



Brexit: A Transatlantic Aviation Perspective

By Michael Goldman and Ulrich Schulte-Strathaus



The United Kingdom's (U.K.'s) July 2016 "Brexit" vote to leave the European Union (EU) had seismic implications not only for the U.K. and the EU, but also for the aviation sector. This article begins by discussing the faltering progress of negotiations between

the U.K. and the EU following the Brexit referendum to agree on the terms of the U.K.'s departure from the EU, then focuses on the implications of Brexit and those negotiations for the U.K.-EU and transatlantic aviation relationships. The authors examine the potential impact of a "hard" versus "soft" Brexit on a wide range of fundamental air service issues, including ownership and control of U.K. and EU carriers, U.K.-EU and U.K.-U.S. traffic rights, access for non-U.K. carriers to London's Heathrow airport, and the future of antitrust-immunized transatlantic airline alliances. Regardless of how the U.K.'s exit from the EU unfolds, the U.K. likely will need to secure a new bilateral air service agreement with the U.S. The process to negotiate such an agreement has begun and is already proving to be challenging. Meanwhile, the clock is ticking toward March 2019, when the U.K.'s two-year notice period for its departure from the EU will expire, by which time these critical aviation issues will need to be resolved.

Time Is Being Lost

The results of the July 2016 U.K. Brexit referendum were widely unexpected. Both sides had assumed that the result would be a narrow victory for those in favor of remaining in the EU. The U.K. government declared itself politically bound by the referendum, but lacked a clear mandate on how to negotiate the country's departure from the EU. The coalition government led by the Conservative Prime Minister Theresa May appears unable to develop a position on its negotiating approach and optimal outcome due to unresolved internal disputes. The opposition Labour Party has fine-tuned its position; it now seeks an exit scenario while retaining as many benefits of EU membership as possible.

The June 2017 U.K. general election increased

uncertainty. The Conservative-led government was denied a comfortable majority, thereby undermining its negotiating leverage in talks with the EU. The position of Prime Minister May appeared weaker than ever during her speech at the October 2017 Conservative Party Conference.¹

Given the complexity of the negotiations, both the U.K. government and the Labour Party opposition appear to increasingly favor transitional agreements that would buy time to continue negotiations.² This "soft" Brexit approach would be tantamount to leaving the EU relationship status quo more or less in place, albeit on a temporary basis. Should negotiations fail, the "hard" Brexit that would result could be disorienting for U.K. trade. For goods and most services, that would mean World Trade Organization (WTO) rules governing U.K.-EU trade relations; for aviation, which is not covered by the WTO, it could mean a "hard" return to pre-EU single aviation market bilaterals, not a "soft" Brexit transitional regime with the EU27 member states.

For the EU, the exit of the U.K., the second largest European national economy, weakens the EU's international negotiating leverage. The Dutch, French, and German national elections, as well as the recently erupted constitutional dispute in Spain over Catalanian independence aspirations, have left several EU nations immersed in domestic issues, which cumulatively exacerbate uncertainty about EU governance.

The EU-U.K. negotiations have now begun, and are structured into two phases. The first phase addresses issues that, according to the EU, should be resolved as a precondition for sector-specific second-phase negotiations on the conditions of the "divorce," i.e., the post-March 2019 EU-U.K. trade relationship and any transitional arrangements. The first phase negotiations focus on three issues: (1) the status of citizens in the territory of either party following Brexit, (2) the issue of financial settlement, and (3) concerns relating to the border between the Republic of Ireland and Northern Ireland. Due to the as yet unclear objectives of the U.K. government, the negotiations held to date have yielded much frustration.

