlines which have allowed them to have a base in one Member State and operate on a 'cabotage' basis within other Member States. For example, easyJet, registered in the UK, can fly without restriction from the UK to other Member States, wholly between other markets (France-Germany) and wholly within countries (domestic Italy).

Respondents to the Government's Balance of Competences Review generally were of the view that liberalisation had broken down restrictive trade and operating barriers that had previously existed, and credited it with encouraging growth in the sector with deregulation facilitating new business models, such as the low-cost carriers. These new business models have increased competition in the industry, driving down prices and forcing efficiency savings.[17] Sophie Dekkers, UK Country Director at easyJet, told the House of Lords European Union Committee that the "liberation of the EU aviation market was part of the growth and the basis on which we grew as an airline and low cost [travel] grew within Europe". She noted that "average fares are now down by 40% in real terms" since 1996, and "numbers of routes have increased by 180%".[18]

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[16] More details are given in HC Library briefing paper CBP 182; the ECAA was extended to the Balkan countries in the mid-2000s and already applied to Norway and Iceland. It covers 36 countries and more than half a billion people, for more information see: European Commission, _International Aviation – ECAA_ [accessed 12 April 2018]

[17] Op cit., _Review of the Balance of Competences between the United Kingdom and the European Union Transport_, p24

[18] HL, European Union Committee, _Brexit: trade in non-financial services_ (18th Report of Session 2016–17), HL Paper 135, 22 March 2017, para 212

Airline ownership rules

At the moment, EU majority-owned and -controlled airlines have the right to establish themselves in any EU Member State and operate freely within the borders of the EU.[19] As Andrew Haines, then Chief Executive of the CAA, said in a December 2016 speech, "If the UK is no longer a member of the EU, then these rights can't be assumed to continue – especially the rights to operate domestic routes within a third country, and the rights to fly between two third countries".[20] This is a major part of some airlines' business models, particularly low cost operators like easyJet.

There have been reports that UK-registered airlines with this sort of business model have been 'warned' by the EU that they would need to relocate their headquarters or sell off shares to EU nationals if they want to continue flying routes within continental Europe after Brexit.[21] Some airlines have already started preparing for Brexit by obtaining EU operating licences.[22] Conversely, some EU-registered airlines are also applying for a UK operating licence.[23] There have been reports about particular concerns for British Airways and its parent company, IAG, which could face conflicting priorities between preserving its EU market and any US-UK aviation deal in the event of a 'no deal' Brexit.[24]

4.2 What does the industry want?

Airlines want the UK Government to negotiate continuing access to this liberalised regime. The most obvious way of doing this would be by remaining a member of the ECAA, post-Brexit. In a speech given on 1 December 2016 the then Chief Executive of the CAA, Andrew Haines, set out the UK's options on access, on a "sliding scale of liberalisation":

1.   Staying in the European Common Aviation Area (i.e. UK airline treated as if part of the EU, with full access – in many ways highly desirable for both sides in this negotiation). But Aviation is likely to be caught in the crossfire- so on what conditions would this be possible and will they be potentially acceptable?

2.   A UK "Open Skies" deal with Europe? (i.e. UK treated as a third country, like the USA)

3.   Negotiating a single bilateral agreement with the EU as a whole if Member States give the EU a mandate to negotiate on their behalf. Or the UK could still negotiate bilateral agreements with individual member states; for instance, if member states wish to or find the EU-led process too slow. (Any state that wanted to go down that route would have to notify the EU and negotiate in a way

[19] On 8 June the European Commission published new 'interpretative guidelines' on ownership and control of EU airlines, see: C(2017) 3711 final, 8 June 2017

[20] *The future of open skies post-Brexit*, GAD Speech by Andrew Haines, Chief Executive of the CAA, 1 December 2016

[21] See, e.g. "Airline investors face forced share sale after Brexit", *Financial Times*, 27 January 2017 and "UK-based airlines told to move to Europe after Brexit or lose major routes", *The Guardian*, 22 March 2017

[22] See, e.g., easyJet press notice, "easyJet Europe now operational after award of Austrian AOC and licence", 20 July 2017

[23] See, e.g. "Ryanair seeks UK operating permit in Brexit move", *Financial Times*, 2 January 2018; and "Another airline has applied for a new licence to get 'Brexit-ready'", *City A.M.*, 18 October 2017

[24] See, e.g. "BA owner warned it will have no special treatment after Brexit", *Financial Times*, 16 October 2018

that is compatible with EU law, but this is a possible scenario.)

4.   Enhanced 'UK open skies deal' – what are the prospects of the UK securing better deals because of its inherent strengths than pan European deals have secured.[25]

Airlines support the ECAA option.[26] However, membership of the ECAA effectively requires acceptance of EU aviation law across all areas, so where the UK might want to move away from current EU rules with which it is not entirely satisfied, compromise would be required.

