



Aviation update: UK-EU Trade Agreement and what it means for aviation post-Brexit

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On Thursday, 24 December, the European Commission and the United Kingdom agreed a comprehensive Trade and Cooperation Agreement (the *Agreement*) which sets out the basis for the future EU and UK trade relationship. The Agreement has been formally approved by all 27 EU countries as well as the UK Parliament and is provisionally implemented pending formal approval by the European Parliament in early 2021.

Compared to the contingency measures (the *Contingency Regulations*) published by the European Commission on 10 December to ensure basic air connectivity in the event no free trade agreement was reached, the Agreement provides several important operational flexibilities and further rights which will benefit UK and EU passenger, cargo, and charter operators.

Operating Rights

From 1 January, UK and EU operators will be treated as third country operators in each other's airspace. UK and EU carriers' traffic rights are now defined by reference to the Agreement and those rights are fundamentally different to the rights UK and EU carriers had while the UK was a member of the European Common Aviation Area.

Under the Agreement, UK and EU air carriers will continue to enjoy flyover rights and operating rights on routes between the UK and the EU (third and fourth freedom rights).

Neither UK nor EU carriers will be able to operate intra-EU or intra-UK cabotage routes respectively.

UK and EU carriers are not automatically entitled to operate routes which have an intermediary stop in the EU or UK respectively, where passengers/cargo are loaded/offloaded before continuing to a third-country destination (fifth freedom rights). However, the Agreement does permit the UK and individual EU Member States to negotiate bilateral agreements for fifth-freedom all-cargo flights (discussed further below).

Pre-requisite Requirements

To benefit from these operating rights it remains the case that air carriers must comply with the ownership and control requirements. For UK carriers, while the ownership and control test no longer forms part of the UK operating licence requirements under domestic law, they will still need to comply with ownership and control requirements to benefit from operating rights under the Agreement.

EU carriers wishing to operate in the UK must be (1) owned and effectively controlled by EU nationals, (2) have a principal place of business in the EU and hold a valid operating licence in the EU, and (3) hold an air operator certificate issued by the EU. As these are already effectively the requirements for EU carriers to obtain an operating licence and air operator certificate under Regulation (EC) 1008/2008 in order to operate in the airspace of the EU Member States, the Agreement should not impose additional requirements for EU carriers.

For UK carriers, there are two paths for meeting the requirements for obtaining operating rights between the UK and EU. For UK carriers granted an operating licence *on or before 31 December 2020*, they must be (1) owned and effectively controlled by EU and UK nationals, (2) have a principal place of business in the UK and hold a valid operating licence in the UK, and (3) hold an air operator certificate issued by the UK. Therefore, for UK carriers whose operating licences were granted on or before 31 December 2020, there is no need (subject to any changes in UK law and/or conditions imposed on the previous granting of operating licences) to transition to ownership and effective control by UK nationals only to benefit from the above operating rights.

For UK carriers granted an operating licence *on or after 1 January 2021*, they must be (1) owned and effectively controlled by UK nationals *only*, (2) have a principal place of business in the UK and hold a valid operating licence in the UK, and (3) hold an air operator certificate issued by the UK. This provision was introduced because UK law now no longer requires that UK carriers be owned and effectively controlled by UK nationals. Importantly, no derogation was provided for ownership and effective control to be held by both UK and EU nationals.

Therefore, for UK carriers whose operating licences were granted on or after 1 January 2021, while there is no need to prove, under domestic UK law, that UK nationals own and effectively control the operating company, they will need to prove that UK nationals own and effectively control the operator to benefit from operating rights to and from the EU under the Agreement.

Application Procedure

Unlike the Contingency Regulations, the Agreement does not stipulate minimum application times for operating rights, instead requiring each party to grant authorisation with “minimum procedural delay”. Further, the EU and UK can only require notification of operating plans, programmes, or schedules for information purposes and must minimise any administrative burdens associated with any notification requirements. This should allow UK and EU operators both greater flexibility and minimum administrative burden in applying for new operating rights under the Agreement and complying with any notification requirements for existing operating rights.

Code-Sharing, Change of Gauge, and Co-Terminalisation Rights

Additionally, the Agreement contains several “operational flexibilities” which were not included in the Contingency Regulations which will likely be of use to passenger, cargo, and charter air operators. Under the Contingency Regulations, the only operational flexibility granted was code-share and blocked-share arrangements. Further, Member States were expressly prohibited from negotiating bilateral air transport service agreements with the UK.

The Agreement preserves code-sharing and blocked-share arrangements from the Contingency Regulations which would allow air carriers to serve as the marketing carrier on routes which only an air carrier licenced in the other jurisdiction can operate. For example, while intra-EU cabotage restrictions mean a UK carrier cannot operate from AMS to FRA, a UK carrier can code-share with an EU operating carrier, selling tickets on the above route as the marketing carrier.

Additionally, the Agreement expressly permits air carriers to transfer traffic between aircraft of the same air carrier at any point (change of gauge) and serve more than one point within the UK or EU in a single service (co-terminalisation). This should provide significant operational and economic flexibilities for UK and EU air carriers. For example, this could allow a UK air carrier to operate a high-capacity aircraft to CDG, offload passengers terminating at CDG, and transfer any continuing passengers to smaller aircraft continuing on to regional destinations within the EU. Alternatively, a UK cargo carrier could operate a scheduled service from LHR to FRA via CDG. While the UK carrier could not uplift cargo at CDG for carriage to FRA, it could offload air cargo at both CDG and FRA on a single flight.