In a September 22, 2017, speech in Florence, Italy, U.K. Prime Minister May attempted to "jump start" the stalled Phase 1 negotiations by declaring that the U.K. wanted to continue under EU single market rules for at least a two-year transition period after March 2019, during which the U.K. would pay its EU budget commitments and allow continued freedom of movement

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of EU citizens. In terms of a long-term trade relationship, she sketched an ambitious but vague vision. She said that Britain did not want either a regime with high access to the single market but low control like non-EU member Norway's, or the low-access, high-control free trade agreement the EU concluded with Canada. In effect, Britain wanted the benefits of continued single market participation without the obligation to accept free movement of EU citizens, adherence to EU rules and European Court of Justice (ECJ) rulings, or any significant financial obligation. This suggested that the U.K. wanted to "have its cake and eat it too" for a post-Brexit relationship with the EU27.³ The speech was met with skepticism by many EU observers, and fueled further discussion within the Conservative Party, which has yet to adopt a position shared by its own leaders, notably the prime minister and the foreign secretary, Boris Johnson.

This offer ultimately helped break the Phase 1 logjam. U.K. negotiators made further significant, tangible, and credible concessions with respect to EU citizens' rights, the financial settlement, and the Irish border question in early December 2017, and after some "perils of Pauline" last-minute dramatics, the EU heads of state at their December 2017 summit could find "sufficient progress" to agree to begin Phase 2 trade negotiations. Phase 2 trade negotiations should now begin by February 2018.⁴

Whether the EU27 ultimately agrees to the "soft" Brexit two-year transition sought by the prime minister may depend on whether the U.K. can avoid a "hard" Brexit and reach agreement by mid-2018 on the form of a long-term U.K.-EU27 trade relationship. If that happens, the EU might agree to a two-year transition under continued EU single market rules. If no long-term trade agreement can be reached, the transition proposed by the U.K. is likely to be rejected by the EU27, and EU-U.K. aviation, as discussed in the next section, would revert to either pre-single aviation market bilaterals or some negotiated regime that preserves basic third and fourth freedom services between the U.K. and the EU27.

Brexit and the EU Single Aviation Market

Aviation stakeholders are legitimately concerned that the aviation sector may not receive the political attention it deserves in the complex and multidimensional EU-U.K. talks. For aviation, two issues are of particular importance.

First, the aviation relationship between the U.K. and the EU must be renegotiated. The EU has consistently maintained that unlimited access to EU points is intrinsically linked to the U.K.'s acceptance of the four freedoms, notably the freedom of movement of people. This would require agreement at least on the parameters of an EU-wide immigration policy, security policy, and data exchange. Prime Minister May's position is that the U.K. will not forfeit national control of immigration policy. It is therefore seeking to renegotiate a post-Brexit trade relationship modeled on the

EU's agreements with non-EU countries such as Turkey, Switzerland, and Canada. For aviation, that could mean a U.K.-EU Open Skies Agreement modeled on the EU's agreements with Turkey and Canada.

Access not only to and from EU destinations but also within the EU is of critical importance to U.K.-based airlines, which arguably benefited more than others from the liberalization of intra-EU aviation. Continued unlimited organic growth, for example, of U.K.-based EasyJet, within several EU member states and/or unlimited sixth and seventh freedom rights between EU member states, or acquisition of and possibly merger with EU airlines, would be highly improbable absent a single aviation agreement between the U.K. and the remaining EU27. Indeed in July 2017, EasyJet acted to protect its position in intra-EU markets by establishing EasyJet Europe, based in Vienna, with an Austrian air operator's license. It remains unclear how EasyJet Europe will satisfy the post-March 2019 requirement of majority EU citizen ownership.⁵ U.K. carriers (and European aviation stakeholders) argue that a framework agreement on post-Brexit U.K.-EU aviation service must be reached by September/October 2018 when carriers load schedules and begin the sale of flights for the post-March 2019 period.⁶

Four scenarios are emerging for aviation in a post-Brexit world, which largely track the scenarios for a broader EU-U.K. trade agreement:

- *No Brexit*: The U.K. withdraws its Article 50 notification of March 2017, and the U.K. stays in the EU. Most observers view this as highly unlikely.
- *"Hard" Brexit*: The U.K. leaves the EU without the two-year transitional arrangement under current EU single market rules sought by Prime Minister May. For aviation, this would mean that EU-U.K. aviation services would be governed by the pre-single aviation market bilaterals between the U.K. and each of the remaining 27 EU member states. Some of these bilaterals are very restrictive, with limits on carriers and frequencies, which is why low-cost carriers like Ryanair and EasyJet are so concerned about this scenario. As an alternative, the parties could agree to allow only current third and fourth freedom traffic rights between the U.K. and the EU27 on an interim basis.
- *"Soft" Brexit*: Under an EU-U.K. two-year transition agreement, current single market rules would permit continued aviation operations under EU single aviation market rules (but perhaps without cabotage rights intra-EU and intra-U.K.). The essential condition precedent for this scenario would be a U.K.-EU27 agreement on the long-term U.K.-EU trade relationship. For aviation, such a "soft" Brexit would probably eventually lead to an EU-U.K. Open Skies-type agreement like the EU-Canada agreement, but based mainly on EU single aviation market rules.
- *Alternative "soft" Brexit*: Under a larger EU-U.K.

trade package, the U.K. would remain in the EU single aviation market, following the Norwegian or Swiss model. U.K. carriers would be subject to the full panoply of EU aviation traffic rights and regulations, but without any U.K. role in the adoption of those rules. This scenario is viewed as unlikely not only because Prime Minister May recently rejected it, but also because it would constitute a de facto rejection of the Brexit referendum, and would subject the U.K. to EU regulations and the ECJ's jurisdiction without any role in their development.

In theory, the economic incentives for the U.K. to remain in the EU single aviation market (and the U.S.-EU Open Skies Agreement) are strong. Both Ryanair (though Irish) and EasyJet (U.K.) have a strong preference for the U.K. to stay in the single aviation market. Approximately 40 percent of EasyJet's capacity is on internal EU routes; as for Ryanair, a large percentage of its capacity is devoted to internal U.K. and U.K.-third country routes (e.g., London-Tel Aviv and -North Africa). This would assure Ryanair, as an EU carrier, access to the numerous U.K.-EU, internal U.K., and U.K.-third country routes it serves today; while EasyJet would be assured access to the internal EU routes it operates today (between the U.K. and the continent)—without the need for Vienna-based EasyJet Europe. As discussed below, the traffic rights of International Airlines Group (IAG)-controlled carriers Iberia and Aer Lingus could also be in jeopardy were the U.K. not in the single aviation market regime.

For the U.K. to remain in the single aviation market for a two-year transition or long term, it would have to secure the same or similar status as such non-EU states as Norway or Switzerland. This would require the U.K. to agree to be subject to the panoply of EU rules governing the internal EU aviation market (with no U.K. participation in EU aviation regulatory policy), adjudication of disputes by the ECJ, and acceptance of the EU's four freedoms, including allowing the free movement of EU citizens to and from the U.K. Based on Prime Minister May's stated position before and after the June 2017 general election—as reaffirmed in her September 22, 2017, Florence speech—this appears to be unacceptable to the U.K. for longer than a short transitional period.⁷

Second, aviation relationships between the EU and third countries, as well as that of the U.K. with third countries, will need to be renegotiated, unless the U.K. continues to be an integral member of the EU's comprehensive agreements with third countries, which appears unlikely as of today.

It is unlikely that the EU and the U.K. would agree that the U.K. would remain a party to the EU's agreements with third countries; from the EU's perspective, this would be a "major concession," unless the U.K. accepted the four fundamental freedoms. That would allow U.K. participation in preparatory meetings as a non-EU member state, which could enable the U.K. to

prevent an agreement of the EU (of which it would no longer be a member) with a third country.

Exclusion of the U.K. from an EU aviation agreement with a third country would have significant repercussions for the third country, particularly with respect to access to London's Heathrow Airport (LHR). In some cases, EU aviation agreements with third countries were only concluded because of increased access for third-country carriers to LHR. Indeed, access to LHR for U.S. carriers was a major factor in the successful conclusion of the U.S.-EU Open Skies Agreement in 2007. The U.S.-U.K. market, in terms of passengers, represents almost one-third (18.3 million passengers) of the total 58.3 million passenger U.S.-EU aviation market.⁸