In its July 2017 report the Independent Transport Commission (ITC) stated that:

> Aviation needs to be treated separately from trade agreements: comprehensive air services agreements are the pre-condition for the success of trade deals. Any agreement should aim to replicate the benefits of membership of the Single Aviation Market in a new format, in light of the fact that the UK was the driving force behind its creation. It should also replicate in new agreements the traffic rights enjoyed by UK airlines under the EU's multilateral aviation agreements. Failure to do so could severely limit UK aviation's – and by extension the UK economy's – ability to generate jobs and economic growth. It could also result in increased costs to the consumer and risk-reduced connectivity, particularly from smaller airports.[27]

4.3 Will a deal be done?

The **Government** has remained consistently optimistic that a deal can be done. The latest European Council negotiating guidelines are aiming for "continued connectivity between the UK and the EU … through an air transport agreement".[28]

In November 2016 the Government and Airlines UK issued a joint statement emphasising the importance of aviation to the UK economy. It stated that "Market access remains a top priority, and we want to make sure we have liberal access to European aviation markets. We will also work closely to explore new opportunities for further liberalisation".[29]

Later that month, in a debate on Brexit and transport, the Secretary for State for Transport, Chris Grayling, said that he was:

> … absolutely [in] no doubt that we will secure in good time and effectively the agreements that our aviation sector needs to continue to fly around the world and within the European Union.

[25] Op cit., *The future of open skies post-Brexit*; see also: op cit., *Brexit: trade in non-financial services*, chapter 7 and *Internal EU27 preparatory discussions on the framework for the future relationship: "Aviation"*, TF50 (2018) 24 - Commission to EU 27, 17 January 2018

[26] See e,g. EasyJet press notice, "Response to result of UK referendum on membership of the European Union ("EU")", 24 June 2016; and CAPA, *Brexit and aviation Part 1: Open Pandora's box and anything can happen. But status quo is likely*, 27 June 2016

[27] ITC, *How will leaving the EU affect UK transport? Key issues*, ITC Occasional Paper No. 10, July 2017, para 2.3.5; the ITC is a land use and transport think tank

[28] Op cit., *European Council (Art. 50) (23 March 2018) - Guidelines*, Article 11(i)

[29] DExEU et al. press notice, "Joint statement between the UK Government and Airlines UK", 14 November 2016

> Not doing so is in no one's interests. Many parts of the EU depend economically on the contribution made by British airlines flying to regional airports. It is in all our interests that that continues.[30]

Appearing before the Transport Select Committee in October 2017 Mr Grayling again expressed confidence in a deal:

> There is absolutely no benefit to anybody in having a situation where the current international aviation structures are weakened as a result of problems between us and the European Union. I am sure that is not what they want. I have a very good relationship with the European Transport Commissioner. I am absolutely certain that over the coming months we will have mutual sensible arrangements put in place, but we are obviously preparing for all eventualities, as you would expect […] The day after we have left the European Union, the world from our airports will look very similar to the day before.[31]

In its June 2018 framework document on transport post-Brexit the Government said that the UK "can be informed by, and take inspiration from established precedents [in the field of aviation], but need not be constrained by them".[32] Specifically on air services it said:

1. The EU has aviation agreements with several countries which are each tailored to their particular circumstances.

2. Provisions on fair competition are included in agreements, but are proportionate to the access granted in the agreement.

3. The EU-US Agreement liberalises services to and from the EU/US with some additional rights. Both parties commit to allow airlines to compete fairly and equally.

4. The EU-Switzerland Agreement goes further, providing rights for services between any countries within the agreement. Consequently, the parties have aligned regulations.[33]

As time has passed, the **industry** has also become increasing confident that a deal can be done. For example, Willie Walsh, chief executive of International Airlines Group (IAG), told the Transport Committee in October 2017 that:

> I think the Secretary of State is optimistic and I share his optimism that the world will continue as it has. There are issues to be dealt with, and I am confident that they can be dealt with well in advance of the beginning of April 2019.[34]

Also, in November 2017 witnesses representing the aviation sector before the House of Lords European Union Committee "expressed confidence that a deal would be reached to cover the sector".[35]

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[30] HC Deb 23 November 2016, cc952-3

[31] Transport Committee, *Oral evidence: Policy priorities for the Department for Transport*, HC 430, 16 October 2017, Qq118 & 126

[32] Op cit., *Framework for the UK-EU partnership: Transport*, p11

[33] Ibid., p11

[34] Transport Committee, *Oral evidence: Aviation and Brexit*, HC 531, 30 October 2017, Q2; Sophie Dekkers, UK director for easyJet agreed with this assessment

[35] HL European Union Committee, *Brexit: deal or no deal* (7th Report of Session 2017–19), HL Paper 46, 7 December 2017, Box 5, p15

Not everyone in the industry is as optimistic. For example, the Chief Executive of Ryanair, Michael O'Leary, and the Chief Financial Officer, Neil Sorahan, have consistently argued that there is little evidence of progress towards an agreement being reached.[36]

There have also been concerns about the **European Commission**'s approach to negotiations on the aviation question and the relationship between the Commission and the UK Government. For example, there were reports in June 2018 that the Commission was "refusing to agree to any back-channel discussions between UK and EU aviation agencies to avert a crisis in the event of a "no-deal" outcome to Brexit".[37]

In September 2018 there were further reports that the Secretary of State for Transport, Chris Grayling, intended to write to his opposite numbers in the EU27, seeking to negotiate aviation deals with individual countries, circumventing the Commission.[38] There were subsequent reports that the Brexit Secretary, Dominic Raab, had been "reprimanded" by the EU's chief Brexit negotiator, Michel Barnier.[39]

