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Fox, Sarah Jane (2016) BREXIT: A bolt from the blue! – Red sky in the morning? Issues in Aviation Law and Policy, 16 (1). ISSN 1934-7170

Final accepted version (with author's formatting)

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BREXIT: A Bolt from the Blue! – Red Sky in the Morning?

by Sarah Jane Fox*

1. INTRODUCTION

On June 23, 2016 the United Kingdom held a national referendum to assess whether the voting population wished the nation to remain a member or cease membership in the European Union (EU). According to then-Prime Minister David Cameron, it was “one of the biggest decisions [the] country face[d] in [the populations’] lifetimes: whether to remain in a reformed EU or to leave.”¹

He added, “[t]he choice goes to the heart of the kind of country we want to be and the future we want for our children.”²

Twenty-four hours later, Cameron resigned, after reportedly being “left shocked and distraught” by the narrow decision to leave, with 52 percent of the vote in favor of the exit.³ In the final few days of campaigning, the polls had indicated a more comfortable margin in support of remaining in the Union. For Cameron, and undoubtedly for the vast majority of the country, the decision was quite literally a “bolt from the blue.” Post-referendum reflection has since indicated that the exit vote had contained a percentage of the electorate registering a protest campaign against factors that they were unhappier about; however, the fact remains that the narrow majority had signaled the intention for a British and Northern Ireland EU exit – BREXIT had become a reality.

The repercussions of the referendum continue to reverberate, not only across the U.K. but throughout Europe as Britain and Northern Ireland’s position remains unclear.

However, somewhat ironically, the majority of the younger electorate had voiced their unanimity in a “remain vote” – the future of the country was speaking, but the majority were not to listen. Chart 1 shows the voting decision by age.

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¹ *EU Referendum to Take Place on 23 June, David Cameron Confirms*, THEGUARDIAN.COM (Feb. 20, 2016), <http://www.theguardian.com/politics/2016/feb/20/cameron-set-to-name-eu-referendum-date-after-cabinet-meeting>.

² *Id.*

³ *David Cameron Resigns after UK Votes to Leave European Union*, THEGUARDIAN.COM (June 24, 2016), <http://www.theguardian.com/politics/2016/jun/24/david-cameron-resigns-after-uk-votes-to-leave-european-union>.

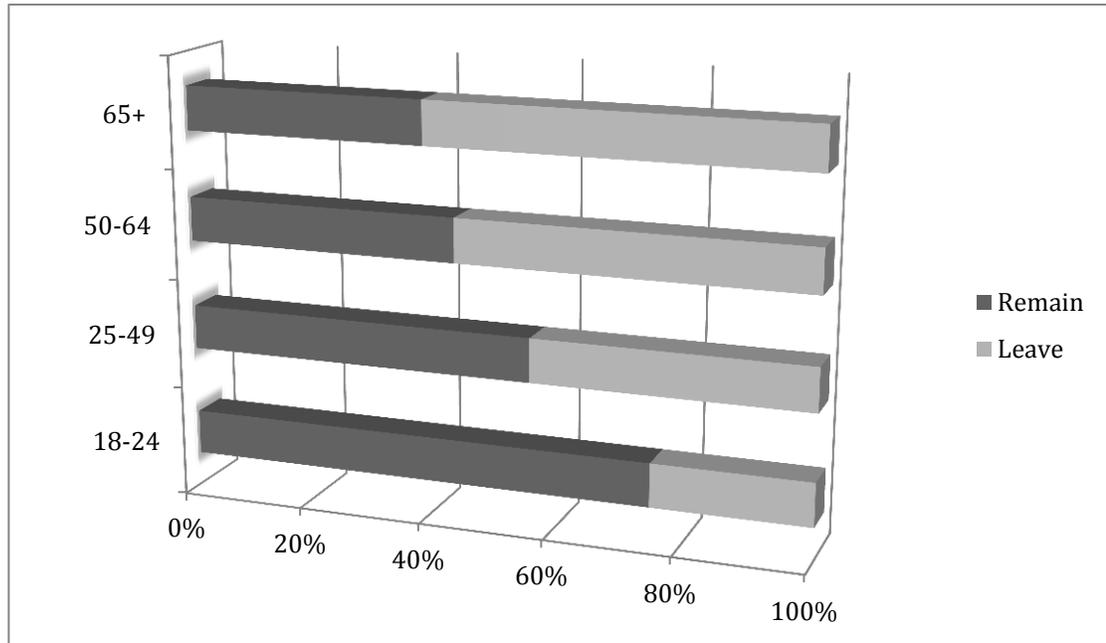


Chart 1: Decision by age group

(Authors: Based on data and information from Yougov/Politico⁴)

Some might view the Brexit referendum as a positive victory for democracy and self-determination,⁵ which, somewhat ironically became the guiding principle for the reconstruction of Europe following World Wars I and II. Or, conversely, it was a spectacular act of national self-harm, where the decision to hold a referendum was based on a political leadership battle waged some months before as part of the general election process. Either way, the result of the referendum could be viewed as a decision made by a voting population that was ill-informed as

⁴ 18-24 year age group results: remain – 75 percent; leave – 25 percent.

25-49 year age group results: remain – 56 percent; leave – 44 percent.

50-64 year age group results: remain – 44 percent; leave – 56 percent.

65+ year age group results: remain – 39 percent; leave – 61 percent.

⁵ Self-determination is the right of a people to determine their own destiny. The principle is evidently embodied in Article I of the Charter of the United Nations, having been incorporated into the 1941 Atlantic Charter and the Dumbarton Oaks proposals, which evolved into the United Nations Charter. The principle is viewed as being fundamental to the maintenance of friendly relations and peace among States. It is recognized as a right of all peoples in the first Article common to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, and the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, which both entered into force in 1976. Paragraph 1 of this Article provides: “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” See also Wex, definition of “Self Determination” under international law, https://www.law.cornell.edu/wex/self_determination_international_law.

to the consequences of its actions and had limited knowledge and understanding of the fallout (political, economic, and social).⁶ While families remain divided and the younger generations express anger at their parents' and grandparents' decisions, the consequences for the U.K. are still uncertain – negotiations continue; however, the official notification has still not actually transpired.⁷ Ultimately, the effects of the EU exit will not relate to one part (or isolated parts) of the EU Treaties that the U.K. population disliked, for while, undoubtedly, the vote reflected the fear of immigration and what was perceived as a Brussels takeover of U.K. sovereignty against a backdrop of economic austerity, the consequences will also resonate upon areas the population favored and supported, such as safeguards in the workplace/worker rights, more equality, free movement of goods and people, including cheaper airfares, and the ease of travel and protection of travelers' rights across the EU, etc.

This paper reflects upon the latter element – namely the possible consequences to U.K. airlines and the traveler, in order to consider whether, after the exit, there will be *red skies at night* after the initial “*red skies in the morning*”⁸ – warning; which, undoubtedly is the current indicator level.

Initially, context is provided by postulating a detailed picture to the reader of the U.K.'s relationship with, and within, the EU and the current position with regard to EU aviation policy and its development over a number of years. Consideration as to future consequences and scenarios is focused around several key background events and results.

⁶ One of the largest Internet hits ever recorded occurred a day after the vote, for the search term, “what is the EU?” See Brian Fung, *The British Are Frantically Googling What the E.U. Is, Hours After Voting to Leave It*, WashingtonPost.com, June 24 2016, <http://wpo.st/uMsq1>. See also Jeff John Roberts, *Brits Scramble to Google “What is the EU?” Hours After Voting to Leave It*, FORTUNE.COM, June 24, 2016, <http://fortune.com/2016/06/24/brexit-google-trends/>.

⁷ Article 50, Treaty on European Union (TEU) states:

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

The formal procedure requires that the Member State notify the European Council of its wish to withdraw, declaring its intention to do so. The timing of this notification lies entirely in the hand of the Member State concerned, and informal discussions are able to take place between it and other Member States and/or EU institutions prior to the notification.

⁸ “Red sky at night, sailors' delight. Red sky at morning, sailors take warning” is a saying/proverb which arguably is traceable back to the Bible. See *Matthew* 16:2–3. It should be noted that some versions also relate the warning to shepherds. See also Jerry D. Hill, *Kentucky Weather* 139 (2005).

However, first it is crucial to appreciate the aspect of sovereignty and the origins of the U.K. (as it currently stands) – so as to understand better the possible rationale of the U.K. Brexit decision – for what could now be viewed as a segregated Britain.

2. Sovereignty

According to Black's Law Dictionary,⁹ sovereignty is defined, inter alia, as a supreme political authority which entails "*the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation.*"¹⁰

The concept of sovereignty stems back to the signing of the Peace of Westphalia Treaty in 1648,¹¹ which ended a 30-year religious war in Europe. It is generally recognized by scholars that the origin of the principle of sovereignty can be found in this treaty, although arguably sovereignty itself is not clearly defined in the texts.¹²

The Treaty however establishes three core ideologies:

- The principle of state sovereignty;
- The principle of (legal) equality of States;
- The principle of non-intervention of one State in the international affairs of another.