Brexit's Implications for Transatlantic Aviation

Brexit also has significant implications for the transatlantic aviation relationship. The U.K. Brexit vote and the resulting need to renegotiate the terms of the U.K.'s relationship with the EU will have major consequences for EU-U.S. and U.S.-U.K. aviation relations. Key issues must be resolved by March 2019 now that the U.K. has given its March 2017 Article 50 notification. U.S.-U.K. negotiations have now begun on a post-Brexit bilateral aviation agreement. The implications of Brexit for the transatlantic aviation market are discussed below:

New U.S.-U.K. Agreement

First and foremost, the U.K. will have to conclude a new Open Skies Agreement with the U.S. to replace the U.S.-EU Open Skies Agreement and provide an aeropolitical basis for U.S.-U.K. flights of U.S. and U.K. airlines. The U.K. has decided to pursue a new U.S.-U.K. agreement at this time because the U.K.'s continued inclusion in the U.S.-EU Open Skies Agreement post-Brexit is not an option.⁹ An Open Skies regime is needed because otherwise U.S. Department of Transportation (DOT)-granted antitrust immunity (ATI) for the American Airlines (AA)/British Airways (BA) and Delta Air Lines/Virgin Atlantic alliances would be jeopardized.

Another option: to return to the old U.S.-U.K. Bermuda II bilateral agreement, with its designation, city pair, LHR, and pricing limits—which was superseded by the U.S.-EU Open Skies Agreement—is an extremely unattractive alternative for most U.S. and U.K. interests because it is so restrictive. With its limitation that only two U.S. airlines may serve LHR and its restrictive list of U.S.-London city pairs that may receive nonstop LHR service (among other pre-Open Skies provisions), a return to Bermuda II would require a major restructuring of existing U.S.-London services. For example, Delta could lose its right to serve LHR, and Dallas/Fort Worth (DFW) and Hartsfield-Jackson Atlanta (ATL) could lose the LHR nonstop flights they now enjoy. For most aviation stakeholders and observers, this would be unacceptable.

A new U.S.-U.K. Open Skies Agreement may not be a "slam dunk." Among the controversial issues to

be addressed are whether ownership and control provisions should be liberalized to embrace a “principal place of business” test in light of the current ownership structures of BA, Virgin, and Norwegian Air UK (NAUK); the scope of Fly America Act liberalization; labor standards similar to U.S.-EU Article 17 bis; and whether LHR slots would be available for new entrants.

U.S.-U.K. aviation discussions that began in August 2017 suggest that a new U.S.-U.K. Open Skies Agreement may not be easy to achieve. Initially the U.K. sought to duplicate the current U.S.-EU agreement by merely substituting “U.K.” for “EU” throughout the text of the agreement.¹⁰ The U.S. side demurred, proposing that the U.K. sign the U.S. Model Open Skies Agreement text.¹¹ That would have left the new U.S.-U.K. agreement without provisions dealing with a joint committee, environmental and labor protections, Fly America traffic, and antitrust cooperation, among others, all of which are included in the U.S.-EU Open Skies Agreement.¹²

Resolution of ownership and control issues concerning U.K. carriers may also pose problems. The U.S. Model Open Skies Agreement’s “substantial ownership and effective control” provision¹³ may cause problems for BA, which (post-Brexit) may not be majority-owned by U.K. nationals (Spanish and Qatari interests may own a majority of IAG, the Spanish holding company that controls BA) and Virgin, which may be majority-owned by a combination of Delta and Air France-KLM. A “principal place of business” test provision for designating U.K. carriers under the new agreement may be the “safe harbor” that the U.K. will seek in order to protect their carriers’ rights to continue to serve the U.S. In negotiating Open Skies agreements with bilateral partners, however, the U.S. has resisted that type of ownership and control provision except in the case of the multilateral MALIAT Agreement, which was concluded at the end of the Clinton administration in 2000.¹⁴ The U.S.-Switzerland Open Skies Agreement, amended after Lufthansa’s purchase of Swiss International, includes a hybrid provision that may also offer a basis for a U.S.-U.K. solution; it allows substantial ownership of a Swiss airline by any combination of Swiss and EU nationals.¹⁵