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[36] See, e.g. "Fears flights between Britain and the EU could be halted after Brexit", *The Independent*, 5 July 2017
[37] "Aviation industry: EU blocks talks to avert 'no-deal' Brexit crisis", *The Guardian*, 18 June 2018; see also: "Brexit: Brussels bars aviation chiefs from preparing for no-deal", *The Times*, 18 June 2018; and "Aerospace body warns that Brussels is risking Brexit disruption", *Financial Times*, 11 September 2018
[38] "Britain draws up 27 different pacts to protect flights if there's no Brexit deal as new government papers will accept possibility UK planes WON'T be able to take off and land on the continent", *Daily Mail*, 6 September 2018
[39] "Barnier confronts Raab over discovery of Brexit no-deal letters to EU27", *The Guardian*, 11 September 2018

5. Air service agreements with third countries

The UK has long had bilateral agreements with many of its important markets, such as the US, which were superseded by EU-third party agreements. The ITC has said that as a result of EU membership UK airlines benefit from 42 Air Services Agreements entered into by the EU with countries inside and outside the EU including the US and China.[40]

Once it has left the EU, the UK would need to have negotiated new agreements with those countries or to have negotiated with the EU and those countries to continue as a party to the agreements as a non-Member State.

In their joint statement issued in November 2016 the Government and UK airlines said that Brexit provided "greater freedom to seek new agreements between the UK and some third countries. This includes looking at possible bilateral agreements to strengthen economic and cultural ties even further with countries such as the US and Canada".[41] In a debate on Brexit and transport later that month Mr Grayling said that leaving the EU would give the UK "more freedom to make our own aviation agreements with other countries beyond Europe".[42]

5.1 Open Skies Agreement with the United States

Once the UK leaves the EU it ceases to be a party to third country agreements between the EU and those countries (unless some sort of arrangement is made).

Given its importance to the UK, the Government has commented specifically on the future of the [EU-US Aviation Agreement](#), commonly called 'Open Skies'.[43] When Open Skies was agreed back in 2007 the UK market was one of the key attractions for the US – at the time the UK accounted for a 40% share of the EU-US market.

In evidence to the Transport Select Committee in October 2016 the Secretary of State for Transport, Chris Grayling, said that his "expectation and my intention would be that we retain the open skies arrangement for the United States. I cannot conceive of any US Transport Secretary who would not want that to be the case".[44]

In a debate on Brexit and transport in November 2016 Mr Grayling said that he had had "positive discussions" with the US Transportation Secretary under President Obama and that he intended to reprise those discussions with President Trump's Transportation Secretary (Elaine

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[40] Op cit., *How will leaving the EU affect UK transport? Key issues*, para 4.4.1
[41] Op cit., "Joint statement between the UK Government and Airlines UK"
[42] HC Deb 23 November 2016, c952
[43] More details are given in HC Library briefing paper SN455
[44] Transport Committee, *Departmental priorities and annual report and accounts*, HC 745, 17 October 2016, Qq74-5

Chao).[45] Updating the Transport Committee in October 2017 Mr Grayling said:

> I expect us to have a very similar arrangement with the United States after we leave. I have a very good relationship with my US counterpart. We have had very constructive discussions. I have no doubt that those arrangements will be put in place in good time. Talks between the two Departments are ongoing on a variety of issues, including this one.
>
> As to the future, whether we choose further liberalisation, on areas such as ownership, is a matter for after we have left. Right now, I am not looking to do significant renegotiation of existing agreements. We simply want to grandfather those arrangements, so that there is a smooth transition. After that, we can look at other things that we want to do, on further liberalisation, for example.[46]

In March 2018 there were press reports that the US was offering the UK a 'worse' aviation deal than it has as an EU member and that 'secret talks' in January "were cut short after US negotiators offered only a standard bilateral agreement. These typically require airlines to be majority owned and controlled by parties from their country of origin".[47] This was later refuted,[48] and was followed by reports that a deal was 'imminent'. *The Telegraph* quoted the view of Nick Calio, Chief Executive of [Airlines for America](#), that:

> Everyone understands there is a problem to be solved but it is being worked out and we believe there will be a framework in place very shortly," Mr Calio, who has been close to the negotiations, said." The issue will be taken care of so that British carriers can fly to the US without challenge. In terms of the timetable, we hope something will be in place as early as the end of the month or the beginning of April".[49]

Most recently, in May 2018, there were reports that a deal was 'close' and that:

> UK and US negotiators have agreed that major transatlantic airlines must be covered despite them being foreign owned - a break with the normal rules.
>
> That means flights from Virgin, Norwegian Air and British Airways owner IAG - all majority-owned outside of the UK and US - would continue after Brexit […]
>
> A fresh round of talks will take place next month with officials and well-placed industry sources increasingly confident an agreement is within reach.[50]

There has been no further update.