In essence, the philosophy was based upon a presumption that independence and isolation of each State would prevent future wars.¹³

International law largely recognizes this philosophy by confirming that each nation-state has sovereignty over its territory and domestic affairs. This, therefore, in the main excludes the interference of external powers, the principle of non-interference in another country's domestic affairs, while also recognizing the principle that every State (regardless of size) is equal in international law.

In an aviation context, certainly, the Chicago Convention¹⁴ adheres to the principle of State sovereignty by recognizing this concept. The U.K. is a founding signatory to the Convention, but it should be recalled that, during the negotiations in 1944, it was still in the midst of WWII, hence the U.K. did not support at that time a more liberalized approach to the economic areas – such as access for commercial activities. It was therefore left to individual States to mutually exchange reciprocal commercial rights, with Article 6 providing that "*[n]o scheduled international air service may be operated over or into the territory of a contracting*

⁹ Henry Black, Black's Law Dictionary (2d ed., The Lawbook Exchange Ltd. 1995).

¹⁰ *Id.*

¹¹ Peace Treaty between the Holy Roman Emperor and the King of France and their Respective Allies, Oct. 24, 1648 [hereinafter Treaty of Westphalia], http://avalon.law.yale.edu/17th_century/westphal.asp.

¹² Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 Int'l Hist. Rev. 569, 569 (1999), <http://dx.doi.org/10.1080/07075332.1999.9640869>.

¹³ Eric Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 Quinnipiac L. Rev. 23, 24 (2004).

¹⁴ Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr. 4, 1947) [hereinafter Chicago Convention].

State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.”¹⁵

Article 1 recognizes and reinforces from the outset that each contracting State has complete and exclusive sovereignty over the airspace above its territory. Article 2 defines “territory” by stating that it “shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State,” hence reinforcing the linkage back to another transport: maritime transport and Laws of the Sea.

Sovereign States continue to protect their State boundaries and borders, which over the years have seen many changes through warfare and acts of aggression, conquest, and declarations of independence. Rarely are such changes amicably achieved, and disputes over territories are known to continue for decades, leading to acts of ongoing hostility.

There is a symbiotic relationship among war, destruction, and, consequently, development, both in terms of legal/legislative and physical advancement.¹⁶ In modern-day warfare, aviation has become inextricably drawn into the equation, and this provides further reasons why civil aviation continues to battle old notions that no doubt impede upon the development of more modern ideas and prevent extension of the concept of more liberalized skies. National sovereignty is still protected and held sacrosanct, and nowhere more so than in aviation, which continues to battle an archaic legacy inextricably linked to sovereign protectionism and ownership of a “national asset” – a throwback undoubtedly linked to its wartime origins (the Chicago Convention).¹⁷ The so-called “nationality clause”¹⁸ has, as a consequence, become embedded in most bilateral air service agreements, also due to “restrictive” government thinking, which has, for the most part, not become more progressive over time.

That said, in terms of the original understanding of the Westphalian Treaty, arguably a more modernist view is emerging based upon a new, post-Westphalian doctrine of the international community, which has led to the belief that globalization had made the old approach anachronistic¹⁹ and has potentially led to the Westphalian system being superseded. In 1999, the U.K. Prime Minister of the day, Tony Blair, somewhat ironically, addressing an audience in Chicago, delivered a powerful monologue in which he stated that there was a need for a new world order.²⁰ He said his speech was “dedicated to the cause of internationalism and against isolationism,” and that there was no place for isolation: “isolationism has ceased to have a reason to exist. By necessity we have to co-operate with each other across nations.”²¹

Yet, debatably some 17 years later, the referendum vote by the U.K. population would tend to question the acceptance of this doctrine; certainly it would seem to in respect to the EU.

¹⁵ *Id.* art. 6.

¹⁶ See generally Sarah Jane Fox, *The Evolution of Aviation in Times of War and Peace: Blood, Tears, and Salvation*, Int’l J. World Peace, Dec. 2014, at 49.

¹⁷ *Id.* Sarah Jane Fox, *CONTEST’ing Chicago Origins and Reflections: Lest We Forget!*, 8 Int’l J. Private L. 73–98 (2015).

¹⁸ See ICAO Secretariat, *Liberalization of Air Carrier Ownership and Control 1*, (ICAO, Working Paper No. ATConf/6-WP/12, 2012).

¹⁹ See Michael Ross Fowler & Julie Marie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty 2* (1995).

²⁰ Tony Blair, U.K. Prime Minister, Address at the Chicago Economic Club (Apr. 22, 1999).

²¹ *Id.*

2.1. *The United Kingdom*

Although the referendum vote was termed by the media as being a Brexit vote, technically this was an inaccurate description.

The U.K. comprises the whole of the island of Great Britain, which includes England, Wales, and Scotland, as well as the northern part of the island of Ireland.

However, the history of the U.K. as a collective unity is relatively new – only in 1707 did the transformation begin with the political union of the kingdoms of England and Scotland into what was deemed Great Britain. England had already absorbed Wales (and Cornwall) by 1543. It was to be nearly another century before a further Act of Union, in 1800,²² resulted in the Kingdom of Ireland being added to create the United Kingdom of Great Britain and Ireland. However, these unions were surrounded by acts of aggression and a history of warfare and migration going back centuries among the various components – so to perhaps initially deem this as a union, certainly a welcomed one in the beginning, is grossly misleading. In actual fact, the Irish union was to last little more than a century before separation occurred, leaving, by 1922, only six of the thirty-two counties remaining in what is now Northern Ireland. The southern part – approximately 80 percent of the island – was to become the Republic of Ireland.²³

It is argued that three hundred years later, the Scottish-British Union “cannot be regarded as settled.”²⁴ Certainly, the result of the referendum was to stir up old sentiments of independence in Scotland,²⁵ in a country that is inherently supportive of the EU and remaining a member of the Union. The “remain” camp was dominant both in Scotland and Northern Ireland²⁶ (and London), with the highest share of the vote to remain being cast in Gibraltar.²⁷

3. The European Union

The formulation of the EU has obvious links back to World War II; while the idea for a European Community was not new, the war provided the impetus for its creation. Barnard describes the war as “*the driving force behind the European Union. . . . the consolidation of a post-war system of inter-state co-operation and integration that would make pan-European armed conflicts inconceivable.*”²⁸ Hence, contrary to the Westphalian philosophy of isolation as a preventative measure of war, the EU is based upon the premise of regional “collective” unity as a method of sustaining peace. In effect, the 1950s could be marked as stepping away from the traditionally held concept of Westphalian sovereignty, where sovereignty could be conceded (in

²² An Act for the Union of Great Britain and Ireland 1800, 39 & 40 Geo. 3 c. 67.

²³ The Republic of Ireland Act, 1948 (Act No. 22/1948) states: “It is hereby declared that the description of the State shall be the Republic of Ireland.” However, it is also commonly referred to as Eire.

²⁴ Allan I. Macinnes, Acts of Union: The Creation of the United Kingdom, BBC.CO.UK, http://www.bbc.co.uk/history/british/empire_seapower/acts_of_union_01.shtml

²⁵ On September 18, 2014, Scotland held a referendum voting on whether it should be an independent country. The “No” side won, with 2,001,926 (55.3 percent) voting against independence and 1,617,989 (44.7 percent) voting in favor of independence. This followed an agreement from London and Edinburgh, which led to the Scottish Independence Referendum Act (2013).

²⁶ Edinburgh polled over 74 percent for “Remain” and Belfast West polled 74.1 percent. See *EU Referendum: The Result in Maps and Charts*, BBC.COM, June 24, 2016, <http://www.bbc.com/news/uk-politics-36616028>.

²⁷ Gibraltar voted 95.9 percent to remain. *Id.*

²⁸ Catherine Barnard, *The Substantive Law of the EU – The Four Freedoms* (2004).

parts) for the benefit of the functioning of the supranational institution – which was ultimately to become the European Union.

However the process of European integration was not to be an immediate process, occurring in many stages across a number of years, aided by subsequent Treaty revisions.

3.1. *The EU-U.K.*

The U.K. was never a founding member of what is now the EU. In fact, it was not until 1973 that the Conservative (Tory) then-Prime Minister Edward Heath took the U.K. into the Community.²⁹ In the same year, the Republic of Ireland also joined what was then the European Economic Community (EEC).

That said, the U.K. had initially attempted to join several times before. In 1961, the U.K. made its first application after it became apparent that it was in danger of political isolation as the Commonwealth and former “Empire” colonies were beginning to strike up agreements with the new regional bloc, which was fast receiving support also from the United States. However, the initial application was vetoed by the French government in 1963, which also vetoed a second application, in 1967. It was only in 1969 that it became known that a more favorable outlook would be taken to negotiation talks that would signal the U.K.’s accession into the EU.