Antitrust Immunity (ATI)

Both the AA/BA and Delta/Virgin alliances enjoy ATI granted by the DOT, including on the U.S.-U.K. routes; similar ATI has been granted to United/Lufthansa (LH)/Scandinavian Airlines (SAS)/Austrian Airlines and Delta/Air France-KLM on U.S.-Europe routes.¹⁶ Under DOT policy, an Open Skies Agreement between the U.S. and the homeland of the foreign carrier seeking ATI with its U.S. partner is a prerequisite to the grant of ATI. Further, in granting ATI to the various alliance agreements between U.S. and European carriers, the DOT has examined competition in the broader U.S.-Europe market as well as on the individual U.S.-Europe country pairs and city pair routes served by the alliance partners.

Both the AA/BA and Delta/Virgin alliances received

similar grants of ATI from the European Commission (EC).¹⁷ Whether those grants will continue to govern U.S.-U.K. air services after March 2019 and whether the carriers need to apply to U.K. competition authorities for post-Brexit antitrust relief are unresolved questions.

The ATI granted by the DOT has effectively turned the U.S.-U.K. market into a duopoly dominated by the AA/BA and Delta/Virgin immunized alliances. The only other significant competitors are United and to a lesser extent Norwegian (and an occasional third-country carrier on some U.S.-London routes). If EU carriers like Norwegian (and perhaps Ryanair) are excluded as potential competitors on U.S.-U.K. routes by the U.K.’s exit from the U.S.-EU Open Skies Agreement, a review of the DOT’s grants of ATI for the U.S.-U.K. carrier alliances may ensue.

As for the Star and SkyTeam alliances established on U.S.-continental Europe routes, the DOT grants of ATI were based in part on one-stop competition provided by the AA/BA alliance (and to a lesser extent, nonaffiliated carriers) on numerous routes between continental Europe and the U.S. via the U.K. It is unclear how Brexit will affect that competition analysis.¹⁸

Another question is whether termination of ATI would be automatic based on the terms of the DOT’s AA/BA and Delta/Virgin orders if there were no Open Skies Agreement governing U.S.-U.K. aviation relations, or whether a DOT show-cause-type procedure would be required. The Delta/Virgin ATI approval orders do not state that ATI would be automatically terminated if a U.S.-U.K. Open Skies Agreement were no longer in effect.

U.S. Traffic Rights of U.K.-Controlled European Airlines

A particular case in point is IAG. IAG is a holding company under Spanish law, owned by the former shareholders of BA and Iberia.¹⁹ IAG subsequently acquired the Irish carrier, Aer Lingus. Post-Brexit, a majority of IAG shares would be held by non-EU27 nationals, primarily U.K. and U.S. citizens, plus a significant minority (20 percent) stake held by Qatar Airways. If so, the U.K. citizenship of BA and the EU citizenship of Iberia and Aer Lingus may be in jeopardy. It is unclear how U.S. authorities would view these carriers’ ownership structures for purposes of granting them traffic rights under relevant air service agreements.

IAG’s bylaws²⁰ contain several provisions intended to preserve its European “nationality,” and by extension the Iberia and BA licenses and traffic rights. These structures and the continuing validity of those licenses and traffic rights could be questioned by third parties once the U.K. leaves the EU.

Iberia and Aer Lingus (EU carriers owned by IAG) may also not satisfy the ownership and effective control requirements for EU carriers under the U.S.-EU Open Skies Agreement if there is a separate U.S.-U.K. air transport agreement. Under DOT policy, waiver of these U.S.-EU agreement ownership and control

requirements would be required once the U.K. is no longer a party to the U.S.-EU Open Skies Agreement. Generally, the DOT has been willing to waive such bilateral ownership and control requirements if it has Open Skies Agreements with both the country licensing the foreign carrier and the country whose nationals own the carrier. Thus, a U.S.-U.K. Open Skies Agreement would be the prerequisite for a DOT waiver to allow Iberia and Aer Lingus to continue to serve the U.S. under the U.S.-EU Open Skies Agreement.