If there are difficulties reaching agreement it is not entirely clear what happens, specifically whether UK-US arrangements would revert back to

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[45] [HC Deb 23 November 2016, c952](#)
[46] Op cit., *Oral evidence: Policy priorities for the Department for Transport*, Q124
[47] "[US offers UK inferior open skies deal after Brexit](#)", *Financial Times*, 5 March 2018
[48] "[Walsh sees clear skies after Brexit](#)", *The Times*, 7 March 2018
[49] "[Deal to prevent post-Brexit grounding of US flights possible by end of month](#)", *The Telegraph*, 15 March 2018
[50] "[Britain 'open skies' deal with US due this summer as negotiators agree key terms](#)", *The Telegraph*, 28 May 2018

the Bermuda II bilateral agreement, signed by the two countries in 1946 and last amended in 1991. The aviation market has changed considerably since then and any reversion to Bermuda II could cause disruption to UK airlines and transatlantic trade and passenger routes. The US negotiator (now independent of the US Government) responsible for the EU-US talks, John Byerly, has said, "it is impossible for me to believe that [reversion to bilaterals] is really what would happen in the real world".[51]

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[51] Op cit., *Brexit and aviation Part 1: Open Pandora's box and anything can happen. But status quo is likely*

6. Safety and EASA

The [European Aviation Safety Agency (EASA)](#) develops common safety and environmental rules at the European level. It monitors the implementation of standards through inspections in the Member States and provides the necessary technical expertise, training and research.[52]

The UK's involvement with EASA and the standards and safety regulation it is responsible for is a key issue which will need to be resolved in any Brexit negotiations. The Government has explicitly stated that it would like to negotiate some sort of ongoing membership of EASA after Brexit.[53] Specifically, in her speech on 2 March 2018 the Prime Minister said:

> We want to explore with the EU, the terms on which the UK could remain part of EU agencies such as … the European Aviation Safety Agency. We would, of course, accept that this would mean abiding by the rules of those agencies and making an appropriate financial contribution.[54]

As to the likelihood of such an arrangement being agreed, the March 2018 European Council negotiating guidelines state that "the aim should be to ensure continued connectivity between the UK and the EU after the UK withdrawal. This could be achieved, inter alia, through an air transport agreement, combined with aviation safety and security agreements.[55] In its March 2018 paper on Brexit, *MLex Market Insight* interpreted this as follows:

> … it foresees a bilateral aviation safety agreement, with the UK's Civil Aviation Authority taking on responsibility for testing and licensing aircraft and components in the country. A streamlined system that simplifies the certification of UK products would be possible with "sufficient trust" in the UK regime, the European Commission said.[56]

In its June 2018 framework document on transport post-Brexit the Government said that the UK "can be informed by, and take inspiration from established precedents [in the field of aviation], but need not be constrained by them".[57] Specifically on safety agreements it said

1. The EU has aviation safety agreements with, for example, US, Canada and Brazil.

2. They provide for regulatory cooperation, but each party maintains their own regulatory frameworks which may diverge.

3. Requirements for certification are reduced, but automatic mutual recognition is not possible.

[52] EASA, *About EASA* [accessed 12 April 2018]
[53] See, e.g. "UK wants to remain in EU aviation safety agency", *Financial Times*, 1 December 2017
[54] *PM speech on our future economic partnership with the European Union*, 2 March 2018
[55] Op cit., *European Council (Art. 50) (23 March 2018) - Guidelines*, Article 11(i)
[56] MLex Market Insights, *Rival Visions of a Brexit Deal*, March 2018, p8
[57] Op cit., *Framework for the UK-EU partnership: Transport*, p11

4.   The parties have a dialogue but do not work in partnership to prepare identical regulations.[58]

There is widespread agreement that continued membership of EASA would benefit the UK and the EU. For example, in a speech given on 1 December 2016 the then Chief Executive of the CAA, Andrew Haines, argued that it was in the UK's best interests to remain an active member of EASA and that it would mean a significant increase in the regulatory burden if the UK sought to establish its own regime. He highlighted the fact that the UK and France provide two thirds of all the rule making input on European Safety Regulation and together undertake close to 90% of EASA's outsourced activities. He also said that post-Brexit the UK can "continue to play a very active role in ICAO – indeed strengthening but it is not a substitute for European engagement".[59]

In a September 2017 paper the Royal Aeronautical Society (RAS) said:

> Far from diminishing UK influence in global aviation, the EASA regime has provided a conduit for UK influence on aviation safety and security within Europe and beyond on behalf of the UK passengers flying on airlines around the world; indeed, the UK has been a major driver of ever-closer alignment on regulatory matters across Europe and the negative impacts of its withdrawal would be felt across the continent, to such an extent that EASA would likely be diminished in stature as an organisation.[60]

It went on to outline three options open to the UK and the EU:

- The UK could remain a full member of EASA; or
- take an off-the-shelf participation option as Switzerland and Norway have done; or
- withdraw from EASA and repatriate all regulatory powers back to the UK Civil Aviation Authority (CAA), potentially contracting some activities back to EASA.

It concluded that "the case for the first option is very strong: the UK should remain within EASA".[61]

In its July 2018 report the NAO stated that the Department had estimated the costs of possible future membership of EASA at £18 million between 2019-20 and 2021-22, based on information on Switzerland's contribution as a non-EU state.[62]

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[58] Ibid., p11
[59] Op cit., _The future of open skies post-Brexit_
[60] RAS, _Civil Aviation Regulation: What Future After Brexit?_, 28 September 2017, pp5-6
[61] Ibid., p6
[62] Op cit., _Implementing the UK's Exit from the European Union: Department for Transport_, para 2.35

7. Airspace change and Single European Sky

Airspace is a complex thing to understand, the easiest way to think of it is as a motorway network in the sky. Airspace is the volume of space above ground level and extends as far as aircraft can fly. UK airspace contains a network of corridors, or airways. These are usually ten miles wide and reach up to a height of 24,000 feet from a base of between 5,000 and 7,000 feet. Airspace is either considered to be 'controlled' or 'uncontrolled'. In controlled airspace, there is a system of structured routes and aircraft which are managed by air traffic control (ATC) services. By contrast, a large volume of airspace in the UK is uncontrolled and this is where the pilot of the aircraft does not receive a service from the ground but has to "see and avoid" other aircraft and navigate independently.