However, within the U.K. the decision to join was not welcomed by all of the population. The U.K.’s membership in the EU had long been one of the most divisive, emotive issues in national politics. During the earlier membership talks, it had been the Labour party which had initially sought membership. The swap between the Labour party wishing membership and the eventual Tory party taking the U.K. into the then-EEC was no doubt, on reflection, a destabilizer to the U.K. population – arguably, in the same way as it is today (as was revealed in the 2016 referendum vote). Ironically, in 1973 the political tension was resolved by requiring a referendum on whether the United Kingdom should remain part of the Community; and, in 1975 the U.K., under the Labour Prime Minister Harold Wilson held a referendum (the last national one until 2016) – which resulted in a 67 percent vote in favor of continued membership.³⁰

The U.K. should be viewed as a nation that once flourished in maritime discovery and the conquering of distant lands and other nations, staking its sovereign claim and enforcing its political will on others.

That said, there are two (linked) chains of thought stemming from this with regard to the uneasy acceptance and position of the U.K. within the EU:

- (i) That, as an empire-builder and also a major trading power, there was some inevitability that Britain would come into conflict with what was perceived as a union which required certain concessions viewed by the population (spurred on by the media) as an attempt by Brussels to take

²⁹ European Communities Act 1972, c. 68,
http://www.legislation.gov.uk/ukpga/1972/68/pdfs/ukpga_19720068_en.pdf.

³⁰ *When Did Britain Decide to Join the European Union?*, THE U.K. IN A CHANGING EUROPE,
<http://ukandeu.ac.uk/fact-figures/when-did-britain-decide-to-join-the-european-union/>. See *1975: UK Embraces Europe in Referendum*, BBC On This Day,
http://news.bbc.co.uk/onthisday/hi/dates/stories/june/6/newsid_2499000/2499297.stm.

sovereign control. In many ways, somewhat ironically, this could be viewed as role-reversal.

Coupled with:

- (ii) There still remains an insular, island mentality which prevails above all else. The U.K. in essence seeks to build more of a solitary empire where its waters act as a barrier and wall – that seek to keep, figuratively and physically, others out.

According to the historian Vernon Bogdanor,³¹ this is based upon the imperial legacy where the navy protected the island; and, hence, the British people continue to resist ties with the continent, being accustomed to separation by water. Ironically, these sentiments also reflect those of the French vetoing President, de Gaulle, in 1963. Certainly, the U.K. has continued to express (via the media) that it does not want a relationship where it is subject to such perceived orders originating from other States or the center of a supranational organization – as is the EU. Based upon this reasoning and evaluation of British thinking, it would have to be questioned whether the referendum decision in June 2016 really was such a bolt from the blue. That said, the same sentiments were clearly never expressed by Northern Ireland or the Republic of Ireland, neither of which have ever expressed the wish to separate from the EU.

However, what seems to have been forgotten in the referendum result are the positive contributions made by the U.K. to the EU and vice versa. Potentially, this has been recognized and appreciated by both Northern Ireland and the Republic of Ireland. For, as Professor Crafts explains, membership has improved the macroeconomics of the U.K.³² This has consequently improved trade and competition, and has led to a liberalized and harmonized approach, which has also inevitably increased access to new markets – none more apparent than through witnessing the advantages accorded to aviation and air services in particular over the last 20 years.

The primary purpose of the Treaty Establishing the European Community³³ was to bring about the gradual integration of the States of Europe and to establish a common market founded on the four freedoms of movement (for goods, services, people, and capital) and on the gradual approximation of economic policies.

The objective behind a single market was always to bring down barriers and simplify existing rules, thus enabling citizens in the EU to make the most of the opportunities offered to them by having direct access to the now 28 countries that comprise the EU. Arguably, transport has always had a key part to play in realizing this goal. It was ultimately realized that “*there can be no market without transport!*”³⁴ And, consequently, without an efficient and effective transport policy, the Internal Market could not be achieved.

³¹ Vernon Bogdanor is a professor of government at King’s College London. He is the author of *The New British Constitution* (2009) and *THE COALITION AND THE CONSTITUTION* (2011), wherein his thoughts are expressed. See Sam Wilson, *Britain and the EU: A Long and Rocky Relationship*, BBC.COM (Apr. 1, 2014), <http://www.bbc.com/news/uk-politics-26515129>.

³² Nicholas Crafts, *The Growth Effects of EU Membership for the U.K.: Review of the Evidence* (Soc. Mkt. Found., Global Perspectives Series, Paper No. 7, 2016), <http://www.smf.co.uk/wp-content/uploads/2016/04/SMF-CAGE-The-Growth-Effects-of-EU-Membership-for-the-U.K.-a-Review-of-the-Evidence-.pdf>.

³³ Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EC Treaty] (now TFEU).

³⁴ European Comm’n, *Road Transport, Europe on the Move 1* (2004) (emphasis added).

4. The EU Transport Policy – Aviation Developments . . . and the U.K.

The transport chapter was an original element of the Treaty of Rome (1957) and has remained virtually unchanged in subsequent Treaty revisions. The Treaty of Lisbon (TFEU) has only made few minor amendments. While Article 91 TFEU re-emphasizes the “distinctive features of transport,” Article 100 TFEU, of the Transport Title, emphasizes that it “*shall apply to transport by rail, road and inland waterways*” but that the “*European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport.*” This demonstrates particularly the difference in terms of the “discretionary” aspect regarding both sea and air transportation.

Although the wording changed very little for the first 30 years of the European Community, the transport policy itself³⁵ remained effectively under the control of the individual governments. During this time, the European Community was either unwilling or unable to implement the Common Transport Policy (CTP) as provided by the Treaty of Rome.³⁶ During this time, liberalization was slow and inconsistencies across the EU remained. It took the intervention of the Court of Justice³⁷ in 1985 for progress to be made, when it was acknowledged that there was not a coherent set of rules and that, with regard to certain aspects of the transport policy, the Council had failed to fulfill its obligations.³⁸ A month later, a program of legislative measures was introduced, the objective being to achieve an internal market by the end of 1992.³⁹

As a consequence of the lack of joint action, aviation had remained subject to individual Member States regulating their own domestic aviation policy until the mid-1980s/early '90s, with intra-EU aviation not being controlled by a single agency, as had been the case in the United States. Subsidies by each country to its State flag carrier had also been commonplace, which inevitably went against the policy direction for one internal, single market among the various airlines, resulting in higher fares and causing market distortion. The EU, following the U.S. initiative of deregulation, and as a consequence of the Court of Justice of the European Union (CJEU) case,⁴⁰ began to adopt a series of packages to liberalize the EU internally (Table 1: Summary of EU Deregulation Packages). This was also arguably due to consumer demands, given that global communications had enabled European customers to see the benefits of liberalization in the U.S. air transport market.

³⁵ Consolidated Version of the Treaty on the Functioning of the European Union, arts. 90–100, Oct. 26, 2012, 2012 O.J. (C 326) 47, 85 (Ex. EC Treaty arts. 70–80).

³⁶ *European Transport Policy for 2010: Time to Decide*, COM (2001) 370 final (Sept. 12, 2001). Policy guidelines of the White Paper, at 6.

³⁷ Case 13/83, *Parliament v. Council*, 1985 E.C.R. 1513, ¶¶ 46–50.

³⁸ *Id.* ¶ 70 (“[T]hat in breach of the Treaty the Council has failed to ensure freedom to provide services in the sphere of international transport and to lay down the conditions under which non-resident carriers may operate transport services in a Member State” (as stated in relation to road transport)). The Treaty of Maastricht later reinforced this principle. Treaty on European Union, July 29, 1992, 1992 O.J. (C 191) 1.

³⁹ *Completing the Internal Market: White Paper from the Commission to the European Council*, COM (1985) 310 final (June 28–29, 1985).

⁴⁰ See *supra* note 37.

| | |
|--|--|
| <p>First Package: (adopted in December 1987)</p> <ul style="list-style-type: none"> - Council Regulation 3975/87 on the Application of the Competition Rules to Air Transport - Council Regulation 3976/87 on the Application of the Treaty to certain categories of agreements and concerted parties - Council Directive 601/87 on Air Fares - Council Decision 602/87 on capacity-sharing and market access | <p>Summarized:</p> <p>This introduced the relaxation of established rules – for intra-EU traffic, limiting government rights re opposing new fares. It extended flexibility to airlines re seat capacity-sharing.</p> |
| <p>Second Package: (adopted in July 1990)</p> <ul style="list-style-type: none"> - Council Regulation 2343/90 on market access - Council Regulation 2342/90 on air fares - Council Regulation 2344/90 on the application of the Treaty to certain categories of agreement and concerted parties | <p>Summarized:</p> <p>This extended market access, providing greater flexibility over fare-setting and capacity-sharing. This led to the concept of “Community (EU) Carriers” being developed and having the right to carry unlimited cargo and passengers between their home State and other EU countries.</p> |
| <p>Third Package: (adopted July 1992)</p> <ul style="list-style-type: none"> - Council Regulation 2407/92 on licensing of air carriers - Council Regulation 2408/92 on market access - Council Regulation 2409/92 on fares and rates | <p>Summarized:</p> <p>This introduced the freedom to provide services within the EU and in 1997 the freedom to provide “cabotage,” the right of an airline of one Member State to operate routes within another Member State.</p> <p>Further reforms re: Public Service Obligation on routes, regarded as essential for regional development.</p> |

Table 1 – Summary of EU Deregulation Packages

Source: Author

The Third Package⁴¹ remained applicable for 15 years, being replaced by Regulation 1008/2008 on common rules for the operation of air services in the Community (the Air Services

⁴¹ Replacing Regulations 2407/92, 2408/92, 2409/92 as of Nov. 1, 2008.