Similarly, the rights of BA and Virgin to operate as U.K.-designated airlines will have to be addressed in the new U.S.-U.K. Open Skies Agreement. With substantial ownership of both by non-U.K. interests, a bilateral agreement test based on “principal place of business” and effective control by U.K. interests or a Swiss-type hybrid ownership provision would appear to be the best solution to protect these carriers’ U.S. operating rights. Such a solution could also benefit NAUK and Norwegian’s extensive London–U.S. services (as discussed below).

Norwegian Air Rights (NAS/NAUK/NAI)

Norwegian Air Shuttle (NAS) is owned by Norwegian citizens but authorized to serve all U.S.–Europe routes under the U.S.-EU Open Skies Agreement, to which Norway is a party. NAS is the tenth largest transatlantic airline today in terms of available seats, and it has a 3 percent transatlantic market share (BA, the industry leader, has a 13.5 percent share). As of summer 2017, NAS served 52 U.S.–Europe nonstop routes to 13 European destinations from more than a dozen U.S. gateways.²¹ NAS serves (or plans to serve by spring 2018) 11 city pairs between London and the U.S.²² With its low fares, it provides much-needed competition on U.S.–London routes. NAS is unlikely to be able to continue its London–U.S. services as an EU carrier if the U.K. is no longer covered by the U.S.-EU Open Skies Agreement. It seems doubtful that, under a U.S.-U.K. Open Skies Agreement, the U.K. would allow EU carriers to exercise third and fourth freedom U.S.-U.K. traffic rights. (The same is true for Norwegian Air International (NAI), its Irish-based affiliate that finally was licensed by the DOT in December 2016; NAI began serving U.S.–U.K. and U.S.–Ireland routes with B-737 MAX aircraft in summer 2017.²³)

Would NAUK, the U.K.-licensed NAS affiliate granted a DOT permit in September 2017,²⁴ still be licensed by the U.K. authorities and accepted by the DOT as a U.K. carrier (if owned by Norwegian citizens) so it could operate NAS’s London–U.S. services under a new U.S.-U.K. air services agreement? Perhaps the U.K. authorities would be prepared to continue to license NAUK as a U.K. carrier to maintain some level of competition on U.S.–U.K. routes. In order to be designated under a new U.S.-U.K. Open Skies Agreement, however, U.K. carrier designation rights would have to be based on a U.K. principal place of business and effective control test, or a Swiss-type hybrid provision, not the traditional majority U.K. citizen ownership test

found in most U.S. air service agreements.

Alternatively, NAUK could be restructured such that at least 50.1 percent of the stock is held by U.K. citizens, and then designated as a U.K. carrier. Were NAUK not restructured, the U.S. could reject NAUK’s designation as a U.K. carrier under a new U.S.-U.K. Open Skies Agreement because the carrier would not be owned and controlled by U.K. citizens (unless a more liberal principal place of business test were included in the new agreement for U.K.-designated carriers).

EU Carriers’ London–U.S. Routes

Two other European carriers’ transatlantic routes may be (or may already have been) impacted by Brexit. La Compagnie, a French carrier that operated an all-business-class service between Paris and Newark (EWR) and between London (Luton) and EWR, terminated its London–EWR services in October 2016. It feared that under a stand-alone U.S.-U.K. Open Skies Agreement, La Compagnie, as a non-U.K. carrier, would lose its London–U.S. traffic rights. The carrier stated that the Brexit vote had created legal and economic uncertainty that rendered its U.K. service unsustainable.²⁵

OpenSkies is a BA subsidiary that operates a Paris Charles de Gaulle–New York scheduled service. As a U.K.-owned carrier, OpenSkies may lose these rights to operate under the U.S.-EU Open Skies Agreement and such rights may not be available to it under a new U.S.-U.K. Open Skies Agreement. Or, OpenSkies could be restructured by IAG so that it is majority-owned by EU nationals, perhaps if owned by some combination of Iberia and Aer Lingus EU national shareholders. In early December 2017, it was reported that OpenSkies would close down by mid-2018, with its services taken over by the new IAG low-cost carrier, LEVEL.²⁶

