



European Economic and Social Committee

TEN/689

Ensuring basic air connectivity after Brexit

OPINION

European Economic and Social Committee

Proposal for a Regulation of the European Parliament and of the Council on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union

[COM(2018) 893 final - 2018/0433 (COD)]

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| Referral | European Parliament, 14/01/2019 Council, 14/01/2019 |
| Legal basis | Articles 100(2) and 304 of the Treaty on the Functioning of the European Union |
| Section responsible | Transport, Energy, Infrastructure and the Information Society |
| Bureau decision | 22/01/2019 |
| Adopted at plenary | 20/02/2019 |
| Plenary session No | 541 |
| Outcome of vote (for/against/abstentions) | 77/1/0 |

1. **Conclusions and recommendations**

- 1.1 The European Economic and Social Committee (EESC) has consistently underlined the importance and size of the Single European Aviation Area as a catalyst for economic growth, prosperity and for maintaining Europe's competitiveness internationally. Once the decision of the United Kingdom (UK) to cease to be a member of the European Union (Brexit) comes into effect, all sectors of the UK's economy will no longer be an integral part of the European single market; its aviation sector will no longer benefit from, and contribute to, the Single European Aviation Area.
- 1.2 The assessment of the impact of Brexit on the important EU-UK air traffic will depend on the ability of the UK and the EU institutions to swiftly adopt the appropriate regulatory measures to secure high levels of competitiveness between the EU27 and the UK's aviation sectors.
- 1.3 In an – increasingly probable – "no Withdrawal Agreement" scenario, the legislation of the EU, in particular Regulation 1008/2008, would cease to apply for air services between the UK and the EU. This creates legal uncertainty, jeopardises planning stability and endangers continued connectivity for services between the UK and the EU.
- 1.4 The proposed Regulation of the European Parliament and of the Council on common rules ensuring basic air connectivity with regard to the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the Union (Regulation) is a temporary solution and a contingency plan to reduce the impact of an abrupt Brexit. The proposed measures are the only realistic way to mitigate possible serious negative consequences to be expected for the aviation sector, if the Withdrawal Agreement is not ratified before 29 March 2019.
- 1.5 The Regulation will provide for further time for the Commission and the UK government to negotiate a comprehensive air services agreement (ASA), which would then become the regulatory framework for aviation between the EU and the UK. It will also provide for basic air connectivity between the EU and the UK to be maintained in the meantime.
- 1.6 Negotiations on an ASA between the EU and the UK will have to be conducted without delay to re-establish a legal basis for robust airline competition between the carriers of both parties. The EESC is ready to provide necessary contributions from organised civil society stakeholders from the EU-27. In the interests of the European economy, its citizens and workers, the EESC encourages the EU and the UK to adopt a comprehensive ASA as soon as possible as the only legal basis for an open and competitive aviation market.
- 1.7 Subsequent to the UK's submission of an Article 50 application to end its EU membership, the Commission developed a coherent negotiation strategy and implemented it consistently and transparently with the full and undivided endorsement of all EU institutions¹. The EESC commends the European Commission, the European Parliament and the Member States for their unity. Pursuing a united approach is in the interests of the EU citizens. It is equally true as far as the civil aviation sector is concerned.

¹ [COM\(2018\) 556 final/2](#); [COM\(2018\) 880 final](#)

- 1.8 The EESC supports the thrust of the proposed Regulation as a contingency measure to secure basic air connectivity, given that the Regulation cannot be seen as an extension of Regulation 1008/2008, or indeed even a unilateral Withdrawal Agreement. The rights contained in the proposed Regulation are rightly limited in time and purpose. The limitation of the commercial opportunities to third and fourth freedom services between the EU and the UK is logical and consistent. Further commercial opportunities for airlines of the EU and the UK must be the subject of negotiations on a future ASA between the EU and the UK.
- 1.9 In order to ensure basic connectivity and fair competition, the proposed Regulation contains several criteria and procedures, such as a cap on frequencies at the level of the IATA summer and winter seasons², the concept of the "equivalence" of rights³, and the Commission's right to reduce, amend or revoke rights⁴. The EESC recommends that – to better reflect current market conditions – the reference period should end on 29 March 2019 (full IATA summer and winter season 2018/2019).
- 1.10 In view of the economic and social consequences of this worst-case scenario, it is crucial that the Commission develops a transparent and close monitoring mechanism. Such a mechanism should also foresee close cooperation between the Commission and the social partners and civil society organisations prior to and during the transition period, and whilst negotiating a new air services agreement. Such monitoring must also include the protection of passengers, workers and environmental standards.
- 1.11 In the EESC's opinion, aviation workers from the UK should keep their rights from the EU legislation regarding, among others, the crew working time, the temporary agency, the flight time limitations, the directive on the transfer of undertakings and others in order to maintain a level playing field towards Union carriers.