The current legal and policy framework for airspace is set by Government, in accordance with international and European standards and requirements. Member states of the International Civil Aviation Organization (ICAO), including the UK, collaborate on a common regulatory framework and agree international standards on various issues, including the access to and use of airspace. EU laws implement several of ICAO's resolutions.

The main EU initiative in this area is the Single European Sky (SES), launched in 1999 to reform the architecture of European air traffic management. Its implementation is intended to increase the overall efficiency of the European air transport system. The UK and Ireland is planning to meet the SES requirements through its Future Airspace Strategy, published in June 2011, with a programme to modernise airspace across the UK out to 2030. In February 2017 the Department of Transport published a consultation on UK airspace policy reform. In October the Government announced it would proceed with most of the main proposals in the paper.

There is general support for proceeding with this work on SES and airspace modernisation more generally at a European level.[63] Norway and Switzerland, which are both outside of the EU, are a part of SES so this may be something to which the UK could be party to after Brexit with relative ease.

In evidence to the Transport Select Committee in October 2016 the Secretary of State for Transport, Chris Grayling, was asked about airspace. He made no specific comment but stated that "my expectation is that it will be in the interests of everyone involved for aviation to continue to function in the way it does now". [64] In December 2016 the European Scrutiny Committee reported that the Government had told it

> More information on airspace change and modernisation can be found in HC Library briefing paper CBP 7889.

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[63] Op cit., *Review of the Balance of Competences between the United Kingdom and the European Union Transport*, p33

[64] Op cit., *Departmental priorities and annual report and accounts*, Q76

that the UK "will remain part of the Europe wide air traffic management network, by virtue of its Eurocontrol membership".[65]

In a March 2018 report on SES, the European Scrutiny Committee noted Government comments that post-Brexit there would be a need to ensure interoperability between the UK's arrangements for managing air traffic and those of the EU and that it would be important to settle whether the UK remains part of the UK-Ireland Functional Airspace Block (FAB) as part of the negotiations with the EU. There are mechanisms other than FABs, such as the Borealis Alliance, for organising air navigation services on a cross-border basis.[66] The Committee concluded that:

> … the Single European Sky (SES) regime will cease upon withdrawal to apply to the UK… Although the UK could unilaterally retain some aspects of SES rules in UK law … many SES provisions are cross-border and reciprocal in character, and will therefore no longer function outside the Union.

> We note that European third countries that conclude agreements with the EU can participate in the SES airspace and regulatory regime, and that participation has been extended to signatories of the European Common Aviation Area Agreement (ECAA); however, these countries apply the EU aviation acquis as well as a wide range of associated environmental, social and consumer protection rules. Participation also entails accepting the indirect jurisdiction of the Court of Justice of the European Union (CJEU).

> Implications for UK air traffic management of an exit from the SES include: the need to renegotiate on a bilateral basis ATM arrangements with the EU (including charging arrangements); the effects of a likely reduction over time in the interoperability between UK and EU ATMS, as the UK becomes less involved in the development of the EU system; the loss of EU funding relating to ATM initiatives; and the cost to the UK of developing its own ATM technological research programme. While these issues pose policy challenges, we consider them less critical than other challenges facing the sector, such as traffic rights, participation in the European Aviation Safety Agency (EASA), and other arrangements affecting trade in goods. In the context of the Article 50 negotiations, we note that it is unclear to what extent these issues can be disaggregated, and that the European Commission's slides on aviation suggest that it may treat them as a package.[67]
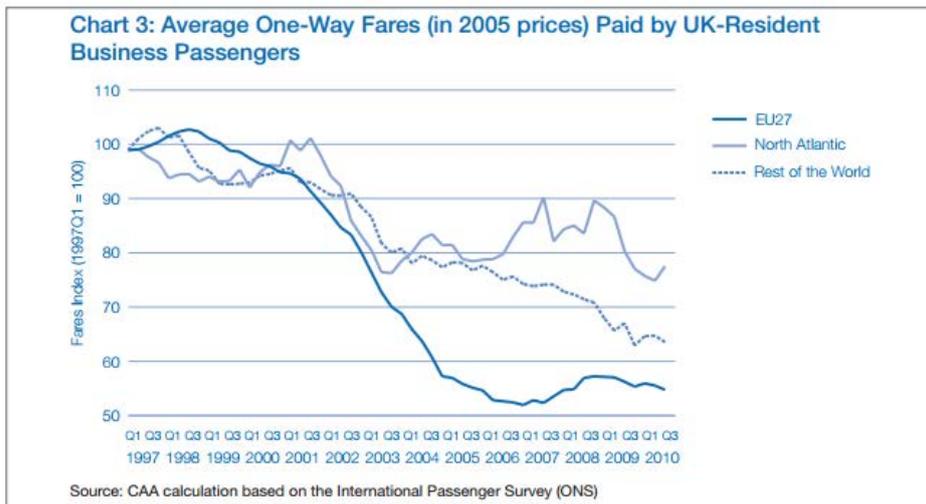
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[65] ESC, *Air traffic management*, HC 71-xx, 13 December 2016; Eurocontrol is the European Organisation for the Safety of Air Navigation. It is an intergovernmental organisation with 41 Member and 2 Comprehensive Agreement States. Its primary objective is the development of a pan-European ATM system
[66] ESC, *Single European Sky*, HC 301-xvi, 6 March 2018
[67] Ibid., paras 5.6-5.8