Transatlantic Brexit Issues: The Way Forward

Current European thinking is that, except for a short transitional period, EU negotiators would not agree to single aviation market status for the U.K. unless the U.K. agrees to free movement to and from the U.K. for EU citizens for work and pleasure. That seems unlikely in the context of the broader, long-term EU27–U.K. trade relationship. Thus, the most optimistic fallback position may be the “soft” Brexit option of an EU-Canada-type aviation agreement whereby the U.K. would exchange third, fourth, and fifth freedom rights with the EU without any EU cabotage rights for U.K. carriers or reciprocal rights for EU carriers to serve U.K.–U.S. routes or for U.K. carriers to serve EU–U.S. routes. In the interim, a post-March 2019 “transitional” arrangement may be achievable whereby the U.K. would continue to participate in the EU single aviation market (like Norway) but without any role in EU regulatory decision making and provided the U.K. continues to abide by the four freedoms and accepts continued ECJ jurisdiction.

Just as likely is a “hard” Brexit, whereby U.K. and EU27

carriers would be limited to third and fourth freedom rights on U.K.–EU routes or the rights enjoyed under pre-single aviation market bilaterals. Under either the “hard” or “soft” Brexit scenario, such a U.K.–EU arrangement would trigger the need for a separate U.S.–U.K. Open Skies Agreement and perhaps some modification or interpretation of the existing U.S.–EU Open Skies Agreement to address the status and nationality of Iberia and Aer Lingus—and perhaps other EU27 carriers—post-Brexit.

Endnotes

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3. Anushka Asthana & Rowena Mason, *Theresa May Asks EU for Two-Year Brexit Transition Period*, GUARDIAN, Sept. 22, 2017, <http://www.theguardian.com/politics/2017/sep/22/theresa-may-asks-eu-for-two-year-brexit-transition-period>; Jon Henley, *Theresa May’s Florence Speech: Key Points*, GUARDIAN, Sept. 22, 2017, <http://www.theguardian.com/politics/2017/sep/22/theresa-mays-florence-speech-key-points>.

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6. The International Air Transport Association’s (IATA’s) CEO agrees with this timeline. *Airlines Need Clear View of Brexit by Oct 2018 at Latest—IATA*, DAILY MAIL (Oct. 25, 2017), <http://www.dailymail.co.uk/wires/reuters/article-5016499/Airlines-need-clear-view-Brexit-Oct-2018-latest—IATA.html>.

7. Jon Henley, *Key Points from May’s Brexit Speech: What Have We Learned?*, GUARDIAN, Jan. 17, 2017, <https://www.theguardian.com/politics/2017/jan/17/key-points-from-mays-what-have-we-learned> (reporting on Prime Minister May’s Lancaster House speech).

8. For U.S.–U.K. and U.S.–EU traffic statistics, see U.S. DEP’T OF TRANSP., U.S. INTERNATIONAL AIR PASSENGER AND FREIGHT STATISTICS (2015), <https://www.transportation.gov/office-policy/aviation-policy/us-international-air-passenger-and-freight-statistics-report-decemb-16>.

9. Although U.S. and U.K. negotiators initially hoped to conclude a new U.S.–U.K. agreement by the end of 2017 (based in the U.S. view on the U.S. Model Open Skies Agreement text), progress has been slow. Formal negotiations are set to begin in February 2018. The goal now appears to be to conclude an agreement sometime during 2018. Once an agreement is reached, it would take effect in March 2019

with the Commission’s blessing.

10. Air Transport Agreement, U.S.–EU, Apr. 30, 2007, 46 I.L.M. 470 [hereinafter U.S.–EU Open Skies Agreement], <https://www.state.gov/e/eb/rls/othr/ata/e/>.

11. The U.S. Model Open Skies Agreement text is available at <https://www.state.gov/e/eb/rls/othr/ata/114866.htm>.

12. See U.S.–EU Open Skies Agreement, *supra* note 10, at arts. 15, 17 bis, 18, 20 & annex 3.

13. U.S. Model Open Skies Agreement, *supra* note 11, at art. 3 (“Each Party . . . shall grant appropriate authorizations and permissions with minimum procedural delay, provided: . . . substantial ownership and effective control of that airline are vested in the Party, nationals of that Party, or both . . .”).