2. General comments

2.1 Legal basis to provide intra-EU air services

As outlined in the Explanatory Memorandum⁵, sovereign states organise air transport by means of bilateral air services agreements. However, subsequent to the liberalisation of intra-EU air transport, the freedom for the Member States' air carriers to provide intra-EU air services is based exclusively on Regulation 1008/2008⁶. This Regulation also lays down the rules for the licensing of those carriers. In the absence of a withdrawal agreement, services between the United Kingdom and the Member States would cease to be governed by this Regulation, and

² [COM\(2018\) 893 final](#), art. 3 II.

³ [COM\(2018\) 893 final](#), art 4.

⁴ [COM\(2018\) 893 final](#), art 4 and art 5.

⁵ [COM\(2018\) 895 final](#).

⁶ [Regulation 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community](#)

therefore, as from 30 March 2019, there would be no legal basis for the provision of services between the United Kingdom and the Member States by the respective carriers. Furthermore, the carriers of the United Kingdom would lose the Union operating license.

Although states can approve flight schedules submitted by designated airlines for a flight season on the basis of comity and reciprocity, these ad hoc approvals provide for no planning stability, and would give rise to barely manageable administrative burdens in the case of flights between the UK and EU Member States, as well as the rather controversial legal issue of whether the EU would retain exclusive rights to negotiate the terms of an EU-UK ASA in the absence of which the Member States could not legally approve any flights. For air services between the EU and the UK it is therefore essential that a legal basis is created for services to operate beyond 29 March 2019.

2.2 **Withdrawal Agreement – consequences for aviation**

The EU and UK have negotiated a Withdrawal Agreement which contains measures to be taken to facilitate the transition of the UK from the status of a Member State to that of a non-EU third country. This agreement would affect all economic sectors. During the transition period, the UK would be subject to both existing EU law and EU law that enters into force during the transition period; however, the UK would not have an active role in the EU's decision-making process, including those conducted by EU agencies such as EASA. This would continue until a new ASA is concluded between the UK and EU27.

2.2.1 International agreements concluded by the EU

Over 750 international agreements entered into by the EU on behalf of the Member States may need to be replicated by the UK after Brexit. These include several aviation-related agreements, in particular the EU-US comprehensive air services agreement from which the UK will cease to benefit. Whenever the EU concluded an air services agreement on the basis of *exclusive* competency, the UK will cease to benefit from that agreement when it ceases to be an EU Member State. Whenever an agreement concluded on the basis of *mixed* competency confers benefits to "EU Member States", the UK will likewise no longer be beneficiary. The EU commits itself in the Withdrawal Agreement to notify all international parties to EU air services agreements that they should treat the UK as an EU Member State during the transition period. Still, it is up to the third party to determine if it will do so; the Withdrawal Agreement has no binding effect on third parties to continue to apply benefits to the UK after 29 March 2019.

2.2.2 With respect to MRO (maintenance, repair and overhaul), aviation manufacturing, repair facilities as well as safety standards, these aspects are addressed in another EESC opinion – TEN/688 "Aviation safety after Brexit".

3. Proposed Regulation

3.1 Context

To mitigate possible serious interruptions of air traffic between the EU and the UK in the scenario without a ratified Withdrawal Agreement, the Commission has adopted two proposals for regulation:

- Proposal on common rules ensuring basic air connectivity with regard to Brexit (COM(2018) 893 final – 2018/0433 (COD)), which is a subject of this opinion, and
- Proposal on certain aspects of aviation safety with regard to Brexit (COM(2018) 894 final – 2018/0434 (COD))⁷.