8. Air fares

Liberalisation has helped bring down fares to the EU at a much greater rate than to other parts of the world:[68]

Chart 3: Average One-Way Fares (in 2005 prices) Paid by UK-Resident Business Passengers

Source: CAA calculation based on the International Passenger Survey (ONS)

It may be that if the UK's access to the ECAA post-Brexit is limited in some way or if there is no access at all, this could potentially lead to higher air fares. As CAPA says: "any reversal of the liberalisation process, leading to increased restrictions on market access (e.g. by UK airlines on intra-EU routes, not just from the UK to the new EU, or by EU airlines flying from the UK to third party EU countries), could result in fare increases". Consultancy Oxera has estimated that such restrictions on market access could lead to UK passenger fares rising by 15% to 30%.[69] Fares could also be affected by dramatic currency fluctuations.

However, higher fares are by no means a certainty and it will depend on the deal the UK secures. For example, Bjorn Kjos, the chief executive of Gatwick-based, low-cost carrier Norwegian Air, told ITV before the referendum that he did not think fares would rise post-Brexit. He said: "We are here providing low fares to everybody... whether you are in the EU or not that's not the problem".[70]

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[68] Op cit., *Review of the Balance of Competences between the United Kingdom and the European Union Transport*, p25

[69] CAPA, *Brexit and aviation Part 2: lower air traffic, economic uncertainty. UK-EU relations up in the air*, 28 June 2016; the Chief Executive of Ryanair, Michael O'Leary, voiced similar concerns, see: "Airfare hikes ahead unless Brexit talks turn, warns Michael O'Leary", *Daily Telegraph*, 7 November 2016

[70] "The boss of one of Europe's biggest budget airlines says Brexit would not end cheap fares", *ITV News*, 31 March 2016

9. General aviation: drones, recreational & model aircraft

As the Government's Balance of Competencies review put it, the general aviation community (that is, the private and recreational flying sector) felt unfairly burdened by EU legislation which they considered was made without regard to their interests but, rather, to those of the commercial air transport industry. As a result they felt their sector to be governed by an overly prescriptive approach and a lack of proportionality.[71]

For a long time private and recreational flying has sought a more nuanced approach for light aircraft and sports and recreational aviation. The CAA has agreed that there is some overly intrusive and costly regulation in this area. Much of general aviation, especially on the operational side, does not have single market implications, and some of it is not even international in nature.[72] The sector's most recent concerns have been about the EU's plans to regulate small drones.[73]

This may be an area where the UK chooses to apply its own more liberal regime post-Brexit, but there has been nothing to indicate that such would be the case.

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[71] Op cit., *Review of the Balance of Competences between the United Kingdom and the European Union Transport*, p55
[72] Ibid., p55
[73] For more information see HC Library briefing paper CBP 7734

10. Exit preparations for aviation

As set out above, the UK Government has started to publish negative SIs relating to transport, made under the Withdrawal Act; some of these have already been sifted by the relevant Committees.[74]

There are three SIs relating to aviation, published to date:

* *Airports (Groundhandling) (Amendment) (EU Exit) Regulations 2018*;

* *Airport Charges (Amendment) (EU Exit) Regulations 2018*; and

* *Civil Aviation Act 1982 (Amendment) (EU Exit) Regulations 2018*

Also relevant, though somewhat tangentially, are the *Computer Reservation Systems (Amendment) (EU Exit) Regulations 2018*.

In each case the sifting committees have agreed with the Government that these SIs do not require a debate in Parliament, though one may still occur.

The EU27 is also preparing for Brexit. The European Commission has issued Notices to Stakeholders on the implications of Brexit in the fields of air transport, aviation safety and aviation security.[75]

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[74] The process is explained on the Parliament website, see: *Statutory instruments relating to Brexit* [accessed 4 October 2018]

[75] EC, *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Air Transport*, 19 January 2018; *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Aviation Safety Rules*, 13 April 2018; and *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the field of Aviation Security and Maritime Security*, 5 July 2018

11. No deal

11.1 Government technical notices

On 23 August 2018 DExEU began to publish 'technical notices', on how to prepare for Brexit if there is 'no deal'. On 24 September the Department for Transport published three papers on aviation, covering flights, safety, and security.

On **flights between the EU27 and the UK** in the event of 'no deal', the relevant paper states that:

> UK and EU licensed airlines would lose the automatic right to operate air services between the UK and the EU without seeking advance permission. This would mean that airlines operating between the UK and the EU would need to seek individual permissions to operate.[76]

It goes on to state that in this scenario the UK envisages granting permission to EU airlines to continue to operate and would "expect EU countries to reciprocate in turn". If such permissions are not granted, there could be disruption to some flights. In these circumstances the UK approach would be as follows:

> In order to ensure permissions were granted and flights continued, the UK's preference would be to agree a basic arrangement or understanding on a multilateral basis between the UK and the EU. Alternatively, bilateral arrangements between the UK and an individual EU country could be put in place, specifying the conditions under which air services would be permitted. By definition any such agreement would be reciprocal in nature.[77]

On **flights to and from the rest of the world**, it states that there would be two approaches:

- For airlines from one of the 111 countries with whom the UK has a bilateral Air Services Agreement (ASA), including China, India and Brazil, there would be no change; and

- For airlines from one of the 17 non-EU countries with whom air services to the UK are currently provided for by virtue of the UK's membership of the EU, replacement arrangements will be in place before exit day.