14. See Multilateral Agreement on the Liberalization of International Air Transportation, art. 3(2), May 1, 2001 [hereinafter MALLIAT Agreement], <https://www.state.gov/e/eb/rls/othr/ata/s/sn/index.htm> (On receipt of such a designation, . . . each Party shall grant appropriate authorizations and permissions with minimum procedural delay, provided that: [a] effective control of that airline is vested in the designating Party, its nationals, or both; [and] [b] the airline is incorporated in and has its principal place of business in the territory of the Party designating the airline.”).

15. Air Transport Agreement, U.S.–Switz., art. 3, June 21, 2010, <https://www.state.gov/e/eb/rls/othr/ata/s/>.

16. Virgin Atl. Airways, Ltd., Order No. 2013-9-14 (Dep’t of Transp. Sept. 23, 2013) (Delta/Virgin); Am. Airlines, Inc., Order No. 2010-7-8 (Dep’t of Transp. July 20, 2010) (AA/BA/Iberia); Air Can., Order No. 2009-7-10 (Dep’t of Transp. July 10, 2009) (United/LH/SAS/Austrian); Alitalia-Linee Aeree Italiane-S.p.A., Order No. 2008-5-32 (Dep’t of Transp. May 22, 2008) (Delta/Air France-KLM).

17. Case COMP/F-1/39.596 (July 14, 2010), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39596/39596_3244_14.pdf (AA/BA/Iberia); Case COMP/M.6828 (June 20, 2013), http://ec.europa.eu/competition/mergers/cases/decisions/m6828_20130620_20310_3232613_EN.pdf (Delta/Virgin).

18. Air Can., Order No. 2009-7-10, at 4 (Dep’t of Transp. July 10, 2009) (Star); Alitalia-Linee Aeree Italiane-S.p.A., Order No. 2008-4-17, at 6–9 (Dep’t of Transp. Apr. 9, 2008) (SkyTeam); United Airlines, Inc., Order No. 2001-1-19, at 9 (Dep’t of Transp. Jan. 26, 2001) (Star).

19. IAG owns 100 percent of the economic rights in the capital of the operating companies Iberia and BA. In order to maintain the licenses (and international air traffic rights) of these operating companies, complex “national structures” have been established to maintain majority (50.1 percent) ownership of the voting rights of BA and Iberia by British and Spanish citizens, respectively. IAG Merger Plan (Oct. 26, 2010), http://media.corporate-ir.net/media_files/IROL/24/240949/84060ACL.pdf.

20. IAG By-Laws (2016), <http://www.iairgroup.com/phoenix.zhtml?c=240949&p=irol-govreg>.

21. Norwegian added London–Denver and London–Seattle flights in summer 2017 as well as new B737 MAX flights to Stewart Airport, New York, and Providence, Rhode Island.

22. Those 11 U.S. cities are: New York, Boston, Orlando,

Ft. Lauderdale, Oakland, Los Angeles, Chicago, Austin, Las Vegas, Denver, and Seattle.

23. See Norwegian Air Int'l Ltd., Order No. 2016-11-22 (Dep't of Transp. Dec. 2, 2016) (granting NAI a foreign air carrier permit).

24. Norwegian Air UK, Order No. 2017-9-16 (Dep't of Transp. Sept. 22, 2017) (granting NAUK a foreign air carrier permit).

25. See Press Release, La Compagnie, Brexit: La Compagnie Suspends Its London–New York Route (Sept. 5, 2016), https://www.lacompagnie.com/sites/default/files/press-release/la_compagnie_suspends_london-ny_uk.pdf.

26. Ben Schlappig, *OpenSkies Is Being Discontinued, LEVEL Launching Longhaul Flights from Paris*, ONE MILE AT A TIME (Nov. 28, 2017), <http://onemileatime.boardingarea.com/2017/11/28/openskies-flights-ending/>.