The adopted measures represent matters of urgency in specific Union law areas in the absence of the Withdrawal Agreement. The limited number of proposed measures are to be seen as exceptional protection efforts of vital interest to the European Union and its citizens in such a scenario.

In particular, the Commission stresses that they should neither be a replication of benefits of EU membership, nor the terms of the envisaged transition period. Measures will be unilaterally adopted by the EU (possibility to revoke them at any time), and sector specific time limitations for measures apply. Furthermore, the enshrined division of competences should be adhered to, and national measures are to be in compliance with EU law. Lastly, they should not function as a remedy for a lack of preparedness measures or timely action.

3.2 Proposed measures

3.2.1 The Proposal for a Regulation seeks to assure – for a 12-month period – basic air connectivity between the UK and the EU. The proposal gives UK operators traffic rights to fly across the territory of the EU without landing, make stops in the territory of the EU for non-traffic purposes, and provide direct connections between the territory of the UK and the EU, regardless of whether the services are for passengers or cargo, scheduled or non-scheduled⁸. Notably, the capacity for flights is proposed to be capped at the pre-Brexit frequencies of the IATA winter and summer seasons of the year 2018⁹.

3.2.2 The rights granted to the UK carriers additionally depend on the adherence to an 'equivalence of rights' principle, essentially entailing that the Commission will monitor whether Union carriers are granted *de jure and de facto* equivalent rights to those which UK carriers will receive under the proposed Regulation. If this is not the case, or the level of rights varies between operators, it is at the discretion of the Commission to impose further capacity restrictions, require Member States to refuse, suspend, or revoke operating authorisations, or

⁷ EESC Opinion on Aviation safety after Brexit, TEN/688 (See page XX in the OJ).

⁸ [COM\(2018\) 893 final](#), Art.3(1).

⁹ [COM\(2018\) 893 final](#), Art.3(2).

adopt other appropriate measures.¹⁰ The same restrictions may be applied by the Commission in cases where they find that fair competition is not ensured, for example if the UK provides subsidies to their carriers, or EU carriers are discriminated against¹¹.

3.2.3 Furthermore, the proposed regulation contains requirements for obtaining operating authorisations from Member States¹², submitting operational plans and schedules to authorities in the Member States concerned¹³, conditions for refusing, revoking, suspending, or limiting authorisation¹⁴, as well as for ensuring continued recognition of airworthiness certificates, competence certificates, or licenses issued by the UK¹⁵.

4. **Specific comments**

4.1 **Capacity freeze**

4.1.1 European stakeholders were divided on the need to impose a cap on the capacity to be offered¹⁶. The key argument for eliminating the cap is the expected market growth of 6% in the coming years.

4.1.2 The EESC agrees though with the Commission, that the purpose of this Regulation is not to extend the applicability of Regulation 1008/2008 and to secure a fully functioning de facto Single European Aviation Market. As a Regulation covering frequencies and therefore capacity offered, it does indeed intervene in the market dynamics. However, as a result of Brexit, and in the absence of any other approved measure such as a Withdrawal Agreement, urgent action is required. The Regulation must therefore be seen in the context of the political inability to adopt an appropriate Withdrawal Agreement which extends the legal basis for a limited time whilst committing the UK to adopt measures as a third country; without such a Withdrawal Agreement, all economic sectors, notably aviation face serious disruptions.

4.1.3 The capacity to be offered through this Regulation is therefore not a reflection of a functioning market, but a reflection of an urgent contingency measure. Without this Regulation, UK carriers seriously risk having their EU operating licence revoked. With the Regulation, basic air connectivity can be secured. Furthermore, the cap provides certainty for Member States in as much as no Member State could approve of additional frequencies, and the basis upon which to take possibly necessary remedial action is likewise clear. The cap on frequencies underlines the both temporary and urgent contingency nature of the Regulation. To better reflect current market conditions, the reference period should end on 29 March 2019 (full IATA summer and

10 [COM\(2018\) 893 final](#) Art.4.