The paper states that the UK "has already agreed a number of these agreements, and is confident the remaining agreements will be agreed well in advance of the UK leaving the EU".[78]

On **air traffic management**, the paper states that the UK would no longer be able to directly participate in the EU's SES initiative (see section 6.4, above), but that the UK "would continue to work through EUROCONTROL to ensure the safe and efficient management of

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[76] DfT, *Flights to and from the UK if there's no Brexit deal*, 24 September 2018
[77] Ibid.; at the AOA conference in October 2018 Mr Grayling stated that one cause of disruption to flights could be EASA refusing or delaying the certification of UK-certified planes ["UK-EU Flight Disruption 'Theoretically Possible' in the Event of a No-Deal Brexit, Admits Chris Grayling", *The Independent*, 29 October 2018]
[78] Ibid.

airspace across its 41 members. The UK will continue to lead the way in providing safe and efficient air traffic control services".[79]

A separate paper on **aviation security** states that if the UK leaves the EU in March 2019 with no agreement in place on aviation security, the existing regulations and procedures will still be retained in domestic law under the EUW Act. It states that:

> Given this, and the higher standards of aviation already in place in the UK, there is no reason for the UK's aviation security regime not to be recognised by the EU as equivalent, which would mean no additional security restrictions would need to be imposed by either the EU or the UK. However, if the EU does not recognise the UK's standards, there would be a number of possible implications for passengers and cargo.[80]

These could include passenger and baggage rescreening at EU airports for UK passengers catching an onward flight. The paper notes that the European Commission has "indicated that they will not recognise the UK aviation security system", with potentially "significant operational and cost implications for those EU airports, and passengers may have to factor increased time for rescreening into their travel schedule".[81]

As regards cargo, the Commission has set out that, in the absence of any agreement, the default regulatory position will require carriers to hold ACC3 designations[82] from an EU Member State in order to transport cargo from the UK into the EU. The paper states that the EU "has not yet provided details of how carriers should apply for an ACC3 designation". The paper states that an outcome where the EU does not immediately recognise UK security standards as equivalent (given standards are higher than in the EU) would "have significant implications for the EU air cargo industry, their supply chains, and the consumers of the products to be shipped" and that the UK therefore expects that its recognition of EU security standards "will be reciprocated in turn by the EU".[83]

A separate paper on aviation safety deals with **EASA**. It states that in the event of 'no deal', the functions currently performed by EASA in relation to approvals for UK designed aeronautical products and approvals for third country organisations would be conferred on the CAA.[84] The CAA has set up a [microsite](#), explaining in more detail what would happen in the event of 'no deal'. The site contains detailed advice for the following:

- [Aerospace design organisations](#);

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[79] Ibid. [Eurocontrol](#) was created via an international convention in 1960. It is an intergovernmental organisation with 41 Member and 2 Comprehensive Agreement States. The aim behind the creation of Eurocontrol was to have an organisation that would be entirely responsible for upper airspace in Europe. Its primary objective is the development of a pan-European air traffic management system.

[80] DfT, *Aviation security if there's no Brexit deal*, 24 September 2018

[81] Ibid.

[82] Air Cargo or Mail Carrier operating into the Union from a Third Country Airport

[83] Ibid.

[84] DfT, *Aviation safety if there's no Brexit deal*, 24 September 2018; the *Civil Aviation Act 1982 (Amendment) (EU Exit) Regulations 2018* (see section 6.7, above) prepare for this contingency

- Aerospace maintenance organisations;

- Aerospace production organisations;

- Air Navigation Service Providers;

- Airlines and AOC holders;

- Airports;

- Approved Training Organisations;

- Cabin crew;

- Commercial pilots;

- Continued Airworthiness Management Organisations;

- Declared entities;

- Drones;

- Engineering training organisations;

- Flight training examiners;

- Licensed engineers;

- Private pilots; and

- UK-registered aircraft: qualified owners

The CAA has also created this short introduction to what a 'no deal' means for aviation safety regulation. One issue it deals with is that of commercial pilots.[85] The CAA states that for most UK-registered commercial pilots, there would be little impact from 'no deal' as a consequence of global aviation rules.[86] Pilots with UK licences who want to fly EU-registered aircraft post- Brexit would need to transfer their licence to another EASA member state before Brexit, or seek a second licence. If pilots currently hold a commercial licence from another EASA member state, they would need to seek validation from the CAA to operate UK-registered aircraft if they want to fly outside the UK. The CAA states that it "is currently developing processes to make this as seamless as possible".[87]

UK airlines, aircraft manufacturers and other members of the aviation industry are now able to register with EASA as a third country', in preparation for a 'no deal'.[88]

11.2 Impact

The impact of 'no deal' on aviation has been widely debated. For example, in its December 2017 report on a 'no deal' Brexit, the House of Lords European Union Committee stated that "The consequences of

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[85] Following some concerns from the CAA about how the issue had been reported by the media, see, e.g. CAA press notice, "CAA statement on Sky News aviation and Brexit story", 11 September 2018