Regulation).⁴² The Air Services Regulation added further simplicity and internal liberalization by setting out rules on:

- Market access;
- Public Service Obligations;
- The granting of and oversight of operating licenses for Community (EU) Carriers;
- Aircraft registration and leasing;
- Pricing; and
- Traffic distribution between airports.

The U.K. was to play an instrumental part in this liberalization process, with the former flag carrier of the U.K. – British Airways – being one of the first airlines in the EU to experience privatization in 1987. The process had begun under the Conservative Thatcher government in 1981. Thatcher, as Prime Minister, had herself many a tussle with the EU and only too clearly had shown her resentment of the control of Brussels. However, how she would have voted in the 2016 referendum is disputed by the Tories, who on the one hand saw her embracing liberalization and on the other disliking the hand of Brussels exerting political will in the U.K.

As part of the BA privatization process, Lord King was appointed as the Chairman, charged with bringing the airline back to profitability. And some 10 years later, in 1997, despite privatization, Thatcher was to again show her “intervening” hand when she physically reacted to BA’s re-branding which had moved away from the Union Jack, the national emblem of the U.K.⁴³ Thatcher’s gesture was indicative of a nation still staking claim to its former flag-carrier and a country wanting to remain “British;” which is perhaps substantiated and reinforced by Thatcher’s uttering, when covering up the new model aircraft’s tailfin design with her handkerchief, “[w]e fly the British flag, not these awful things.”⁴⁴

Over time, BA has continued to embrace the opportunities afforded by the more open and liberalized aviation area within the EU in order to achieve further profitability; but, at times, it also voiced opposition to developments which were to see this concept being further extended externally. The principle of the Internal Aviation Market is based upon extending the Open Skies initiative by creating an Open Aviation Area (OAA) within the EU. This led to the concept of the Community carrier and, consequently, removal of the substantial ownership/effective control and traffic rights limitations. As a consequence, BA is now the leading partner within the IAG holding group,⁴⁵ which has seen the original partner – Spanish Iberia (the former flag carrier of Spain) being joined by fellow Spanish (hybrid) airline Vueling, and most recently the former flag carrier of the Irish Republic – Aer Lingus, in what is truly a union of European airlines. Without EU membership, this would not have been conceivable or feasible, and this inevitably raises questions concerning future unity in view of the U.K. Brexit

⁴² Council Regulation 1008/2008, Common Rules for the Operation of Air Services in the Community, 2008 O.J. (L 293) 3–20.

⁴³ *Classic Thatcher on BA*, YOUTUBE (Oct. 9, 1997), <https://www.youtube.com/watch?v=78CqcbwFeBA>.

⁴⁴ See Dirk Beveridge, *Thatcher Takes Aim at British Airways Tail Logos*, APNEWSARCHIVE.COM, <http://www.apnewsarchive.com/1997/Thatcher-takes-aim-at-British-Airways-tail-logos/id-c5a90438a0daf5287b2a3acd7403fc89>.

⁴⁵ IAG = International Airlines Group.

vote – and “if” and “in what form” the U.K. should/will leave the EU. And what will this mean to such partnerships, and to U.K. airlines in Europe and external to it?

However, such a union between two States of the EU was not a new concept to aviation; and, while the transfer of more than a 49 percent shareholding may not have previously occurred within the EU, there had been some significant and high-profile commercial interaction among EU airlines before the Community carrier concept had been recognized. Of particular note was the development of the supersonic Concorde airliner by, somewhat ironically perhaps, the U.K. and France, a fact that de Gaulle, while not supporting the U.K. joining the EU, had also positively remarked on in 1963.⁴⁶ That said, opposition to the “nationality clause” and the potential transfer of shares and ownership of airlines outside of the State of origin also became more than apparent during the so-called “*Open Skies*” judgment by the CJEU in 2002.⁴⁷ The U.K. was one of seven countries that had concluded individual open skies agreements with the United States, arguably to the detriment of the other Member States of the Union. Such separate and non-aligned bilateral agreements were deemed, through the *Open Skies* judgment, to have breached Community law because the clause on the ownership and control of airlines constituted discrimination against the other (non-participant) Member States. The cases also reinforced the right of establishment of airlines in any of the other Member States. The judgment, in essence, was to result in a more aligned approach being taken in respect to both the internal and external aviation policy direction. This included clarifying the distribution of power and competence between the EU and its Member States, particularly in the field of the regulation of international air services.

4.1. *The U.K. and the EU (Internal and External) – Progression!*

4.1.1. Internally: A Case Study (easyJet)

The packages of measures (Table 1) allowed the U.K., alongside the other Member States, to be part of what is recognized as the most liberalized aviation market in the world. The EU effectively managed to achieve what was unable to be resolved in 1944 as part of the Chicago Convention negotiations, and that is integrated economic access to Member States’ markets. This, arguably, improved internal (fair) competition, allowing establishment of bases in any one of the Member States while also allowing for majority control and ownership outside of the respective country, creating one “open aviation area,” which extends far beyond the principle of open skies.

Following on from the U.S. deregulation strategy, part of the liberalization process also resulted in the development and rise of the low cost carrier (LCC) market, with the early European leaders originating in Ireland: Ryanair being formed in 1985 and easyJet in 1995.⁴⁸ In the early period, easyJet initially operated just two routes from London Luton to Glasgow and

⁴⁶ French President Charles de Gaulle, Press Conference at The Elysee, Paris: Veto on British Membership in the EEC (Jan. 14, 1963).

⁴⁷ Case C-466/98, Comm’n v. United Kingdom, 2002 E.C.R. I-9427; Case C-467/98, Comm’n v. Denmark, 2002 E.C.R. I-9519; Case C-468/98, Comm’n v. Sweden, 2002 E.C.R. I-9575; Case C-469/98, Comm’n v. Finland, 2002 E.C.R. I-9627; Case-471/98, Comm’n v. Belgium, 2002 E.C.R. I-9681; Case C-472/98, Comm’n v. Luxembourg, 2002 E.C.R. I-9741; Case C-475/98, Comm’n v. Austria, 2002 E.C.R. I-9797; Case C-476/98, Comm’n v. Germany, 2002 E.C.R. 9855.

⁴⁸ Jaap G. de Wit & Joost Zuidberg, *The Growth of the Low Cost Carrier Model*, 21 J. Air Transp. Mgmt. 17–23 (July 2012).

Edinburgh, before introducing its Amsterdam route in 1996. In just over 20 years, the airline has experienced remarkable growth, which saw its shares being floated on the London Stock Exchange in 2000. Gatwick was added as the fifth base in 2001, and very quickly was to result in the airline establishing itself as the second-largest scheduled carrier at the airport. The current headquarters remains, however, in the U.K.'s Luton Airport.

Currently, easyJet operates over 820 routes across more than 30 countries, both within and external to the EU. It employs over 10,000 people and fully embraces the advantages afforded by operating out of bases within mainland Europe. While a third of its capacity is due to its home position within the U.K., the mainland bases in Europe have allowed easyJet to maximize cabotage opportunities, with planned expansion and development continuing into 2017.⁴⁹ EasyJet is, in essence, a pan-European airline, which is making maximum use of the traffic rights that the U.K.'s membership in the EU has provided to it. This has ultimately advantaged the company, the shareholders, and the passengers, who constitute a “new kind of user” from all over the EU and adjoining countries. This “newer” LCC airline model has afforded the opportunity of air travel to EU citizens who had in the past, arguably, not been able to afford flying – which, prior to deregulation, had been viewed as a luxury means of travel. Most importantly, it has advantaged the European Union per se. In essence, the low cost carrier model has allowed EU countries to be linked with ease, so perhaps it is with some irony that British flyers have not appreciated fully the advantages and opportunities afforded them through the U.K.'s membership in the EU. EasyJet has brought prosperity, too, to the U.K., and embraced technology in its business model, now being one of the top-10 e-commerce retailers in the U.K.; and yet, the voters arguably failed to take into account the possible effects of an exit vote on one of the U.K.'s leading businesses.

Other customer benefits that have resulted through EU membership and the creation of an internal market include increased competitiveness – which has not only driven down prices but has also resulted in a measurably higher quality of service, as well as consistency in terms of safety and security. Hence, common rules have overlapped into adjoining areas of customer protection in the event of airline insolvency, delayed bookings, damage and personal injury, etc. These have arisen through changes in both the economic and regulatory landscape, which have extended into the external aviation arena.