11 [COM\(2018\) 893 final](#) Art.5.

12 [COM\(2018\) 893 final](#) Art.6.

13 [COM\(2018\) 893 final](#) Art.7.

14 [COM\(2018\) 893 final](#) Art.8.

15 [COM\(2018\) 893 final](#) Art.9.

16 [COM\(2018\) 893 final – 2018/0433 \(COD\)](#)

winter season 2018/2019). It will take effect during the time required to agree upon a new ASA, maximum 12 months.

4.1.4 The EESC supports the time-limited cap on frequencies underlining the provisional and targeted contingency nature of the measure. However, in the interests of the European economy, and its workers, the EESC encourages the EU and the UK to adopt a comprehensive ASA as soon as possible as the only legal basis for an open and competitive aviation market.

4.2 **Extension to code-sharing, leasing agreements**

4.2.1 The EESC is of the position that inclusion of clauses to continue operation of code-sharing and leasing agreements would exceed the purpose of the Regulation. These commercial agreements cannot be construed as falling under the category of providing for basic connectivity between two parties. The legal basis for such commercial cooperation agreements lies in Regulation 1008/2008; if such agreements are to be continued, they will have to be included in a future comprehensive ASA between the EU and the UK.

4.3 **Extension to fifth freedom (cargo) operations**

4.3.1 The regulation provides for the core element of connectivity – an air service between two countries: third and fourth freedom traffic rights. The Regulation also includes technical rights, first and second freedom traffic rights. Any rights exceeding the basic connectivity between two countries cannot fall under this Regulation which does not seek to provide for new commercial opportunities, or even extend the legal basis for all current operations. The EESC believes that it would not be consistent with the purpose and rationale of the proposed Regulation to extend the provisionally granted commercial traffic rights beyond third and fourth freedom rights.

4.4 **Implications for ownership and control requirements**

4.4.1 The EESC is of the view that the ownership and control requirements of 1008/2008 should not be modified because of Brexit. If an EU airline is at risk of losing its EU operating licence after Brexit, the proposed regulation should foresee a sufficient additional period enabling the airline to adjust its ownership structure to be approved by the Commission.

4.5 **Exemption to applying EU Regulation 868/2004 to traffic from UK carriers to the EU**

4.5.1 The EESC is of the view that Regulation 868/2004 should be maintained as an instrument with no exceptions, as this would create a precedent for future applications of this trade protection instrument. Furthermore, such an exemption is not required, as the regulation itself foresees measures which can be activated, should the Commission deem them necessary to neutralise discriminatory acts against EU carriers.

4.6 **Equivalence clause**

4.6.1 Concerns have been raised about the equivalence clause, which enables the Commission to ask the Member States to revoke or limit the rights of UK carriers to provide services. The clause is

indeed open to interpretation, and it is by no means a given that all Member States will interpret this clause similarly. Its primary advantage is that it avoids automatic penalising action against airlines, and thus reduces the level of obligation to intervene in the market. Given the temporary nature of the Regulation, a pragmatic approach is more appropriate than a formalistic tit-for-tat mechanism, particularly, as this clause invites.

- 4.6.2 The EESC acknowledges the advantages of the "de facto or de iure equivalence of rights" as described in Article 4 of the proposed Regulation as a means to ensure fair competition and a level playing field for airlines offering services between the EU and the UK. UK airlines would, in the absence of a Withdrawal Agreement no longer be bound by EU provisions on, for example, consumer protection, the Emissions Trading Scheme or the State Aid Guidelines. However, it is not only in the interests of the airlines, but also in the interest of the EU citizen to gain a better understanding of when certain services could potentially be terminated to establish "factual or legal" equivalence of rights.
- 4.6.3 The EESC therefore recommends that the Commission ensure harmonised implementation of this clause with potentially more specific examples of situations that could give rise to retaliation by the EU.
- 4.7 In the EESC's opinion, aviation workers from the UK should keep their rights from the EU legislation, notably from the working time directive, the temporary agency directive, the flight time limitations regulation, the European Works Council Directive, the directive on the transfer of undertakings, etc., in order to maintain a proper level playing field towards Union carriers.

Brussels, 20 February 2019.

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