[86] Under the International Civil Aviation Organization (ICAO)

[87] CAA, *The CAA's guide to Brexit No Deal & Aviation Safety*, CAP 1714, 24 September 2018, pp5-6

[88] EASA, *Brexit* [updated 2 October 2018]

failure to reach a deal [on aviation] would be grave".[89] There has been speculation that the UK-Spain market could be particularly badly hit.[90] In a March 2018 report the Business, Energy and Industrial Strategy Select Committee set out the potential consequences of a UK exit from EASA:

> If the UK is to make a managed departure from EASA, it would require a transition period in which special arrangements are made with the EASA, the US Federal Aviation Authority and other global regulators. The Civil Aviation Authority would need to undergo a major investment and recruitment programme if it is to take over the functions of EASA at some point in the future, and Bilateral Aviation Safety Agreements with mutual recognition agreements would need to be negotiated with the EU, US and other major markets. Given the complexities involved, this transition may need to last beyond the two years that the Prime Minister has said is likely to be appropriate for the economy-wide implementation period. This disruptive and costly process is unlikely to result in any significant divergence in regulation.[91]

The UK in a Changing Europe stated in a September 2018 paper that:

> Brexit in any form will be disruptive for airlines, but failure by the UK and the EU to reach agreement would leave the industry in chaos. Because the sector has its own system of regulation, based on the 1944 Chicago Convention, there is no WTO safety net in aviation. Moreover, although the Chicago system has provided a stable framework for the development of aviation since the second world war, it is unwieldy, difficult to change and restrictive.[92]

It went on:

> Some argue that … fears are exaggerated and that it is in the economic interests of both the UK and the EU to avoid [no deal]. It is true that contingency measures could be mobilized to retain basic connectivity – for example, the UK could grant access unilaterally – but such steps would merely limit the damage. They would certainly not provide for a continuation of the advanced system that currently exists. A UK-EU air services agreement, as well as UK bilaterals with third countries, would take years to negotiate, as each side aims to secure the best deal for its airlines under uncertain conditions.[93]

Watson Farley & Williams argued in a March 2017 paper that "the connection between aviation and the EU Single Market is not inherent and compromise may be possible, but will require both sides to be bold".[94] It further stated that:

> … the logic of requiring the UK to leave the single aviation area because it is leaving the Single Market is not easy to follow … it would be perverse to allow the creation of new restrictions on flying between the UK and the EU when third countries such as Canada, on another continent, have the possibility of securing

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[89] Op cit., *Brexit: deal or no deal*, Box 5, p15

[90] "No-deal Brexit would halt most UK-Spain flights, industry says", *The Guardian*, 24 October 2018

[91] BEIS Committee, *The impact of Brexit on the aerospace sector* (Sixth Report of Session 2017–19), HC 380, 19 March 2018, para 47; see also: European Select Committee, *EU Aviation Safety Agency (EASA)*, HC 301-xiv, 27 February 2018

[92] The UK in a Changing Europe, *Cost of No Deal Revisited*, 3 September 2018, p27

[93] Ibid., p27

[94] WFW, *Keeping Skies Open After Brexit*, 29 March 2017, p4

> fully open skies provided ownership and control restrictions on both sides are eliminated […]

> It would be wrong to say the EU-Canada agreement could be a "model" for a future UK-EU aviation deal; it would be more correct to say it shows the link between membership of the Single Market and the single <u>aviation</u> market is not essential.[95]

The Institute of Economic Affairs (IEA) published a 'no deal fear checker' in August 2018. This stated that there is mutual self-interest on the part of the UK and the EU27 in ensuring that planes can still fly:

> First, the UK is a world leader in aviation, which means it has plenty of leverage. The UK market itself is the largest in the EU, and the third largest globally, after only the US and China […]

> Second, the mutual interests are strong. Grounding UK airlines would be hugely damaging for the EU economy, particularly in areas like tourism. And, of course, foreign airlines presumably want to continue to fly to and from the UK as well. Since these agreements are reciprocal, it is unlikely that other countries would deny the UK the most important rights when they would then almost certainly lose them too.

> Third, even if this is left to the last moment, there are several quick fixes. In particular, the UK and EU (or a third country like the US) could agree at least a temporary extension of the current arrangements by something as simple as a memorandum of understanding.[96]

The International Air Transport Association (IATA) has urged "an early resolution for aviation in the Brexit discussion" in order to ensure that passengers have security about their travel arrangements:

> Time is precious. The Brexit clock is ticking towards a deadline of March 2019. But the aviation deadline is earlier. Normally passengers can book travel about a year in advance. At a minimum, the flight schedules and seat and cargo inventories must be available at least six months in advance. So that puts the airlines' deadline at October 2018…[97]

There were reports towards the end of 2017 that some airlines were tightening their terms and conditions for flights booked in advance for after Brexit, warning customers that they may not take off and that airlines will not pay compensation if planes are grounded.[98]

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[95] Ibid., p5

[96] IEA, _"No Deal" Fear-checker No. 1: "Planes won't fly"_, 27 August 2018, p2

[97] IATA press notice, "UK Aviation Priorities: Clarity on Brexit and Expanding Heathrow", 8 November 2017

[98] "Airlines may not guarantee flights after exit from EU", _The Times_, 18 October 2017; see also: "Ryanair confirms roll out of "Brexit clause" in tickets", _City A.M._, 31 January 2018