4.1.2. Externally

The basis of the EU's external aviation policy is to create closer international relations.

In essence, there has been a three-pillar “external” approach since 2005,⁵⁰ whereby:

(1) Bilateral agreements not in line with EU law are to be amended so as to ensure that all EU airlines are on an equal footing and that the concept of EU designation is recognized in conformity with EU law. This is the basis of the EU Horizontal

⁴⁹ *About Us*, EASYJET PLC, <http://corporate.easyjet.com/about-easyjet.aspx>. See also *EasyJet*, Routes Online, <http://www.routesonline.com/airlines/3452/easyjet/50/route-exchange-airline-requirements/>.

⁵⁰ See *External Aviation Policy*, EUROPA, http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/index_en.htm (last visited Sept. 6, 2016).

Agreements as per Regulation 847/2004.⁵¹

(2) The EU has positively worked to develop a Common Aviation Area with adjoining countries whereby it has extended the concept of opening up the internal market, including regulatory harmonization, and internal EU aviation legislation and regulation with its neighbors.

(3) The EU continues to negotiate comprehensive agreements to integrate the EU aviation markets with its key trading partners – based upon the concept of market opening, removal of investment barriers, regulatory convergence, and cooperation.

The U.K. has actively benefitted from all three pillars of this approach, which is further developed in the EU's 2015 "Aviation Strategy for Europe," whereby the objective is to "enable European aviation (to collectively) flourish globally."⁵²

The 2015 Aviation Strategy extends the external aviation agreements with several identified countries and regions around the world and is based upon the concept of increased connectivity and hence growth; increased competition resulting in lower prices; and an increase in the number of flights and routes, thus giving more choices to all participants. One underlying premise is the establishment of common rules, which builds upon the success and approach of the internal market. This also extends to recognizing and tackling the limitations and challenges to aviation growth through capacity constraints and limitations, both in the air and on the ground. In this respect, one of the most capacity-constrained airports in the EU remains in the U.K., at London Heathrow. Of course, it should be acknowledged that EU internal legislation has also had an impact in ensuring a consistency of approach with respect to ground handling services,⁵³ slot allocation,⁵⁴ and environmental factors (to name but a few areas) through Directives and other legislative and regulatory means.

To date, no agreement made under the third pillar – with a trading partner outside the EU (other than European Economic Area States) – has seen anywhere near the same liberal and free market access opportunities as the EU has enjoyed internally. While the objective is to strengthen the goal of ensuring fair competition, ultimately there are always winners and losers, which invariably has links to sovereign supremacy, in this case a trading advantage.⁵⁵

Noticeably however, agreements have since been achieved by the EU with the United States and several other key countries but, that said, the two open skies agreements with the U.S.⁵⁶ still did not lead to the same degree of openness as had been hoped for in terms of both market access and share transfer/investments (i.e. the removal of ownership restrictions). The principle had been to create a transatlantic Open Aviation Area, a single air transport market

⁵¹ Council Regulation 847/2004, Negotiation and Implementation of Air Service Agreements between Member States and Third Countries, 2004 O.J. (L 157) 7–17.

⁵² *External Aviation Policy*, *supra* note 50.

⁵³ Council Directive 96/67/EC, Access to the Groundhandling Market at Community Airports, 1996 O.J. (L 272) 36.

⁵⁴ Council Regulation 95/93, Common Rules for the Allocation of Slots at Community Airports, 1993 O.J. (L 14) 1–6.

⁵⁵ Sarah Jane Fox, Presentation at the 14th World Conference on Transport Research, Shanghai (July 2016).

⁵⁶ Air Transport Agreement, U.S.-EU, Apr. 30, 2007, 2007 O.J. (L 134) 4, 46 I.L.M. 470, as amended by Protocol to Amend the Air Transport Agreement, U.S.-EU, Mar. 25, 2010, 2010 O.J. (L 223) 3. The (First Stage) Agreement was applied March 30, 2008; the Protocol (Second Stage) was applied June 24, 2010.

between the two unions of States, including access to the domestic markets of both parties. It should be recalled that the CJEU's 2002 *Open Skies* judgment had found that Member States had acted discriminatorily and contrary to the principle of EU law by concluding individual bilateral agreements, which in turn had limited the freedom of establishment of Community companies. Yet, the first joint Community negotiations with the U.S. proved to be unpopular, particularly with the U.K.⁵⁷

This was based upon the position of the former flag carrier BA and the U.K.'s stance to arguably protect the airline's favorable position, together with London Heathrow. During the ensuing lengthy negotiations to conclude an agreement, the subject was broached and debated in the U.K. Parliament,⁵⁸ wherein it was questioned as to whether

there [was] not a grave danger that the United Kingdom, which has premier status on the north Atlantic route in particular, could lose that position in the longer term through its extraordinary decision to allow the European Union to negotiate on its behalf air service agreements that should properly be the interest of our country alone?⁵⁹

Adding that the U.K. was effectively being "asked to sign up to a deal between the Commission and the United States Government that is supposed to provide a much more liberal regime for airlines in Europe and the U.S.," the Shadow Transport Minister, Damian Green, argued, "the deal that the Commission has negotiated is a bad one for large parts of the UK aviation industry. It will open up Heathrow to all US carriers, and give US carriers unlimited access to carry passengers and cargo within and beyond the EU."⁶⁰

"Reports in early 2006 indicated that British Airways was concerned that more than one-third of its operating profits could be 'wiped out' if a deal was agreed, due to the opening up of London Heathrow."⁶¹ In essence, the EU-U.S. Air Transport Agreement (eventually signed just over a year later, on April 25 and 30, 2007) was to raise serious concerns in the U.K. as to the negative impact to "its" industry; sentiments which arguably were firmly in contradiction to the EU principle of equal market opportunity for all the Member States. This was also in contrast to a report prepared for the European Commission by U.S. consultants, The Brattle Group, which estimated that the conclusion of an EU-U.S. Open Skies agreement would generate upwards of 17 million extra passengers a year, provide "consumer benefits" of at least \$5 billion a year, and boost employment on both sides of the Atlantic.⁶² And, while BA (and Virgin Atlantic) had expressed disdain, a fellow airline of the time, bmi, had long been lobbying both the U.K. and the EU for more opportunity for access to the U.S. and it eagerly welcomed the EU/U.S. agreement. Surprisingly, however, it was later to make the announcement that it would not be entering the North Atlantic market.⁶³

⁵⁷ Sarah Jane Fox & Rosida Ismail, *The Skies the Limit! Open Skies – with Limitations!*, 4 Eur. J. Comp. L. & Governance (forthcoming 2017).

⁵⁸ 422 Parl Deb HC (6th ser.) (2004) Deb 08 cols. 175–244.

⁵⁹ Mr. John Wilkinson (Conservative MP).

⁶⁰ 422 Parl Deb HC (6th ser.) (2004) Deb 08 cols. 188–89.

⁶¹ *Id.*

⁶² The Brattle Group, *The Economic Impact of an EU-US Open Aviation Area* (2002).

⁶³ Barry Humphreys & Peter Morrell, *The Potential Impacts of the EU/US Open Sky Agreement: What Will Happen at Heathrow After Spring 2008?*, 15 J. Air Transport Mgmt. 72–77 (2009).

Whether or not the U.K. was protecting its interests in isolation is contestable. However, the U.K. did, at that time, account for a 40 percent share of the EU-U.S. market. The U.K. Select Committee's view was that the U.S. had achieved access to the EU market (and most particularly London Heathrow) without conceding anything on the key issues of cabotage in U.S. airspace, or foreign ownership or control of U.S. airlines. So, unsurprisingly, negotiations leading to the EU-U.S. Open Skies Stage II agreement were commenced almost immediately, starting on May 15, 2008 in Ljubljana, Slovenia.⁶⁴

Little has been voiced by BA (publicly) following the five years since the implementation of the Protocol to amend the (Stage I) Air Transport Agreement between the EU and the U.S., and certainly the business strategy and developments that have ensued in this period would have a profound effect on any current decision on the transatlantic route. During this time, the U.K., as a member of the EU, has also been party to other comprehensive aviation agreements with other nations and during the negotiation periods, the same degree of protest registered during the EU/U.S. talks has not been repeated.

What is now evident is the fact that the U.K. has become fully entwined in a global EU aviation policy, inextricably linked to negotiations concluded through the EU, both externally and internally. This ultimately could be viewed as a complex honeycomb structure resulting in a lattice of cells inevitably providing honey – or an explosive minefield to negotiate – following the Brexit referendum results.