Bilateral UK and Member State Agreements

While the Contingency Regulations expressly prohibited individual Member States and the UK from granting any expansion of air operator rights, the Agreement contains two exemptions: the UK and Member States can authorise (1) all-cargo flights which make stops for the offload and uplift of cargo in the territory of a Member State or the UK before departing for a third-country destination (fifth freedom flights) and (2) non-scheduled air transport services beyond the rights provided for in the Agreement.

For cargo operators, the Agreement provides for the possibility that, subject to bilateral agreements being made, cargo flights with an intermediary stop in the UK and EU can be maintained. Bilateral agreements between the UK and Member States with cargo hubs such as CDG, FRA, and AMS will allow for EU and UK carriers to maintain lucrative cargo flights which connect European and UK cargo hubs before continuing on to the Americas, Asia, and Africa. Interestingly, the Agreement makes no provisions for fifth-freedom passenger flights, though passenger air carriers can still benefit from the code-sharing provisions detailed above.

For charter operators (i.e non-scheduled) who provide ad-hoc charter flights to popular holiday destinations, any negotiated agreements can allow them to retain a significant portion of their current operating model. For example, the UK and Greece could negotiate an agreement which authorises intra-UK and intra-Greek non-scheduled flights. This would then permit UK or EU charter operators to offer charter solutions which would pick up passengers from across the UK, transport them directly to various Greek islands, before returning them to their points of departure.

Absent the above exemptions, UK and EU operators will need to apply for permits from the relevant Member States or restructure their operations to obtain a second UK/EU operating licence and air operator certificate to continue operating cabotage and/or fifth freedom routes.

Further details and a comprehensive before and after pictorial representation of traffic rights under the Agreement will be released in due course.

Leasing

Like the Contingency Regulations, the Agreement places limitation on the operating rights of air carriers using leased aircraft. To benefit from the above operating rights, a UK or EU air carrier must either use a leased aircraft which is (1) dry leased without crew or (2) is wet-leased where that leasing is justified on the basis of exceptional needs, seasonal capacity needs, or operational difficulties of the lessee and the lease does not exceed the duration strictly necessary to fulfil those needs.

However, as compared to the Contingency Regulation, the Agreement expands the rights of UK or EU air carriers to wet-lease aircraft with foreign crew. UK and EU air carriers are permitted to wet-lease an aircraft crewed by crew from an EU licenced air carrier. Importantly, EU air carriers are not permitted to wet-lease an aircraft with a UK crew unless the “exceptional needs” requirement above is satisfied.

Prior to granting operating authorisation for leased aircraft, the UK or EU can require that the competent authorities verify compliance with the above conditions prior to granting approval.

Certifications and Licencing

Under the Agreement, certificates of airworthiness, competency, and licences issued by the UK will be recognised as valid by the EU (and vice-versa) in exercising operating rights granted under the Agreement.

Ownership and Control Liberalisation

The Agreement includes an article requiring that both the EU and UK agree to consider options for the reciprocal liberalisation of the ownership and control requirements for air carriers within 12 months of entry into force of the Agreement. While the Agreement does not impose any minimum liberalisation requirements (such as reducing the ownership requirement to less than 50%, including UK and EU nationals jointly within ownership and control considerations), given the EU's historically strict stance on airline ownership, this may pave the way for incremental reforms and liberalisation. This drafting is, in the short term, likely a marker for both the UK and the EU to consider UK nationals as qualifying nationals for the purpose of the ownership control test for EU airlines (and vice-versa). This would put us in the position we were in, pre-Brexit, from a ownership and control perspective. Note, this would not change the more limited traffic rights that have been granted to UK and EU carriers as outlined above.

Passenger Rights/Consumer Protection

The Agreement includes an article requiring that all parties take effective and non-discriminatory measures to protect consumer interests. The UK has already retained Regulation 261/2004 (*EC261/04*) into UK domestic law through the Air Passenger Rights and Air Travel Organisers' Licencing (Amendment) (EU Exit) Regulations 2019. An article on the implementation of EC261/04 into UK law and implications post 31 December 2020 is available [here](#).

While the Agreement does not impose any minimum requirements, the UK would need to consult the EU on any matters relating to consumer protection and any planned measures in that regard. Therefore, any changes to EC261/04 in UK law would first need to be consulted with the EU.

Right to Restrict and/or Terminate Rights

Under the Agreement, both the UK and EU agree to eliminate any forms of discrimination which may adversely affect the other party's air carriers. Where the UK or EU believe that there is discrimination which adversely affects their air carriers, there is an arbitration and retaliatory measures mechanism. Importantly, any retaliatory measures must be appropriate, proportionate, and restricted in scope and duration, therefore generally ensuring that the Agreement will not be wholly terminated and suspended for all air carriers.

Additionally, while issues such as the EU's access to UK fisheries following the five and a half-year transition period and potential disputes over fair competition may lead to disputes or attempts to terminate the Agreement, any termination requires written notice and the aviation provisions would only cease to have effect on the first day of the ninth month following the date of notification.

However, given the importance of ensuring air connectivity and the long-notice period for any termination of the aviation provisions, we expect that the EU and UK will bring back similar minimum connectivity rights along the lines of the Contingency Regulations in the event of termination.

Conclusions

While the Agreement does not completely replicate the rights that EU and UK air carriers had while the UK was a member of the European Common Aviation Area, the Agreement provides more significant rights to air operators beyond those granted under the Contingency Regulations. Additionally, the Agreement provides for a long-term framework for air transport between the UK and EU, granting operational certainty to operators as they plan operations and routes for 2021 and beyond. In a time which is nothing short of desperate for the aviation sector, the Agreement provides at least some shoots of hope that there might be a route to the open aviation market customers, operators, and investors historically enjoyed.

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