5. BREXIT: U.K. (EU) Regression!

In truth, what Brexit will mean to airlines and the supporting infrastructure, including airports and customers, remains unclear and ultimately speculative. This uncertainty is therefore of concern, given the various possibilities that could transpire. As evidenced within a day of the referendum results, uncertainty affects profits, with share prices of IAG and other British carriers being among the hardest hit in the initial 24-hour period, and in many instances witnessing the lowest plunge since 1985. In fact, BA was the first company to warn that the vote to leave the EU would hit its profits. This is, of course, a similar warning to that given by the company in connection with the EU-U.S. Open Skies agreements. On June 24, 2016, IAG shares were recorded to be down 20.2 percent at £421.10, while easyJet shares were 19.2 percent lower at £12.37, both being among the heaviest losers in the FTSE 100.⁶⁵

The future for aviation is ultimately dependent upon the solutions and conclusions reached between the U.K. and the EU regarding the degree of separation that is desired or feasible. But this remains complex, given the framework and lattice structure that currently exists across all of the Treaties areas. However, the fact remains that it will not be a quick or easy solution and, while there has been some recovery in the U.K. airlines' share prices,⁶⁶ the

⁶⁴ It had been clearly stated that negotiations on the second stage would commence within 60 days of the date of provisional application of the first part (originally Oct. 28, 2007, finally Mar. 30, 2008).

⁶⁵ *Shares*, The Telegraph, <http://shares.telegraph.co.uk/> (last visited June 24, 2016); Ben Martin, *British Airways Owner IAG Sounds Profit Warning Within Hours of Brexit Result*, TELEGRAPH.CO.UK (June 24, 2016, 11:02 AM), <http://www.telegraph.co.uk/business/2016/06/24/british-airways-owner-sounds-profit-warning-within-hours-of-brex/>.

⁶⁶ For example, by early August 2016 IAG had recovered some of the near-30 percent drop in its price suffered immediately after the vote.

industry consensus is that this decision will result in challenges over the coming years. Amid the myriad of uncertainties, the U.K. is unlikely to see extra investment in infrastructure, such as a third runway at Heathrow to reduce capacity constraints or aid airlines' route growth.

To appreciate why this is so complex, it is important to realize that the U.K.'s membership in the EU resulted in supremacy of EU law and hence the first step, other than formally applying to withdraw from the EU through Article 50 TEU,⁶⁷ is to repeal the European Communities Act 1972. However, a high percentage of U.K. legislation results from EU law and policy; while Regulations become directly applicable,⁶⁸ Directives require implementation into U.K. law resulting in a related (and joined) U.K. Statutory Instrument. This means that the U.K. will need to decide which parts of EU-originated legislation to keep, and of course this remains subject ultimately to the end-relationship with Brussels. In essence, once the relationship with Brussels changes, so inevitably will the legislation.

The CJEU has also interpreted EU law where questions or concerns have been identified, which has had an influence in directing policy – as has been seen in the 2002 *Open Skies* judgment. The U.K. referendum largely implied that British citizens wanted independence from “all” the influence and control of Brussels, therefore suggesting that this includes the influence on U.K. jurisprudence. However, unraveling previous interpretations and EU-originated laws from the U.K. is a momentous task – one that may not be achievable. Just as Roman law⁶⁹ has had a residual impact on the U.K., inevitably so will EU law and policy.

The above only touches the surface of EU legislation that has had an impact upon the development and direction of aviation in the U.K. Invariably, removal of all or some could significantly change the landscape and the position of the U.K. The underlying concern to aviation remains on two fronts: (i) the position re internal aviation relations after Brexit; and hence, (ii) where this leaves external relations, which are ultimately closely linked to the determinant of (i).

This said, the EU referendum question was phrased in such a way that “leaving” did not convey the sheer significance of the ability to access the internal market if the vote was for the U.K. to leave the European Union. The question asked was:

“Should the United Kingdom remain a member of the European Union or leave the European Union?”

The fundamental issue here is that the two aspects are inextricably linked.

5.1. Internal Access

One of the biggest benefits afforded by EU membership is the fact that any airline owned and controlled by nationals of any EU Member State is permitted open access within the EU, meaning the airline is allowed to operate anywhere within the internal market without restrictions on capacity, frequency, or pricing. The approach has led to the Community carrier

⁶⁷ See *supra* note 7.

⁶⁸ Which means they are directly implemented into U.K. law without the need for legislation from the U.K. Parliament.

⁶⁹ Edward D. Re, *The Roman Contribution to the Common Law*, 29 Fordham L. Rev. 447 (1961), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1673&context=flr>.

concept, whereby ownership and nationality restrictions, for EU citizens, have been removed.

Ceasing to be an EU member would technically see the advantages of membership being removed, with any access (and associated benefits) having to be renegotiated. It is unlikely that aviation will be renegotiated in isolation however, given the overlap into adjoining areas such as the freedom of establishment, free movement of persons and goods, discrimination/discriminatory barriers to trade, consumer rights and protection, and even related labor laws, etc.

The discussions will therefore center on reaching an achievable solution – which stands to affect not only the U.K. but the remaining 27 Member States, as well as arguably non-EU States under some scenarios.

5.1.1. The European Common Aviation Area

While there are some alternative models already in existence, such as the European Common Aviation Area (ECAA), this is by no means a given solution permitting internal access, as is now enjoyed. The ECAA is a multilateral agreement based upon two conditions: (i) the acceptance of EU aviation laws; and (ii) the establishment of a “framework of close economic cooperation, such as an Association Agreement” with the EU.⁷⁰

Arguably, the new aviation strategy could see changes to these conditions developing over time, and while the U.K. now has a say on such developments, as a member only through the ECAA this level of input will be reduced. It will effectively lose much of its lobbying clout within Europe, which, like many of the proposed solutions, actually places the U.K. in a weaker position than it presently has. Currently, the U.K. is a member of the ECAA, as are all the EU States, but membership also extends to Iceland, Norway, Switzerland, as well as several Balkan countries. Continued membership therefore remains dependent upon the agreement of existing members as well as the two broad conditions. Certainly, there is nothing within the ECAA agreement that covers the current situation in terms of an EU State leaving the union and retaining the automatic right or entitlement to access through the ECAA.

5.1.2. A U.K.-EU Bilateral/Horizontal Agreement

Technically, it would be possible to create a bespoke agreement as has happened with Switzerland (Swiss-EU) or even on similar lines as the EU-U.S. model. Of course, this is subject to variable levels and limits.

As has been discussed, the EU-U.S. Air Transport Agreement did not realize the same level of cooperation as has been achieved internally, and hence there are significant limitations – such as full market access and also restrictions on substantial ownership and effective control.

While the Swiss-EU model is far more accommodating, by providing mutual market access for airlines of both parties, it also effectively binds Switzerland into much of the EU’s aviation legislation. And, in much the same way as discussed previously, in terms of the ECAA, this would be without the same discussion rights as previously accorded to the U.K. through EU

⁷⁰ Multilateral Agreement between the European Community and its Member States, the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the former Yugoslav Republic of Macedonia, the Republic of Iceland, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and the United Nations Interim Administration Mission in Kosovo on the establishment of a European Common Aviation Area art. 32, 2006 O.J. (L 285) 3, 11.

Membership. The Swiss-EU model also takes into account other related EU legislation and policy; hence there is in fact an extended series of related agreements – all effectively tied together, whereby Switzerland complies with the related four freedoms that form the foundations for the EU's single market.

Although these models show that it is possible to conclude a bespoke agreement, there are other warnings here perhaps, too:

- (1) The EU is unlikely to concede an advantage to the U.K. (as arguably occurred in the EU-U.S. Agreement). And while the U.K. would perhaps wish to retain all the benefits it currently has, in terms of open access and operating anywhere within the internal market without restrictions on capacity, frequency, pricing, or ownership limitation, etc., this will no doubt also come at a price, *if a compromise/solution is able to be achieved*. While this may not directly be to the detriment of aviation, it could have an influence on some other policy areas.
- (2) Continuing from the above point: policies and legislation are ultimately joined; acceptance of one area, or the rebuff of one, will stand to have an effect on an adjoining area.
- (3) Whatever the solution/conclusion, the U.K. is unlikely to have the influence and voice in the area of aviation within Europe that it currently has.

The likelihood of the U.K. negotiating bilateral agreements with each Member State of the EU has largely been discounted on the basis that the CJEU would likely view such pacts in the same way as it did in the 2002 *Open Skies* judgment, namely that any individual agreement was contrary to EU law and discriminated against the other EU Member States.

One of the worst scenarios envisaged, however, would be the inability to reach a compromise and put any agreement in place. If such a situation occurred, resolution likely would be sought through international law, and hence the Chicago Convention, to which all Member States are individually party (as opposed to collectively as represented by the EU). In many ways, this could strike at the very issue of legal order and governance, from a national, regional, and international perspective. It would be perhaps an ironic situation for the U.K. to find itself in, given that it has ultimately fought to *retain or regain* sovereignty out of the hands of the EU, and while the Chicago Convention recognizes the rights of nations to conclude their own agreements with fellow nations, the EU ultimately could influence other contracting nations.

Inevitably, the high risk potential is that the U.K. will find itself in a regressive position, particularly from the situation it currently enjoys. And arguably, this could be viewed to be the present situation and start of this backward move, given the degree of uncertainty and the lengthy time it will take to resolve matters. Of course this extends to external relations, too.

5.2. External Repercussions

EU membership advantages extend beyond the internal market and hence both aspects remain linked. Membership therefore brings benefits to a country (and hence its airlines and airports) through Air Services Agreements, negotiated with third parties by the EU on behalf of all Member States. The most significant of these is the so-called EU-U.S. Open Skies

Agreement (discussed *supra*) which now provides that the airlines of both parties are entitled to fly from anywhere in the EU to anywhere in the U.S. and vice versa, although it does not allow access within the domestic market.

While meeting with some opposition from the U.K., particularly during the First Stage negotiations, the EU-U.S. Agreement has ultimately been viewed as a precondition for the U.S. to give antitrust immunity (ATI) to the joint ventures (JV) of the airlines within the three strategic global alliances. This is significant to all three airline alliances and their carriers within the U.S. and within the EU. Of course, this is particularly relevant to the oneworld alliance, since BA (not IAG) is identified specifically within the JV-ATI and the U.K. is a signatory to the Agreement. That said, party to the same Agreement are the ECAA States – Norway and Iceland, so invariably it could be argued that it would be in all parties' interest to allow the U.K. to retain this position. But inevitably this remains tied to the solution achieved internally.

It could result in the U.K. establishing new trading relationships, including Air Services Agreements, with the rest of the world. While it has been argued that this could be positive in some instances, the U.K. would lack the bargaining power of the EU and the 500 million citizens of this trading bloc.⁷¹ It would also be a very lengthy process and only part of the difficulties that could arise as a result of the U.K. exit from the EU.

In the interim period, it has been argued that if agreements are not reached – particularly within the timeline after withdrawal under Article 50 has been commenced, subject to agreed extensions – then provisions could revert back to the last prior agreements in place. For the U.S./U.K., this could see a return to the 1977 Bermuda II⁷² bilateral (or Bermuda two-and-a-half, following some moderations in 1980) agreement, which was in place before the EU-U.S. air services agreements were reached. It is unlikely BA would, or even could, return to the previous situation, as the airline has in effect moved on considerably, evolving and adapting to the new regulatory environment and to the opportunities afforded it – predominately due to the U.K.'s membership in the EU. In essence, BA no longer exists as a stand-alone company in its own right. The consequences of such a possible return to the pre-EU-U.S. ASA would predictably be disastrous to all: the U.K., the U.S., and all Member States of the EU and ECAA, no doubt resulting in a backward move to a more restricted, regressive setting.⁷³

5.3. U.K. – Airlines

The Brexit decision has certainly resulted in anxious times for U.K. airlines. The creation of the liberalized internal aviation market has been recognized to be the primary catalyst behind the rapid development of LCCs in Europe. And hence, the U.K.'s position in the internal market particularly stands to affect an LCC such as easyJet. Immediately following the referendum result, Carolyn McCall, the chief executive of easyJet, was reported as saying that she was “*confident*” in the “business model and our ability to continue to deliver our successful strategy”⁷⁴

⁷¹ *The Impact of 'BREXIT' on U.K. Air Transport*, IATA (June 2016),

https://www.iata.org/whatwedo/Documents/economics/impact_of_brexit.pdf.

⁷² Air Services Agreement, U.S.-U.K., July 23, 1977, 28 U.S.T. 5367, T.I.A.S. No. 8641 [hereinafter Bermuda II].

⁷³ *Id.*

⁷⁴ Victoria Bryan, *European Airlines Slump on Brexit Vote, IAG Warns on Profit*, REUTERS.COM (June 24, 2016, 6:22 AM) (emphasis added).

That said, this inescapably remains subject to the U.K.'s position within the EU and hence the "new relationship." So perhaps her confidence was a little premature, as on June 24, she also acknowledged, "[easyJet] have today written to the U.K. Government and the European Commission to ask them to prioritize the U.K. remaining part of the single EU aviation market, given its importance to trade and consumers."⁷⁵

EasyJet is said to have been exploring setting up a different business model including obtaining an air operator's certificate (AOC) through a local holding company, and using its Swiss AOC and its Swiss subsidiary more; hence a clear indicator that easyJet's business model will not necessarily work so well post-Brexit.⁷⁶ Such proposed changes would see less reliance on the U.K. as its primary operating base, but the timing could be questioned and explored by the EU and the success of a changed business model has not been tested by the company. However, if this should occur, the U.K. economy and consumers would ultimately be the losers. As for its rival Ryanair (a Republic of Ireland LCC), while it might stand to make further gains as a result of any negative change experienced by easyJet, it also might suffer as a result of the U.K. exit because it currently works out of major bases in the U.K. The possible scenario here is that it may choose to close those bases, which economically would have a negative impact on the U.K.

As for easyJet, the worst-case scenario is more substantial, since the airline might lose the benefits accorded to it in the EU through the U.K.'s membership. This could ultimately be disastrous for the airline and the U.K.⁷⁷

Other airlines are, of course, also affected. FlightGlobal recently made reference to a newly published report regarding the U.K. regional carrier Flybe in which it was stated that, "[i]t is hard to imagine a business more exposed to the current portfolio of adverse developments."⁷⁸ Flybe also confirms the fact that the decision to leave has and will continue to have a "materially adverse" effect on the airline.⁷⁹

The day after the referendum result, IAG was reported as having said it believed "that the vote to leave the European Union will not have a long term material impact on its business."⁸⁰ That said, the legal position of IAG (and the airlines under its umbrella) would have to be questioned to ensure that this level of confidence is realistic. It is, by all accounts, a very unusual and complex situation for BA – an airline that arguably now survives only through a retained name. Upon this basis, it is no doubt true that the holding group set-up provides more security and reassurance to BA, for in reality it has ceased to exist. Depending upon the outcome and solutions of the U.K. exit from the EU, it may in fact be necessary to revisit the composition of IAG – which is now a complex legal minefield of merged European airlines that would take years to untangle.

⁷⁵ Martin, *supra* note 65.

⁷⁶ Depending, of course, upon the degree of separation from the EU.

⁷⁷ Ben Martin & Ben Marlow, *EasyJet Eyes New European Operation if Britain Flies Solo*, TELEGRAPH.CO.UK (June 11, 2016, 8:30 PM), <http://www.telegraph.co.uk/business/2016/06/11/easyjet-eyes-new-european-operation-if-britain-flies-solo/>.

⁷⁸ Lewis Harper, *Analysis: Brexit Unknowns Hang Heavy over European Carriers*, FLIGHTGLOBAL, Aug. 2, 2016, <https://www.flightglobal.com/news/articles/analysis-brexit-unknowns-hang-heavy-over-european-c-428086/> (Quoting an HSBC equity research note in July 2016).

⁷⁹ *Id.*

⁸⁰ Martin, *supra* note 65.

Initially, the original airlines involved – BA and Iberia – merged the two companies through a complex system of share exchanges, which led to the creation of the new, European airline group. The two companies subsequently signed the Merger Agreement on April 8, 2010.

But, while it is openly said that the merger was achieved by inserting the Spanish company – International Consolidated Airlines Group, S.A. (IAG) – as the new holding company of British Airways and Iberia, this is somewhat misleading and arguably contradictory to say the least. Prior to the transaction with IAG, BA was held by BA Holdco (a now-dormant entity), and it was through the BA Holdco arrangement that Iberia and what was BA were merged, by means of a Spanish domestic merger, into what is now IAG. Therefore, BA effectively ceased to exist as of the full completion of the merger in January 2011, with shares then being traded only under the name of IAG. BA has now become immersed into a Spanish company registered in Madrid, albeit with its headquarters (IAG) in London.

There is no denying that over a period of nearly 30 years (following privatization in 1987), BA has changed significantly under a more liberalized regime. The U.K.’s membership in the EU has provided opportunities for mergers with other European carriers, which has resulted in BA’s survival as merely a brand, associated with a past national identity, which also importantly has provided slots and other rights that it retains in the U.K. While this remains acceptable today, it could, however, be further reviewed and investigated in the future, depending upon the outcome of the U.K. exit and the consequences to the internal market and external relations. The complacency and confidence of IAG may be well placed; however, there may be a “*but*” in the equation – in the future.

The Brexit decision affects all U.K. airline business models, including those flying to the U.K., as “no airline type will be immune from the impacts.”⁸¹ However, dependent upon the U.K. exit resolution, British air carriers could be prevented from merging with airlines within the EU – which could result in financial ruin and ultimately the demise of other known U.K. brands that would not enjoy the same opportunities as experienced by BA. Inevitably, this could result in a reduced market; certainly it will be a changed market.

And what about the end users – the customers?⁸² There is no doubt that the majority of voters had absolutely no concept of the possible effects on the airlines, the airports, the economy and, ultimately, them – as customers. They no doubt expected it to be *business as usual*. As Newton’s law of motion aptly states, though – *for every action there is an equal and opposite reaction*⁸³ (or, arguably in this case, “fallout”). Those enjoying their cheaper-priced flights on easyJet, for example, may find prices increasing, or fewer opportunities to fly out of the U.K. to various destinations in the EU – both flight frequency and locations could ultimately be reduced.

As stated *supra*, the position with regard to EU Regulations and Directives remains unknown – namely whether individual ones would be retained, changed, or collectively maintained, etc. Some of the wording may, of course, need to be revised, depending upon the outcome of the solution going forward after the U.K. ceases to be an EU Member State. In terms of passenger rights, for example, while in the main there would be some type of protection,

⁸¹ Harper, *supra* note 78.

⁸² Particularly U.K. consumers who arguably caused this situation to arise, and certainly those who voted to exit the EU.

⁸³ Sir Isaac Newton, 1 Mathematical Principles of Natural Philosophy 20 (Andrew Motte trans., 1729).

certain aspects would need to be revisited. Taking, as an example, the Regulation on common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights,⁸⁴ within the legislation reference is made to related Directives and Regulations, not least in terms of defining a “Community carrier.” This is specifically defined as “an air carrier with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No. 2407/92. . . .”⁸⁵ Obviously, the position with regard to U.K. carriers holding an operating license granted by a Member State remains to be defined and clarified. The operator may well have been granted a license when the U.K. “was” a Member State but going forward, for example, this will need to be confirmed – would a license cease on the day membership ceased? Under the new agreement and arrangements would a U.K. airline still be eligible? While within Europe, a U.K. resident would no doubt still be entitled to make a claim under the terms of the Regulation – since Article 3 states that the Regulation shall apply:

3(1)(b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies . . . if the operating carrier of the flight concerned is a Community carrier.

And at,

3(1)(a) to passengers departing from an airport in the territory of a Member State to which the Treaty applies.

In essence, the entire process of withdrawing from the EU will have social, economic, and regulatory limitations and consequences, and there will be many issues that need to be resolved that impact upon the airlines, the airports, and the end-users – the customers.

6. CONCLUSION

The Brexit vote sent shockwaves across the U.K., but the aftereffects were and continue to be felt across Europe and further afield. The complexity of the relationship with the EU means that severing this connection or removing isolated strands is a momentous task, which will also have reverberating consequences. That said, even the “decision” is questioned as actually being final. A referendum decision is, according to many expert sources, not legally binding. Within a matter of weeks after the poll, a group of leading lawyers in the U.K. had petitioned the government that their “legal opinion is that the referendum is advisory.”⁸⁶ Article 50 TEU has not yet been invoked; the rationale also being that in order to trigger Article 50 there must first be primary legislation.

While the U.K. does not have a written Constitution, Articles 1 and 2 of the Bill of Rights of 1689, which remains in force today, expressly provides that no body apart from Parliament

⁸⁴ Council Regulation 261/2004, Compensation of Air Passengers Denied Boarding, 2004 O.J. (L 46) 1–8.

⁸⁵ *Id.* at 3, art. 2(c).

⁸⁶ See *UK Government Faces Pre-Emptive Legal Action over Brexit Decision*, THEGUARDIAN.COM (July 4, 2016, 2:00 AM), <https://www.theguardian.com/law/2016/jul/03/parliament-must-decide-whether-or-not-to-leave-the-eu-say-lawyers>.

itself can override an act of Parliament, which invariably adds further credence to the need for a decision from the U.K. government (and not one based upon the U.K. referendum).⁸⁷

Even the predicted date, in early 2017, to officially notify the EU looks set to be further pushed back as Prime Minister Theresa May's EU Brexit advisory team is only now being established and hence is not ready to enter the formal negotiation process. In the meantime, Owen Smith, the Labour candidate, has reaffirmed that under his leadership he would ensure a vote against commencing the Article 50 process, believing that a second referendum or general election is first needed, *if* the exit decision is to be further pursued.

That said, P.M. May maintains that "*Brexit means Brexit*," but at what cost? This statement, as was the referendum decision, remains an irresponsible course of action, not just for aviation but for the country. How the U.K. managed to make one of the "biggest decisions [the] country [had ever] face[d] in [the population's] lifetimes: whether to remain in a reformed EU or to leave,"⁸⁸ without actually knowing what the consequences would be, will no doubt be reflected in history as one of the major failings of U.K. politics – *ever!* The fact that one of the biggest Google searches in history occurred during the following days, after the referendum results were known, and asked "what is the EU?" only too clearly shows the absurdity of the situation. In essence, the population made a decision without knowing what it would mean – there was no alternative "package" on offer. Of course the EU is not perfect, but it has had many positive consequences, including one of the longest periods of unity and peace within Europe – but why the result was as it was remains largely conjecture. That said, there are reasons that are more prominently acknowledged than others – such as immigration and the condition of the National Health Service. Such negative views relating to both areas are largely attributed to the U.K.'s membership within Europe and the decisions emanating from Brussels. While sovereignty may not specifically be cited, there was clear resentment of the perceived interference in national State affairs from the EU. With some irony perhaps, other cited reasons are linked to the health of the economy, which has been interpreted as a north-south divide in England in terms of wage growth. While the EU, and hence the U.K., may have experienced a recession or two within the last twenty years, the U.K. was showing clear signs of recovery.⁸⁹

In essence, the vote to leave was undoubtedly linked to a longing from the voters to turn the clock back – but what was hoped to be achieved is really again speculative; whether this was a desire to return to a different cultural existence long past, and a call against social change, particularly related to immigration, is highly disputed. However, there remains a naiveté in seeking a return to a so-called "golden age," and furthermore in actually believing it is achievable. The world has moved on, the irony again being that the pioneering seafaring nation

⁸⁷ An Act for Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M. ch. 2, § 9, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/collections-glorious-revolution/billofrights/>. See also Cristina E. Parau, *Core Principles of the Traditional British Constitutions* (Mar. 2015) (unpublished manuscript), http://www.politics.ox.ac.uk/materials/Core_Principles_of_the_British_Constitutions.pdf.

⁸⁸ *EU Referendum to Take Place on 23 June, David Cameron Confirms*, *supra* note 1.

⁸⁹ For an expanded discussion, see Bulent Gokay, *The 2008 World Economic Crisis: Global Shifts and Faultlines*, GLOBALRESEARCH.CA (Feb. 15, 2009), <http://www.globalresearch.ca/the-2008-world-economic-crisis-global-shifts-and-faultlines/12283>; Szu Ping Chan, *Britain on Top: Recovery from Great Recession Was Faster than Thought*, TELEGRAPH.CO.UK (Sept. 30, 2015, 10:06 AM), <http://www.telegraph.co.uk/finance/economics/11900934/U.K.-GDP-growth-stronger-previously-though-recovery-ONS.html>.

of “*Old Blighty*” was instrumental in laying the very foundations for this global development and worldwide linkage through many centuries. The U.K. was also a nation that was involved in positively seeking immigrants for employment (in healthcare and transport particularly), and this clearly predates EU membership. In the 20th century this was most noticeable from the 1930s to the 1970s when successive U.K. governments recruited doctors and nurses from various continents.⁹⁰ There is no doubt that while the sea has remained a key way to arrive in the U.K., it is now being surpassed by the modern travel mode for international connectivity (for the passenger at least) – the airplane. The U.K. was again prominent in developing early flight routes to its former empire colonies, but the British Empire had collapsed about 10 years before EU membership, and somewhat ironically as a result of World War II.

Of all those voting in the referendum, those in the age group under 77 will not recall a pre-WWII Britain and those under 44 will not recall a pre-EU one either. The youth of today have embraced technology and communications, which also provide worldwide connectivity in much the same way as aviation does, and, arguably so have many of those who voted to exit the EU.

While aviation has been driven by international agreements, most noticeably as a result of that compromise Convention achieved at Chicago during World War II, the EU has undoubtedly taken aviation to new heights. The EU remains the most prosperous trading bloc in the world and one that has significantly enhanced global development and international prosperity. Internally, it has shown the power of unity and taken a massive leap above the concept of the Westphalian doctrine. In terms of aviation, it remains a world leader and an example of achievement through liberalization. IAG has shown that aviation can clearly surpass nationality and ownership by totally embracing the concept of union. It has shown the power of joining airlines from different countries.

But what of the future, post-Brexit? The answer is, *it is up in the air*, but the consequences of an exit, for all areas including aviation, must be seriously considered: the warning has to be of *red skies in the morning*. Ironically, if the U.K should fully separate from the EU it would stand to lose the symbol of this Union (e.g. on vehicle registration marks) but the U.K. is also likely to perhaps see the removal of the U.K. flag on its former air carrier and perhaps even witness the E.U. or Spanish flag replacing it on the tail of a British Airways plane. What would Thatcher and the U.K population have to say about that?

⁹⁰ For example, India and the Caribbean, etc. Stephanie Snow & Emma Jones, *Immigration and the National Health Service: Putting History to the Forefront*, HISTORYANDPOLICY.ORG (Mar. 8, 2011), <http://www.historyandpolicy.org/policy-papers/papers/immigration-and-the-national-health-service-putting-history-to-the-forefront>.